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I TITELS VAN BYDRAES

Bladsy

(Artikel – (a), Aantekening – (aa), Vonnisbespreking – (v))

Abolition of the wife's domicile of dependency: a lesson in history, The *by* Schoeman, E (aa) ..... 488 – 495

Advocate's mandate and the accused's right to testify: *R v Matonsi* revisited, The *by* Katz, MP (aa) ..... 310 – 312

Application of the reasonable foreseeability test for negligence, The – *Stratton v Spoornet* 1994 1 SA 803 (T) *by* Scott, J (v) ..... 128 – 131

Artikel 2(3) en 2A van die Wet op Testamente – kondonasiebevoegdheid van die hof – verlyding en herroeping van testamente – *Logue v The Master* 1995 1 SA 199 (N); *Horn v Horn* 1995 1 SA 48 (W) *deur* Schoeman, MC en Van der Linde, A (v) ..... 517 – 523

Artikel 2(3) van die Wet op Testamente 7 van 1953 – *Horn v Horn* 1995 1 SA 48 (W) *deur* Jamneck, J (v) ..... 341 – 343

Artikel 5(1) van die Mineraalwet 50 van 1991: 'n herformulering van die gemenereg? *deur* Badenhorst, PJ en Roodt, JA (a) ..... 1 – 15

Artikel 31-eis van die afhanklike en die sertifikaatvereiste: die sage duur voort – *Finlay v Kutoane* 1993 4 SA 675 (W) *deur* Du Plessis, W en Olivier, NJJ (v) ..... 136 – 144

Aspekte rakende die struktuur en verloop van grondwetlike geskille *deur* Malan, K (aa) ..... 478 – 488

Aspekte van die lasterreg in die lig van die Grondwet – *Gardener v Whitaker* 1995 2 SA 672 (OK) *deur* Neethling, J en Potgieter, JM (v) .. 709 – 715

Begunstigdeklousule in die versekeringsreg: regsoorwegings en -gevolge, Die *deur* Henckert, H (a) ..... 177 – 193

Beste belang van die kind by egskeiding, Die – enkele gedagtes na aanleiding van *McCall v McCall* 1994 3 SA 210 (K) *deur* Robinson, JA (aa) ..... 472 – 478

Beyond belief – religious freedom under the South African and American Constitutions *by* Carpenter, G (aa) ..... 684 – 695

Brown v Leyds recalled: what does a constitution constitute and what constitutes a constitution? *by* Van der Merwe, D (aa) ..... 661 – 672

Closely held corporations: perspectives on developments in four jurisdictions *by* Henning, JJ (aa) ..... 100 – 106

Bladsy

Conclusion of life insurance contracts in Roman-Dutch law, The *by* Havenga, P (a) ..... 45 – 72

Deliktuele aanspreeklikheid weens liggaamskending as gevolg van spermavernietiging: 'n verreikende uitspraak van die Duitse Bundesgerichtshof – BGH, Urt v 9/11/1993, 1994 NJW 127 *deur* Labuschagne, JMT (v) ..... 148 – 150

Deliktuele aanspreeklikheid weens nadeel deur onbekende lede van 'n groep toegebring I: Probleemstelling, die regsvergelykende metode, sekere gebruiklike begrippe en die menings van Suid-Afrikaanse skrywers *deur* Van der Walt, CFC (a) ..... 421 – 439

Deliktuele aanspreeklikheid weens nadeel deur onbekende lede van 'n groep toegebring II: Terminologiese lig op die aard van aanspreeklikheid en die benaderingswyses in die Anglo-Amerikaanse en Duitse reg (vervolg) *deur* Van der Walt, CFC (a) ..... 613 – 632

Deliktuele onregmatigheid by die nie-nakoming van 'n statutêre voorskrif – *Knop v Johannesburg City Council* 1995 2 SA 1 (A) *deur* Neethling, J en Potgieter, JM (v) ..... 528 – 532

Development and significance of the title "officer of the court", The *by* Cilliers, JB and Luiz, SM (a) ..... 603 – 612

Discharge of the accused at the end of the prosecution's case – a question of law which may be challenged by the prosecution on appeal? *by* Jordaan, L (aa) ..... 106 – 111

Distinction between agreements and unilateral administrative acts, The – *Basson t/a Repcomm Community Repeater Services v Postmaster-General* 1994 3 SA 224 (SEC) *by* Floyd, TB (v) ..... 725 – 733

Does the Supreme Court enjoy the inherent power to order relevant parties to submit to blood tests to establish paternity? *by* Taitz, JL and Singh, P (aa) ..... 91 – 100

Draft negotiating document on labour relations in bill form: some thoughts *by* Basson, AC and Strydom, EML (aa) ..... 257 – 275

Enkele gedagtes oor die historiese interpretasie van hoofstuk 3 van die Oorgangsgrondwet – *De Klerk v Du Plessis* 1994 6 BCLR 124 (T) (1995 2 SA 40 (T)) *deur* Du Plessis, L (v) ..... 504 – 513

Enkele gedagtes oor fundamentele regte en die familiereg *deur* Visser, PJ (aa) ..... 702 – 708

Enkele opmerkings oor die werking van die risiko-reël by die koop onderworpe aan 'n opskortende voorwaarde en soortgelyke bedinge *deur* Floyd, TB (aa) ..... 461 – 472

Epilepsy, causation and future damage *by* Blackbeard, M (a) ..... 219 – 233

Erfregtelike ontwikkelinge aan die Kaap: 1806–1828 *deur* Du Plessis, W (a) ..... 585 – 602

Family courts in South Africa and the implication for divorce mediation *by* Goldberg, V (aa) ..... 276 – 288

Force of agreements: valid, void, voidable, unenforceable?, The *by* Van der Merwe, S and Van Huyssteen, LF (a) ..... 549 – 567

Freedom of contract and constitutional rights: a noteworthy decision by the German Constitutional Court *by* Strydom, HA (aa) ..... 696 – 702

Heroorweging van korrektiewe toesig, Die – *S v Dreyer* 1994 2 SASV 300 (T); *S v Jacobs* 1994 2 SASV 326 (K) *deur* Terblanche, S (v) ..... 322 – 325

Het die appèlhof 'n nuwe judisiële maritieme retensiereg geskep – maar slegs vir die Engelssprekende? – *National Iranian Tanker Co v MV Pericles GC* 1995 1 SA 475 (A) *deur* Booysen, H (v) ..... 721 – 725

Horizontal equity as a constitutional norm in income tax law: an analysis with specific reference to section 23(b) of the Income Tax Act *by* Swart, GJ (aa) ..... 633 – 661

Is there an obligation to disclose epilepsy when entering into a (insurance) contract? *by* Blackbeard, M (aa) ..... 121 – 127

Juridiese kousaliteit bereik volle wasdom – *Smit v Abrahams* 1994 4 SA 1 (A); *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) *deur* Neethling, J en Potgieter, JM (v) ..... 343 – 348

Juvenile justice and constitutionalism *by* Singh, P (aa) ..... 296 – 302

Karakterkommersialisering ("character merchandising") en onregmatige mededinging in die Suid-Afrikaanse reg – *Federation Internationale de Football v Bartlett* 1994 4 SA 722 (T) *deur* Neethling, J (v) ..... 313 – 318

Marginal notes on powerful(l) legends: critical perspectives on property theory *by* Van der Walt, AJ (a) ..... 396 – 420

Meaning of the concept "mineral" – *Rand Mines Ltd v Potgieter* 1994-09-19 case no 93/9540 (T) *by* Badenhorst, PJ and Van der Vyver, E (v) ..... 325 – 331

Middellike aanspreeklikheid van die motorvoertuigeienaar: terugkeer na die tradisionele beskouing? – *Pretorius v Claasen* 1994-02-10 saakno A 520/93 (T) *deur* Gerber, HJ (v) ..... 337 – 341

Migrerende egpare se huweliksgoedereprobleme: *common law*- en gemengde regstelsels *deur* Roodt, C (a) ..... 194 – 218, 440 – 460

Modekonformering, dieremishandeling en diereregte – BayObLG, Beschl v 8/4/1993 NJW 1993, 2760 *deur* Labuschagne, JMT (v) ..... 750 – 752

Notarial bonds and insolvency *by* Scott, S (aa) ..... 672 – 684

Onregmatige mededinging: aspekte van prestasie-aanklamping – *The Concept Factory v Heyl* 1994 2 SA 105 (T); *Payen Components SA Ltd v Bovic Gaskets CC* 1994 2 SA 464 (W) *deur* Neethling, J en Potgieter, JM (v) ..... 131 – 136

Onvermoënde vruggebruiker, Die *deur* Wright, GF (aa) ..... 86 – 91

Payment by a bank on a countermanded cheque and the *condictio sine causa* – *B&H Engineering v First National Bank of SA Ltd* 1995 2 SA 279 (A) *by* Pretorius, C-J (v) ..... 733 – 744

Principle of equality in the law of contract, The *by* Hawthorne, L (a) ..... 157 – 176

Privatism, authoritarianism and the Constitution: the case of Neethling and Potgieter *by* Botha, H (aa) ..... 496 – 499

Bladsy

Psychological fault concept versus the normative fault concept: *Quo vadis* South African criminal law?, The *by* Van Oosten, FFW (a) ..... 361 – 378, 568 – 584

Putatiewe noodweer: opmerkinge oor 'n dadersubjektiewe benadering tot misdaadomskrywing *deur* Labuschagne, JMT (aa) ..... 116 – 121

Reality of real contracts, The *by* Kleyn, D (a) ..... 16 – 30

Redelike dokter versus redelike pasiënt – *Castell v De Greef* 1994 4 SA 408 (K) *deur* Dreyer, L (v) ..... 532 – 539

Reg aan die Kaap tydens die inwerkingtreding van die Regsoktrooie, Die *deur* Van der Merwe, J (a) ..... 234 – 256

Reg op emosionele trankiliteit: opmerkinge oor die dinamiese aard van die persoonlikheidsreg, Die *deur* Labuschagne, JMT (aa) ..... 499 – 503

Retraction, apology and right to reply *by* Midgley, JR (aa) ..... 288 – 296

Safe deposit securities *by* Itzikowitz, A (aa) ..... 111 – 115

Spanningsveld tussen die psigo-kulturele en die juridiese: opmerkinge oor die vermoënsregtelike gevolge van gemeenregtelike huwelike tussen swartes *deur* Labuschagne, JMT (aa) ..... 302 – 310

Staat en die universiteitswese in Suid-Afrika: nuwe wedersydse grondwetlike verantwoordelikhede, regte en verpligtinge, Die *deur* Venter, F (a) ..... 379 – 395

Stawing en versigtigheidsreëls in die strafreg *deur* Chinner, RJ (a) ..... 73 – 85

Steeds 'n paar tekstuele ikone teen die regstaatlike muur – *Kalla v The Master* 1995 1 SA 261 (T) *deur* Botha, C (v) ..... 523 – 528

Successful constitutional invasion of private law, A – *Gardener v Whitaker* 1995 2 SA 672 (E) *by* Visser, PJ (v) ..... 745 – 750

Terugwerkendheid van 'n verandering van huweliksgoederebedeling ingevolge artikel 21(1) van die Wet op Huweliksgoedere – *Ex parte Burger* 1995 1 SA 140 (D) *deur* Heaton, J en Jacobs, S (v) ..... 513 – 517

Uitbreiding van die toepassingsgebied van die *condictio indebiti* en die ontwikkeling van 'n algemene verrykingsaksie – *Kommissaris van Binnelandse Inkomste v Willers* 1994 3 SA 283 (A) *deur* Pretorius, C-J (v) ..... 331 – 336

Verdere helderheid oor 'n vereiste vir die appelleerbaarheid van interlokutore hofbeslissings oor spesiale verwere – *Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk*; *Red Head Boer Goat (Edms) Bpk v Eerste Nasionale Bank van Suider Afrika Bpk*; *Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk* 1994 3 SA 407 (A) *deur* Van der Walt, C (v) ..... 318 – 321

Versigtigheidsreëls en die beoordeling van die getuienis van 'n kind – *S v S* 1995 1 SASV 50 (Z) *deur* Watney, M (v) ..... 715 – 721

Voordeeltoerekening en verpligte groepslewensversekering ingevolge 'n dienskontrak – *Burger v President Versekeringsmaatskappy Bpk* 1994 3 SA 68 (T) *deur* Dreyer, L (v) ..... 144 – 148

Wetenskapsfilosofie en die regswetenskap *deur* Thomas, PhJ (a) ..... 31 – 44

II OUTEURS VAN BYDRAES

(Artikel – (a), Aantekening – (aa), Vonnisbespreking – (v))

Badenhorst, PJ en Roodt, JA: Artikel 5(1) van die Mineraalwet 50 van 1991: 'n herformulering van die gemenereg? (a) ..... 1 – 15

Badenhorst, PJ and Van der Vyver, E: Meaning of the concept "mineral" – *Rand Mines Ltd v Potgieter* 1994-09-19 case no 93/9540 (T) (v) ..... 325 – 331

Basson, AC and Strydom, EML: Draft negotiating document on labour relations in bill form: some thoughts (aa) ..... 257 – 275

Blackbeard, M: Is there an obligation to disclose epilepsy when entering into a (insurance) contract? (aa) ..... 121 – 127

Blackbeard, M: Epilepsy, causation and future damage (a) ..... 219 – 233

Booysen, H: Het die appèlhof 'n nuwe judisiële maritieme retensiereg geskep – maar slegs vir die Engelssprekende? – *National Iranian Tanker Co v MV Pericles GC* 1995 1 SA 475 (A) (v) ..... 721 – 725

Botha, C: Steeds 'n paar tekstuele ikone teen die regstaatlike muur – *Kalla v The Master* 1995 1 SA 261 (T) (v) ..... 523 – 528

Botha, H: Privatism, authoritarianism and the Constitution: the case of Neethling and Potgieter (aa) ..... 496 – 499

Carpenter, G: Beyond belief – religious freedom under the South African and American Constitutions (aa) ..... 684 – 695

Chinner, RJ: Stawing en versigtigheidsreëls in die strafreg (a) ..... 73 – 85

Cilliers, JB and Luiz, SM: The development and significance of the title "officer of the court" (a) ..... 603 – 612

Dreyer, L: Redelike dokter versus redelike pasiënt – *Castell v De Greef* 1994 4 SA 408 (K) (v) ..... 532 – 539

Dreyer, L: Voordeeltoerekening en verpligte groepslewensversekering ingevolge 'n dienskontrak – *Burger v President Versekeringsmaatskappy Bpk* 1994 3 SA 68 (T) (v) ..... 144 – 148

Du Plessis, L: Enkele gedagtes oor die historiese interpretasie van hoofstuk 3 van die Oorgangsgrondwet – *De Klerk v Du Plessis* 1994 6 BCLR 124 (T) (1995 2 SA 40 (T)) (v) ..... 504 – 513

Du Plessis, W: Erfregtelike ontwikkelinge aan die Kaap: 1806 – 1828 (a) 585 – 602

Du Plessis, W en Olivier, NJJ: Artikel 31-eis van die afhanklike en die sertifikaatvereiste: die sage duur voort – *Finlay v Kutoane* 1993 4 SA 675 (W) (v) ..... 136 – 144

Floyd, TB: The distinction between agreements and unilateral administrative acts – *Basson t/a Repcomm Community Repeater Services v Postmaster-General* 1994 3 SA 224 (SEC) (v) ..... 725 – 733

Floyd, TB: Enkele opmerkings oor die werking van die risiko-reël by die koop onderworpe aan 'n opskortende voorwaarde en soortgelyke bedinge (aa) ..... 461 – 472

Gerber, HJ: Middellike aanspreeklikheid van die motorvoertuigeienaar: terugkeer na die tradisionele beskouing? – *Pretorius v Claasen* 1994-02-10 saakno A 520/93 (T) (v) ..... 337 – 341

Goldberg, V: Family courts in South Africa and the implication for divorce mediation (aa) ..... 276 – 288

Havenga, P: The conclusion of life insurance contracts in Roman-Dutch law (a) ..... 45 – 72

Hawthorne, L: The principle of equality in the law of contract (a) ..... 157 – 176

Heaton, J en Jacobs, S: Terugwerkendheid van 'n verandering van huweliksgoederebedeling ingevolge artikel 21(1) van die Wet op Huweliksgoedere – *Ex parte Burger* 1995 1 SA 140 (D) (v) ..... 513 – 517

Henckert, H: Die begunstigdeklousule in die versekeringsreg: regsoorwegings en -gevolge (a) ..... 177 – 193

Henning, JJ: Closely held corporations: perspectives on developments in four jurisdictions (aa) ..... 100 – 106

Itzikowitz, A: Safe deposit securities (aa) ..... 111 – 115

Jamneck, J: Artikel 2(3) van die Wet op Testamente 7 van 1953 – *Horn v Horn* 1995 1 SA 48 (W) (v) ..... 341 – 343

Jordaan, L: Discharge of the accused at the end of the prosecution's case – a question of law which may be challenged by the prosecution on appeal? (aa) ..... 106 – 111

Katz, MP: The advocate's mandate and the accused's right to testify: *R v Matonsi* revisited (aa) ..... 310 – 312

Kleyn, D: The reality of real contracts (a) ..... 16 – 30

Labuschagne, JMT: Modekonformering, dieremishandeling en diereregte – BayObLG, Beschl v 8/4/1993 NJW 1993, 2760 (v) ..... 750 – 752

Labuschagne, JMT: Deliktuele aanspreeklikheid weens liggaamskending as gevolg van spermavernietiging: 'n verreikende uitspraak van die Duitse Bundesgerichtshof – BGH, Urt v 9/11/1993, 1994 NJW 127 (v) 148 – 150

Labuschagne, JMT: Die reg op emosionele trankiliteit: opmerkinge oor die dinamiese aard van die persoonlikheidsreg (aa) ..... 499 – 503

Labuschagne, JMT: Putatiewe noodweer: opmerkinge oor 'n dadersubjektiewe benadering tot misdaadomskrywing (aa) ..... 116 – 121

Labuschagne, JMT: Spanningsveld tussen die psigo-kulturele en die juridiese: opmerkinge oor die vermoënsregtelike gevolge van gemeenregtelike huwelike tussen swartes (aa) ..... 302 – 310

Malan, K: Aspekte rakende die struktuur en verloop van grondwetlike geskille (aa) ..... 478 – 488

Midgley, JR: Retraction, apology and right to reply (aa) ..... 288 – 296

Neethling, J: Karakterkommersialisering ("character merchandising") en onregmatige mededinging in die Suid-Afrikaanse reg – *Federation Internationale de Football v Bartlett* 1994 4 SA 722 (T) (v) ..... 313 – 318

Neethling, J en Potgieter, JM: Aspekte van die lasterreg in die lig van die Grondwet – *Gardener v Whitaker* 1995 2 SA 672 (OK) (v) ..... 709 – 715

Neethling, J en Potgieter, JM: Deliktuele onregmatigheid by die nienakoming van 'n statutêre voorskrif – *Knop v Johannesburg City Council* 1995 2 SA 1 (A) (v) ..... 528 – 532

Neethling, J en Potgieter, JM: Juridiese kousaliteit bereik volle wasdom – *Smit v Abrahams* 1994 4 SA 1 (A); *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) (v)..... 343 – 348

Neethling, J en Potgieter, JM: Onregmatige mededinging: aspekte van prestasie-aanklamping – *The Concept Factory v Heyl* 1994 2 SA 105 (T); *Payen Components SA Ltd v Bovic Gaskets CC* 1994 2 SA 464 (W) (v) ..... 131 – 136

Pretorius, C-J: Payment by a bank on a countermanded cheque and the *condictio sine causa* – *B&H Engineering v First National Bank of SA Ltd* 1995 2 SA 279 (A) (v)..... 733 – 744

Pretorius, C-J: Uitbreiding van die toepassingsgebied van die *condictio indebiti* en die ontwikkeling van 'n algemene verrykingsaksie – *Kommissaris van Binnelandse Inkomste v Willers* 1994 3 SA 283 (A) (v)..... 331 – 336

Robinson, JA: Die beste belang van die kind by egskeiding – enkele gedagtes na aanleiding van *McCall v McCall* 1994 3 SA 210 (K) (aa).. 472 – 478

Roodt, C: Migrerende egpare se huweliksgoedereprobleme: *common law*- en gemengde regstelsels (a) ..... 194 – 218, 440 – 460

Schoeman, E: The abolition of the wife's domicile of dependency: a lesson in history (aa) ..... 488 – 495

Schoeman, MC en Van der Linde, A: Artikel 2(3) en 2A van die Wet op Testamente – kondonasiebevoegdheid van die hof – verlyding en herroeping van testamente – *Logue v The Master* 1995 1 SA 199 (N); *Horn v Horn* 1995 1 SA 48 (W) (v)..... 517 – 523

Scott, J: The application of the reasonable foreseeability test for negligence – *Stratton v Spoornet* 1994 1 SA 803 (T) (v) ..... 128 – 131

Scott, S: Notarial bonds and insolvency (aa)..... 672 – 684

Singh, P: Juvenile justice and constitutionalism (aa)..... 296 – 302

Strydom, HA: Freedom of contract and constitutional rights: a noteworthy decision by the German Constitutional Court (aa) ..... 696 – 702

Swart, GJ: Horizontal equity as a constitutional norm in income tax law: an analysis with specific reference to section 23(b) of the Income Tax Act (aa) ..... 633 – 661

Taitz, JL and Singh, P: Does the Supreme Court enjoy the inherent power to order relevant parties to submit to blood tests to establish paternity? (aa) ..... 91 – 100

Terblanche, S: Die heroorweging van korrektiewe toesig – *S v Dreyer* 1994 2 SASV 300 (T); *S v Jacobs* 1994 2 SASV 326 (K) (v)..... 322 – 325

Thomas, PhJ: Wetenskapsfilosofie en die regswetenskap (a)..... 31 – 44

Van der Merwe, D: *Brown v Leyds* recalled: what does a constitution constitute and what constitutes a constitution? (aa) ..... 661 – 672

Van der Merwe, J: Die reg aan die Kaap tydens die inwerkingtreding van die Regsoktrooie (a) ..... 234 – 256

Van der Merwe, S and Van Huyssteen, LF: The force of agreements: valid, void, voidable, unenforceable? (a) ..... 549 – 567

Van der Walt, AJ: Marginal notes on powerful(l) legends: critical perspectives on property theory (a) ..... 396 – 420

Van der Walt, C: Verdere helderheid oor 'n vereiste vir die appelleerbaarheid van interlokutore hofbeslissings oor spesiale verwere – *Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk*; *Red Head Boer Goat (Edms) Bpk v Eerste Nasionale Bank van Suider Afrika Bpk*; *Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk* 1994 3 SA 407 (A) (v) ..... 318 – 321

Van der Walt, CFC: Deliktuele aanspreeklikheid weens nadeel deur onbekende lede van 'n groep toegebring I: Probleemstelling, die regsvergelykende metode, sekere gebruiklike begrippe en die menings van Suid-Afrikaanse skrywers (a) ..... 421 – 439

Van der Walt, CFC: Deliktuele aanspreeklikheid weens nadeel deur onbekende lede van 'n groep toegebring II: Terminologiese lig op die aard van aanspreeklikheid en die benaderingswyses in die Anglo-Amerikaanse en Duitse reg (vervolg) (a) ..... 613 – 632

Van Oosten, FFW: The psychological fault concept versus the normative fault concept: *Quo vadis* South African criminal law? (a) ..... 361 – 378, 568 – 584

Venter, F: Die staat en die universiteitswese in Suid-Afrika: nuwe wedersydse grondwetlike verantwoordelikhede, regte en verpligtinge (a) ..... 379 – 395

Visser, PJ: Enkele gedagtes oor fundamentele regte en die familiereg (aa) 702 – 708

Visser, PJ: A successful constitutional invasion of private law – *Gardener v Whitaker* 1995 2 SA 672 (E) (v) ..... 745 – 750

Watney, M: Versigtigheidsreëls en die beoordeling van die getuienis van 'n kind – *S v S* 1995 1 SASV 50 (Z) (v) ..... 715 – 721

Wright, GF: Die onvermoënde vruggebruiker (aa) ..... 86 – 91

III BOEKRESENSIES

Butler D and Finsen E: Arbitration in South Africa *deur* Hurter, E ..... 353 – 354

Faris JA, Kelbrick RA en Hurter E: Studentehandleiding vir siviele prosesreg *deur* Morkel, DW 764

Forsyth CF and Pretorius JT: Caney's The law of suretyship *deur* Floyd, TB ..... 358 – 359

Gering L: Leading cases on insolvency *deur* Ailola, DA 547

Grové NJ and Jacobs L: Basic principles of consumer credit law *deur* Floyd, TB ..... 543 – 545

Hardy IT (ed): The effects of electronic mail on law practice and law teaching *deur* Ferreira, NM ..... 354 – 355

Joubert WA and Scott TJ (eds): Indigenous law 32 LAWSA *deur* Vorster, LP ..... 355 – 358

Kriegler J: Hiemstra: Suid-Afrikaanse strafproses *deur* Terblanche, S ..... 349 – 352

Le Roux PAK and Van Niekerk A: The South African law of unfair dismissal *deur* Ellis, A ..... 753 – 755

Lötter C and Mosime K: Arbitration at work *deur* Garbers, C 546

Myburgh AT, Goldberg J, De Villiers CM and Wade RB (eds): Butterworths Law Reports: Labour Law *deur* Mischke, C ..... 540 – 543

Patel EM and Watters C: Human rights: fundamental instruments and documents *deur* Botha, N ..... 759 – 761

Prest CB: Interlocutory interdicts *deur* Hurter, E ..... 155 – 156

Pretorius P (ed): Dispute resolution *deur* Hurter, E ..... 152 – 153

Schäfer ID: The law of access to children *deur* De Jong, M ..... 547 – 548

Sharrock R and Kidd M: Understanding cheque law *deur* Garbers C: ..... 154 – 155

Van Wyk DH, Dugard J, De Villiers B and Davis DM (eds): Rights and constitutionalism – the new South African legal order *deur* Van Reenen, TP ..... 761 – 763

Visser PJ en Potgieter JM: Inleiding tot die familiereg; Introduction to family law; Family law: cases and materials *deur* Robinson, JA ..... 755 – 759

Vyas Y (ed) et al: Law and development in the third world *deur* Konyana, DS ..... 151 – 152

IV BESPREEKTE VONNISSE

A

A to Z Bazaars (Pty) Ltd v Minister of Agriculture 1975 3 SA 468 (A) 732

AK Entertainment CC v Minister of Safety and Security 1994 4 SA BCLR 31 (E) 644

Adamson v Boshoff 1975 3 SA 221 (K) 28

Administrateur, Natal v Trust Bank van Afrika Bpk 1979 3 SA 824 (A) 529

Anna Sauer v Landdros van Graaff-Reinet 1822 GH 47/2/23 ..... 243, 246

Anossi en Neethling (Smuts) v Fleck 1806 CJ 1419 6-300 591

Apex Mines Ltd v Administrator, Transvaal 1986 4 SA 581 (T) 8

Apex Mines Ltd v Administrator, Transvaal 1988 3 SA 1 (A) 8

Argus Printing and Publishing Co Ltd v Esselen's Estate 1994 2 SA 1 (A) ..... 711 – 712

Attorney-General, Venda v Molepo 1992 2 SACR 534 (V) ..... 107, 109 – 110

Awnrod v The Croswell Motor Services (1952) 2 All ER 755 338

B

B&H Engineering v First National Bank of SA Ltd 1995 2 SA 279 (A) . 733 – 744

Balston v Bird 1824 GH 48/2/62 ..... 243, 245, 250

Balston v Cloete, Agent of the East Indian Company 1923 GH 48/2/62 243

Barclays National Bank Ltd v Natal Fire Extinguishers Manufacturing Co (Pty) Ltd 1982 4 SA 650 (D) 676
Barnett v Abe Swersky and Associates 1986 4 SA 407 (K) 180
Basson t/a Repcomm Community Repeater Services v Postmaster-General 1994 3 SA 224 (SEC) ..... 725 – 733
Basson v Chilwan 1993 1 SA 742 (A) ..... 562 – 563
BayObLG, Beschl v 8/41993 NJW 1993, 2760 ..... 750 – 752
Bell v Bell 1991 4 SA 195 (W) 209
Bester v Commercial Union Versekeringsmaatskappy van SA Beperk 1973 1 SA 769 (A) 501, 502
BGH, Urt v 9/11/1993, 1994 NJW 127 ..... 148 – 150
Birkbeck v Hill 1915 CPD 687 471
Black Allied Workers Union v Prestige Hotels CC t/a Blue Waters Hotel 1993 14 ICJ 963 (LAC) 269
Blesbok Eiendomsagentskap v Cantamessa 1991 2 SA 712 (T) ..... 332 – 333
Bootsman v Landdros, Worcester 1823 GH 47/2/26 249
Bourgeois v State, Through Department of Highways (1972) 255 50 2d 861 .. 222
Bristou v Grout The Times 1986/11/03 224
Brown v Leyds NO (1897) 4 OR 17 ..... 662 – 662, 669, 670
Brunsden v Humphrey (1884) 14 QBD 141 229
Burger v President Versekeringsmaatskappy Bpk 1994 3 SA 68 (T) ..... 144 – 148
Burger v Union National South British Insurance Co 1975 4 SA 72 (W) 232
Burnett v Burnett (1895) 12 CLJ 147 (OVS) 491

C

Calvin's case 7 Coke 398 237
Cantwell v Connecticut 310 US 296 (1940) 689
Capital Estate and General Agencies (Pty) Ltd v Holiday Inns Inc 1977 2 SA 916 (A) 315
Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Red Head Boer Goat (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk 1994 3 SA 407 (A) ..... 318 – 321
Cassely v Minister of Defence 1973 1 SA 630 (A) 230
Castell v De Greef 1994 4 SA 408 (K) ..... 532 – 539
Cloete v Briers 1819 GH 48/2/41 242
Coetzee v Coetzee 1991 4 SA 702 (K) 758, 759
Concept, The Factory v Heyl 1994 2 SA 105 (T) ..... 131 – 136
Concorde Leasing Corporation (Rhodesia) Ltd v Pringle-Wood NO 1975 4 SA 231 (R) ..... 610 – 611
Conradie v Rossouw 1919 AD 279 ..... 27, 29
Cooper NO v Die Meester 1992 3 SA 60 (A) 682
Crookes NO v Watson 1956 1 SA 277 (A) 183
Crow v McMynn (1989) 49 CRR 290 ..... 98 – 99

D

Dayton Walther Corp v Caldwell 1980 402 Ne 2d 1252 (B) ..... 221 – 222
De Klerk v Du Plessis 1994 6 BCLR 124 (T) (1995 2 SA 40 (T)) ..... 504 – 513, 524, 699 – 701, 710, 746

De Vos v Landdros van Stellenbosch 1818 GH 47/2/21 249
Dickenson v Fisher's Executors 1914 AD 424 319
Diepsloot Residents' and Landowners' Association v Administrator, Transvaal 1993 1 SA 577 (T), 1993 3 SA 49 (T), 1994 3 SA 336 (A) ..... 397 – 398 , 402, 408 – 410, 412, 415, 419 – 420
Dippenaar v Shield Insurance Co Ltd 1979 2 SA 904 (A) ..... 145 – 148
Dlikili v Federated Insurance 1983 2 SA 275 (K) ..... 141 – 142
Du Plessis v Faul 1985 2 SA 85 (NK) 337, 339, 340

E

E v E 1940 TPD 333 96
Edwards v Edwards 1960 2 SA 623 (D) 474
Eilon v Eilon 1965 1 SA 703 (A) 493, 494
Eksteen v Eksteen 1823 GH 48/2/59 1-14 ..... 588 – 589
Employment Division v Smith 485 US 660 (1990) ..... 690 – 691
Engel v Vitale 370 US 421 (1962) 687
Estate Behr v Klotz 1926 TPD 353 609
Estate Van der Byl v Swanepoel 1927 AD 141 338
Esterhuizen v Administrator, Tvl 1957 3 SA 710 (T) ..... 534 – 535
Everson v Board of Education 330 US 1 (1947) 687
Evins v Shield Insurance Co Ltd 1980 2 SA 814 (A) 230
Ex parte Bauman: In re International Rock Products (Pty) Ltd 1985 1 SA 70 (W) 611
Ex parte Burger 1995 1 SA 140 (D) ..... 513 – 517
Ex parte Engelbrecht 1986 2 SA 158 (NK) 514
Ex parte Estate Wagenaar 1953 4 SA 435 (K) 87, 89
Ex parte James: In re Condon (1874) 9 Ch 609 606
Ex parte Krös 1986 1 SA 642 (NK) ..... 515 , 514, 516, 517
Ex parte Minister of Justice: In re Nedbank Ltd v Abstein Distributors (Pty) Ltd; Donelly v Barclays National Bank Ltd 1995 3 SA 1 (A) 564
Ex parte Oosthuizen 1990 4 SA 15 (OK) 515, 516, 517
Ex parte Rowland 1937 1 PH B8 (T) ..... 492 – 493
Ex parte Simmonds: In re Carnac (1885) QBD 308 605
Ex parte Von Berg et Uxor 1990 2 SA 70 (O) 514
Executors of McCorkindale v Bok NO (1884) 1 SAR 202 ..... 664 – 666, 669
Eynon v Du Toit 1927 CPD 76 96

F

Faure (Kurator van Fytjie) v Van Breda 1826 GH 48/2/70 248
Federation Internationale de Football v Bartlett 1994 4 SA 722 (T) ..... 313 – 318
Finbro Furnishers (Pty) Limited v The Registrar of Deeds, Bloemfontein 1985 4 SA 773 (A) ..... 326 – 331
Finlay v Kutoane 1993 4 SA 675 (W) ..... 136 – 144
First National Bank of SA Ltd v B & H Engineering 1993 2 SA 41 (T) 734
Fiscal v Cooke and Thompson 1823 GH 47/2/24 ..... 249, 251

G

Gardener v Whitaker 1995 2 SA 672 (OK) (1995 5 BCLR 19 (OK)) ..... 498, 709 – 715, 745 – 750

Gebhard(t) v Landdros van Stellenbosch 1822 GH 47/2/23 ..... 247, 248, 249
Gehring v Unie Nasionaal Suid-Britse Versekeringsmaatskappy Bpk
1983 2 SA 266 (K) 145
Gilbert v Bekker 1984 3 SA 774 (W) ..... 609 – 610
Gluckman v Wylde 1933 EDL 322 609
Goldman v Weinberger 475 US 503 (1986) ..... 689 – 690
Govender v Standard Bank of SA Ltd 1984 4 SA 392 (K) 734, 742
Green v Coetzee 1958 2 SA 697 (W) 229, 230
Greenshields v Wyllie 1989 4 SA 898 (W) ..... 476 – 477

H

Halloran v Fiscal 1810 GH 47/2/1 ..... 243, 250
Hartman v Chairman, Board for Religious Objection
1987 1 SA 922 (O) ..... 684 – 685
Hartongh v Heyns 1816 GH 48/2/28 247
Hassen v Post Newspapers (Pty) Ltd 1965 3 SA 265 (W) ..... 713 – 714
Hawkins v New Mendip Engineering Ltd (1966) WLR 1341 224
Heatley v Rowles 1829 GH 48/2/39 ..... 242, 247 – 248
Heimann v Heimann 1948 4 SA 926 (W) 474
Herbert v Greater London Council 1981 A No UB 280 Oct 21 224
Hess v The State (1895) 2 OR 112 ..... 667 – 669
Heyman v Yorkshire Insurance Co Ltd 1964 1 SA 487 (A) 319
Hlela v Commercial Union Assurance Co of South Africa Ltd
1990 2 SA 503 (N) 139, 140, 142, 143
Holland v Deysel 1970 1 SA 90 (A) 319
Horn v Horn 1995 1 SA 48 (W) ..... 517 – 523
Horne v Nesbit 1824 GH 48/2/66 ..... 245 – 246
Hudson v Mann 1950 4 SA 485 (T) ..... 8 – 9
Huntley v Horne 1824 GH 48/2/66 251
Hussey v Backton 1811 GH 48/2/2 248

I

Imperial Cold Storage and Supply Co Ltd v Field 1993 ILJ 1221 (LAC) 273
In re Knitwear (Wholesale) Ltd 1988 2 WLR (CA) 276 607
In re Opera Ltd (1891) 2 Ch 154 606
In re Sandiford (No 2) (1935) Ch 681 – 692 607
In re Wigzell; Ex Parte Hart (1921) 2 KB 835 605
International Shipping Co (Pty) Ltd v Bentley 1990 1 SA 680 (A) ..... 343 – 344
Ismail v Ismail 1983 1 SA 1006 (A) 303

J

James v Magistrate, Wynberg 1995 1 SA 1 (K) ..... 603 – 604, 611
Jankelow v Binder, Geuring & Co 1927 TPD 364 181
Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd
1984 3 SA 155 (A) 178
Johannesburg Municipality v African Realty Trust Ltd 1927 AD 163 409
Jones v Griffiths (1969) 1 WLR 795 ..... 224 – 225

K

Kalla v The Master 1995 1 SA 261 (T) ..... 524 – 528
Kastan v Kastan 1985 3 SA 235 (K)..... 473, 474
Kauesa v Minister of Home Affairs 1995 1 SA 51 (Nm)..... 642 – 643
Kellerman v South African Transport Services 1993 4 SA 872 (K) 348
Ketteringham v The Cape Town City Council 1933 CPD 316..... 607
Knop v Johannesburg City Council 1995 2 SA 1 (A) ..... 528 – 532
Kommissaris van Binnelandse Inkomste v Willers
1994 3 SA 283 (A)..... 331 – 336, 736
Koursk, The (1924) P 140 (CA) ..... 624 – 625
Kruger v Coetzee 1966 2 SA 428 (A)..... 128, 129
Kumalo v Jonas 1982 ACCC (S) 111 (BC)..... 308
Kurlan v Columbia Broadcasting (1953) 256 P 2d 965..... 316

L

Lagesse v Lagesse 1992 1 SA 173 (D)..... 209 – 210
Laubscher v Orphan Chamber 1819 GH 48/2/38 245
Laubser v Suid-Afrikaanse Spoorweë en Hawens
1976 4 SA 589 (T)..... 326, 329 – 330
Lazarus and Jackson v Wessels, Olivier and the Coronation Freehold
Estates, Town and Mines Ltd 1903 TS 499..... 7
Le Mesurier v Le Mesurier (1895) AC 517..... 489, 492
Le Roux v Loewenthal 1905 TS 742..... 7
Lee v Weisman 112 Sup Ct 2649 (1992)..... 688 – 689
Lemon v Kurtzman 403 US 602 (1971) ..... 687 – 688
Lloyds Bank Ltd v Bundy 1975 QB, 326 3 All ER 757..... 175
Logue v The Master 1995 1 SA 199 (N) ..... 517 – 523
Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd,
Lorimar Productions Inc v OK Hyperama Ltd, Lorimar Productions
Inc v Dallas Restaurant 1981 SA 1129 (T)..... 313
Lying v Northwest Indian Cemeterian Protective Association
485 US 439 (1988) 690

M

M v R 1989 1 SA 416 (0) 94, 97
MacCarthy v Fiskaal 1827 CJ 640 385..... 254
Magmoed v Janse van Rensburg 1993 1 SACR 67 (A)..... 107 – 109, 111
Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 4 SA 874 (A) 562
Makgae v Sentraboer (Koöperatief) Bpk 1981 4 SA 239 (T)..... 141
Malaza v Mndaweni 1975 ACCC (C) 45 305
Mandela v Falati 1994 4 BCLR 1 (W) (1995 1 SA 251 (W)) .. 510, 701, 710 – 711
Manickum v Lupke 1963 2 SA 344 (N) 339, 340
Marsay v Dilley 1992 3 SA 944 (A)..... 321
Mason v Mason 1885 4 EDC 330..... 491
Maturin v Scotty Brick Co (1974) 292 So 2d 859..... 220 – 221
Maynard v Hill 125 US (1887)..... 707 – 708
Mayeki v Shield Insurance 1975 4 SA 370 (K)..... 141
McCall v McCall 1994 3 SA 201 (K)..... 472 – 478
McKinney v University of Guelph (1990) 3 SCR 229 ..... 388, 393

Mhlungu v State (CCT 25/94 ongerapporteer) 528
Milbourn v Milbourn 1987 3 SA 62 (W) 209
Minister of Home Affairs v American Ninja IV Partnership
1993 1 SA 257 (A) ..... 732 – 733
Minister of Posts and Telegraphs v Daddy Bros and Johnstone
1965 3 SA 394 (OK) 28
Minister van Polisie v Ewels 1975 3 SA 590 (A) 131
Monamodi v Sentraboer Cooperative Ltd 1984 4 SA 845 (W) ..... 139 – 142
Montgomerie v Rand Produce Supply Co 1918 WLD 167 ..... 470, 472
Morkel (Rossouw) v Laubscher (Watermeyer) 1812 CJ 1546 1-104 ..... 597 – 602
Moroka Swallows Football Club Ltd v The Birds Football Club
1987 2 SA 511 (W) ..... 316 – 317
Moser v Meiring 1931 OPD 74 28
Mqoqi v Protea Insurance Co Ltd 1985 4 SA 159 (K) 142
Msomi v Nzuza 1983 3 SA 939 (D) 142
Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality
1985 1 SA 419 (A) ..... 45 – 46
Mutual and Federal Insurance Co Ltd v Swanepoel 1988 2 SA 1 (A) ..... 146 – 147
Mutual Life & Citizens' Assurance Co Ltd v Evatt
1971 1 All ER 150 (PC) 529

N

N v T 1994 1 SA 862 (K) ..... 502 – 503
Natal Bank Ltd v Roorda 1903 TH 298 ..... 734, 735
National Automobile and Allied Workers Union (now known as National
Union of Metalworkers of SA) v Borg-Warner SA (Pty) Ltd
1994 ILJ 509 (A) 268
National Iranian Tanker Co v MV Pericles 1995 1 SA 475 (A) ..... 721 – 725
National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd
1992 ILJ 405 (IC) 272
Ndhlovu v Ndhlovu 1937 NAC (N & T) 80 305
Neebe v Registrar of Mining Rights 1902 TS 65 7
Nell v Nell 1990 3 SA 889 (T) 95, 97
Nkambula v Linda 1949 NAC (N-E) 60 ..... 306 – 307
Nonnemaker v Nonnemaker 1819 GH 48/2/38 245
Nortje v Pool 1966 3 SA 96 (A) ..... 332, 334 – 335, 336
NSW v Commonwealth (1990) 169 CLR 484; 1 ACSR 137; 90 ALR 355 103
Nxaba v Nxaba 1926 AD 392 319

O

O v O 1982 4 SA 137 (K) 98

P

Page v Blieden & Kaplan 1916 TPD 606 470
Pasela v Rondalia Insurance 1967 1 SA 339 (W) 141
Paten v Caledonian Insurance Co 1962 SA 691 (D) 339
Payen Components SA Ltd v Bovic Gaskets CC 1994 2 SA 464 (W) ..... 131 – 136

Perskorporasie van SA Bpk v Media Workers Association of SA 1993 ICJ 938 (LAC) 271
Port Elizabeth Electric Tramway Co v Commissioner for Inland Revenue 1936 CPD 241 652
Pretorius v Claasen 1994-02-10 Saakno A 520/93 (T) ..... 337 – 341
Price v Deputy Sheriff of the Witwatersrand 1903 TH 467 ..... 607 – 608

Q

Qozeleni v Minister of Law and Order 1994 1 BCLR 75 (OK) (1994 3 SA 625 (OK)) 384, 512

R

R v Big Mart Ltd 18 DLR (4th) 321 ..... 686 – 687
R v Brewis 1944 AD 261 (A) 78
R v C 1955 4 SA 40 (N) 717
R v J 1958 3 SA 699 (SR) ..... 717 – 718
R v Kohlinfila Qwabe 1939 AD 255 79
R v Kritzinger 1952 2 SA 401 (W) 110
R v Lakatula 1919 AD 362 ..... 108 – 110
R v Louw 1918 AD 344 109
R v Matonsi 1958 2 SA 450 (A) ..... 310 – 312
R v Mbombela 1933 AD 269 119
R v Melaragni (1992) 76 CCC 3d 78 (Ontario Court, GD) 118
R v Ncanana 1948 4 SA 399 (A) 78
R v Ndaru 1955 4 SA 182 (A) 120
R v Oakes 26 DLR (4th) 200 694
R v P 1957 3 SA 444 (A) 81
R v S 1948 4 SA 419 (G) 716
R v Saul 1927 NLR 75 305
R v Sephanyane 1955 2 PH H 233 85
R v Sikosana 1960 4 SA 723 (A) 84
R v Slabbert and Prinsloo 1945 AD 137 ..... 108 – 109
R v Thielke 1918 AD 373 109
R v Viljoen 1947 2 SA 56 (A) ..... 82 – 83
R v Vloko 10 CCC (2d) 189 (Ontario CA) 120
R v W 1949 3 SA 772 (A) ..... 717 – 718
Rabe v Jordaan 1819 GH 48/2/39 ..... 243, 245
Rand Mines Ltd v Potgieter 1994-09-19 case no 93/9540 (T) ..... 325 – 331
Rapp and Maister Holdings Ltd v Ruflex Holdings (Pty) Ltd 1972 3 SA 835 (T) ..... 333 – 334, 335
Rau v Rau 6 Ariz App 362, 432 P 2d 910 (1967) ..... 206 – 207
Re Contract Corp, Gooch's Case (1872) 7 Ch App 207 606
Rebecca v Landdros van Graaff-Reinet 1823 GH 47/2/26 ..... 246, 247
Regalado v United States 572 A 2d 416, 6 ALR 5th 1178 752
Regents of the University of California v Bakke 438 US 265 (1978) 394
Reynolds and Murray v His Majesty's Fiscal 1813 GH 47/2/6 ..... 250 – 251
Rogers v Whitaker 1993 67 ALJR 47 537
Roman v Pietersen 1990 3 SA 350 (K) 337
Rondalia Assurance Corporation of SA v Britz 1976 3 SA 243 (T) ..... 138 – 139

Rossouw v Brink 1819 GH 48/2/39 ..... 243, 250
Roux v Hamman 1811 CJ 1534 140 – 378 ..... 590 – 591
Ryneveld v Zorn 1819 GH 48/2/40 244

S

S v A Juvenile 1990 4 SA 151 (ZSC) 300
S v Artman 1968 3 SA 339 (A) 79
S v De Kock 1992-12-18 saakno A 631/92 (K) 323
S v De Oliveira 1993 2 SASV 59 (A) 116
S v Dreyer 1994 2 SASV 300 (T) ..... 322 – 325
S v Duna 1984 2 SA 591 (K) ..... 80 – 81
S v Jacobs 1994 2 SASV 326 (K) ..... 322 – 325
S v Kearney 1964 2 SA 495 (A) 85
S v Khumalo 1991 4 SA 310 (A) 79
S v Kumalo 1983 2 SA 379 (A) 85
S v L 1992 3 SA 713 (OK) ..... 91 , 92, 93, 96, 97 – 98, 99
S v L Erasmus 1993-08-23 saakno CC 8/93 (OK) 84
S v Lackay 1993-06-09 saakno A 366/92 (K) 323
S v Lelempe 1989-03-30 saakno 315/88 (A) ..... 79, 82 – 83
S v Letsedi 1963 2 SA 471 (A) 85
S v Makwanyane 1994 3 SA 868 (A) 524
S v Makwanyane 1995 6 BCLR 665 (CC) 639, 651, 660
S v McC; W v W (1972) AC 26 96
S v Mhlungu 1995 7 BCLR 793 (CC) ..... 639 – 640
S v Mjoli 1981 3 SA 1233 (A) 84, 85
S v Mokgethi 1990 1 SA 32 (A) ..... 227, 343 – 344
S v Phuravhatha 1992 2 SACR 544 (V) ..... 110 – 111
S v S 1995 1 SASV 50 (Z) ..... 715 – 721
S v Saib 1994 2 BCLR 48 (D) 638
S v Sam 1980 4 SA 289 (T) 119
S v Swart 1965 3 SA 454 (A) ..... 92 – 93
S v T 1963 1 SA 484 (A) 717
S v T 1986 2 SA 112 (O) 118
Saambou v Essa 1993 4 SA 62 (N) 736
Sampson v McDonald 1821 GH 48/2/41 245
Santam Bpk v Fondo 1960 2 SA 467 (A) 144
Santam Insurance Co Ltd v Liebenberg 1976 4 SA 312 (N) 96
Santam Versekeringsmaatskappy v Byleveldt 1973 2 SA 146 (A) 145
Saridakis t/a Auto Test v Lamont 1993 2 SA 164 (K) 17
Sasfin (Pty) Ltd v Beukes 1989 1 SA 1 (A) ..... 173, 563 – 564
Saul v His Creditors 5 Mart (n 5) 569 (La 1827) 202
Schlebusch v Schlebusch 1988 4 SA 548 (OK) 474
Schultz v Butt 1986 3 SA 667 (A) 133, 134
Seetal v Pravitha 1983 3 SA 827 (D) ..... 94 – 95, 97
Sentraalwes (Koöp) Bpk v Die Meester 1992 3 SA 86 (A) 677
Seven Abel CC t/a The Crest Hotel v Hotel and Restaurant Workers Union 1990 ILJ 504 (LAC) 270
Short v Fiscal 1818 GH 47/2/21 ..... 243, 246
Short and Berry v Herrer 1811 GH 48/2/2 ..... 249 – 250
Short and Berry v Thomson 1819 GH 48/2/38 ..... 245, 246

Sidaway v Bethlem Royal Hospital Governers 1985 1 All ER 643 535
Sir John Heydon's Case (1613) 11 Co Rep 5, 77 ER 1150 ..... 621 – 622
Smit v Abrahams 1994 4 SA 1 (A) ..... 343 – 348
Smuts v Fleck 1809 CJ 1492 1 – 757 591
Solaglass Finance Co Pty Ltd v Commissioner for Inland Revenue
1991 2 SA 257 (A) 654
South African General Investment and Trust Co Ltd v Mavaneni
1963 4 SA 89 (D) 339
Standard Chartered Bank of Canada v Nedperm Bank Ltd
1994 4 SA 747 (A) ..... 343 – 348
State v Cape 78 Ohio App 429, 67 NE 2d 912 (1946) 120
Stratton v Spoornet 1994 1 SA 803 (T) ..... 128 – 131
Swart v Swart 1980 4 SA 364 (O) 758

T

Taylor and Horne (Pty) Ltd v Dentall (Pty) Ltd 1991 1 SA 412 (A)... 131, 132,136
Theron v Fiscal 1812 GH 47/2/5 247
Thomas v Dawes 1824 GH 48/2/66 ..... 246, 251
Tiel v Fiscal 1817 GH 47/2/14 ..... 246, 247
Transvaal Investment Co v Springs Municipality 1922 AD 337 14
Trustee, Assigned Estate Wall v Illovo Trading Co (1909) 30 NLR 522 608 – 609

U

Union Wine Ltd v E Snell and Co Ltd 1990 2 189 (K) 317
Universal City Studios Inc v Video Network (Pty) Ltd 1986 2 SA 734 (A) 94

V

Van Aarde v Coetzee 1819 GH 48/2/39 242
Van der Walt's Case 1986 4 SA 303 (T) ..... 653 – 654
Van der Westhuizen v Van Aardt's Estate 1943 EDL 299 89
Van Rooyen v Van Rooyen 1994 2 SA 325 (W) ..... 757 – 758
Van Staden v Van Wyk 1958 2 SA 686 (0) 87
Van Vuuren v Van Vuuren 1993 1 SA 163 (T) 473, 478
Venter v Venter 1993 1 SA 763 (D) 473
Ventura (Jansens) v Danielsen (De Oude) 1810 CJ 1509 264 – 544..... 591 – 592

W

Wallace v Jaffree 472 US 38 (1985) 687
Weatherley v Weatherley (1879) Kotzé 66 489
Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd
1990 2 SA 718 (T) 136
Willers v Serfontein 1985 2 SA 591 (T) 473
William Francis Vinet v Charles Blair 1812 GH 48/2/9 246
Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue
1992 4 SA 202 (A) 13, 332, 335, 336
Wisconsin v Yoder 406 US 205 (1972) 689

Z

Zaaiman v Landdros van George 1820 GH 47/2/27 250
Zavaleta v Zavaleta 358 NE 2d 13 (1976) ..... 95 – 96
Zimnat Insurance Co Ltd v Chawanda 1991 2 SA 825 (ZS) 143
Zuma's Case 1995 4 SA BCLR 401 (CC) ..... 638 – 639, 651

V WETGEWING

Order in Council 1838 304
Wet 28 van 1865 (N) 305
Wet 1 van 1871 (N)
a 1 6
Wet 3 van 1871 (T)
a 2 304
15 304
25 304
Wet 46 van 1887 (N)
a 1 ..... 6, 304 – 305
11 305
13 305
Wet 17 van 1895
a 1 6
Wet 69 van 1899 (O) 304
Wet 28 van 1914 652
Wet 32 van 1916
a 67 609
Wet 31 van 1917 ..... 77, 108 – 110
Wet 41 van 1917 652
Wet 40 van 1925 652
Wet 46 van 1926 104
Wet 38 van 1927 ..... 304 – 309
a 22 ..... 279, 305 – 307, 308, 309, 356, 448
Wet 9 van 1929 279
Wet 18 van 1932 (N) 673
a 2 673
4 674
89 674
106 674
Wet 37 van 1933 489
a 6 489
Wet 24 van 1936
a 2 674
102 677
Wet 47 van 1937 ..... 326 – 329
a 3 ..... 326, 328
Wet 22 van 1939 ..... 489, 492
a 1 ..... 489, 492
Wet 31 van 1941 652

Wet 27 van 1943 ..... 126, 187, 188, 190 – 191
a 39 187
41 706
42 188
43 188
44 188
63 126
Wet 13 van 1944 386
Wet 32 van 1944 279
Wet 3 van 1952
a 7(1) 726, 728, 729
Wet 7 van 1953 ..... 517 – 523, 587
a 2 ..... 341 – 343, 517 – 523
2A ..... 517 – 523
4 343
Wet 45 van 1955 191
Wet 56 van 1955 ..... 77, 351
a 257 77
Wet 25 van 1956
a 17 706
Wet 28 van 1956 ..... 257, 258, 271, 275, 540
a 65 ..... 258, 271
Wet 34 van 1956 616
Wet 59 van 1959 154
a 34(1) 609
Wet 58 van 1962 ..... 192, 632
a 56 192
Wet 71 van 1962
a 2 751
Wet 80 van 1962 351
Wet 62 van 1963
a 18 314
Wet 76 van 1963 ..... 136 – 144
a 31 ..... 136 – 144
32 ..... 137, 139 – 142
Wet 34 van 1964
a 73(a) 736
Wet 34 van 1964 ..... 154, 171
a 52 171
53 171
Wet 73 van 1964 ..... 6 – 7
Wet 42 van 1965 353
Wet 66 van 1965 ..... 517, 519 – 520
a 8 ..... 519 – 520
37 587
Wet 28 van 1966
a 21 318
Wet 20 van 1967 ..... 6 – 7
Wet 59 van 1968 386

Wet 70 van 1968 ..... 490 – 491
a 21 ..... 490 – 491
Wet 73 van 1968 ..... 169, 543, 544
Wet 15 van 1970 386
Wet 41 van 1971 352
Wet 61 van 1973 ..... 105, 112
a 1 112
379(1) 611
Wet 56 van 1974 386
Wet 57 van 1976 386
Wet 80 van 1976 169
Wet 51 van 1977 ..... 73, 83 – 85, 107 – 111, 297 – 300
a 35 352
58 ..... 349 – 352
59 350
60 350
61 350
67 351
8 351
70 351
115 ..... 84, 351
118 351
171 351
174 ..... 107, 109 – 111
179 351
196 310
209 ..... 73, 83 – 85
221 108
254 297
276 324
276A ..... 322 – 325
290 300
310 ..... 107, 111
319 ..... 107 – 108, 110 – 111
Wet 71 van 1977
a 170A 720
Wet 111 van 1978 386
Wet 70 van 1979 ..... 195, 197 – 198, 213, 280, 309, 356, 440 – 460, 473, 476, 490
a 2 490
6 ..... 473, 476
7 ..... 195, 197 – 198, 213 – 214, 440 – 460
Wet 75 van 1980 ..... 169 – 170, 543, 544
a 4 545
5 545
13 ..... 169, 545
Wet 68 van 1981 ..... 543, 545
a 20 545
28 545
Wet 6 van 1983 136
reg 16 136

Wet 74 van 1983 ..... 297 – 299
a 5 297
6 297
7 297
14 297
25 299
30 299
58 297
Wet 65 van 1983 149
a 18 – 23 149
Wet 105 van 1983 ..... 721 – 725
Wet 69 van 1984 ..... 100 – 102
a 11 102
Wet 83 van 1984 137
Wet 88 van 1984 ..... 190, 192, 195, 207 – 211, 213, 309, 356, 447, 460, 513 – 517
a 2 213
7 ..... 209, 210, 211
15 190
21 ..... 207 – 208, 209, 513 – 517
25 514
36 195
hfst 1 516
Wet 29 van 1985 102
Wet 34 van 1986 279
Wet 81 van 1987 586
Wet 24 van 1987 ..... 278 – 279, 475 – 476
Wet 82 van 1987 ..... 92 – 93
a 1 ..... 92 – 93
2 ..... 92 – 94
Wet 3 van 1988 ..... 195, 308 – 309, 356
Wet 45 van 1988
a 1 143
Wet 29 van 1989
a 122 323
Wet 78 van 1989 ..... 101 – 102
Wet 93 van 1989 ..... 146, 229, 231, 233
Wet 97 van 1990 112
Wet 50 van 1991
a 5 ..... 1 – 15
47 3
68 ..... 4, 12 – 15
Wet 139 van 1991 352
Wet 3 van 1992 ..... 488, 490, 492 – 494
a 1 ..... 488, 490, 493 – 494
2 494
5 493
Wet 20 van 1992 352
Wet 43 van 1992 ..... 517, 519
a 3 ..... 342, 517
4 517

Wet 44 van 1992 456
Wet 85 van 1992 ..... 111 – 115
a 9 ..... 111 – 113
Wet 57 van 1993 672
a 1(1) 676, 679, 680, 681, 682
2 680
5 681
Wet 104 van 1993 112
Wet 113 van 1993
a 23(b) 654
Wet 120 van 1993 ..... 276, 279, 280
Wet 132 van 1993 756
Wet 153 van 1993 387
Wet 200 van 1993 ..... 106, 157, 160 – 162, 257 – 275, 297 – 300, 351, 379 – 395, 415 – 416, 477 – 478, 478 – 488, 496 – 499, 504 – 513, 523 – 528, 550, 755 – 759
a 4 ..... 527, 635
7 635
7(1) 700
7(2) 701
8 ..... 632, 643, 646, 647, 660, 661
8(2) 685, 704
10 710
13 632
14 ..... 632, 684 – 695
15 ..... 699, 745
15(1) 685, 711
17 705
22 632
23 632
24 632
25 632
25(2) 703
28 632
30(3) 752
31 685
33 ..... 634, 648
33(2) 701
33(4) 523, 527, 528, 693, 700
35 ..... 525, 526, 527, 635, 759
35(3) 750
73 635
74 635
101 ..... 524, 525
102 525
103 525
232 ..... 527, 636
241 ..... 524, 525, 528
241(8) 709
hfst 3 ..... 357, 523

Wet 21 van 1995
a 2(b) 633
5(b) 633
6 633
7(1) 633
10(1) 633
11(1) 633
12(1) 633
22 633
26 633
27 633
34 633
36 633
42 633
44 633

VI ONDERWERPSINDEKS

Administratiefreg
administratiewe handelinge ..... 725 – 733
diskriminasie 381, 395
kwasi-judisiële handelinge 727
Arbeidsreg ..... 257 – 275
dispute ..... 152 – 153, 546
onbillike arbeidspraktyke ..... 257, 267 – 273, 540, 753 – 755
staking ..... 257 – 262
werkgewer en werknemer ..... 753 – 755
Arbitrasie ..... 353 – 354
Bankreg ..... 154 – 155
Bedrog en wanvoorstelling
nie-openbaarmaking ..... 124 – 126
Belasting ..... 191 – 193
boedelbelasting ..... 191 – 192
inkomstebelasting ..... 191, 633 – 661
Beslote korporasies ..... 100 – 106
Bewysreg ..... 479 – 480, 486 – 487
bewyslas ..... 479 – 480, 487, 711
bloedtoetse ..... 91 – 100
getuienis ..... 77 – 85, 353
getuies ..... 75 – 77, 310 – 312
privilegie 538
seksuele sake ..... 74, 715 – 721
toelaatbaarheid van getuienis ..... 715 – 721
vaderskap ..... 91 – 100
Bouverenigings ..... 154 – 155
Buitelandse reg
Australië – beslote korporasies ..... 102 – 104
Australië – delik 291, 537
Australië – egskeidingsreg 284
Australië – internasionale privaatreg ..... 204 – 205, 211, 216 – 218

Buitelandse reg (*vervolg*)
- België – kontrak ... 549
- Brittanje – delik ... 98 – 99, 149, 290 – 291, 537, 710
- Brittanje – egskeidingsreg ... 277, 280 – 285, 474 – 476, 478
- Brittanje – howe ... 604 – 607
- Brittanje – huweliksreg ... 443 – 450, 452 – 454, 457
- Brittanje – internasionale privaatreg ... 201 – 202, 211, 214 – 218, 443 – 450, 452 – 454, 457
- Brittanje – kinders ... 474 – 476, 478
- Brittanje – kontrak ... 26 – 27, 48, 123 – 124, 164 – 167
- Brittanje – prosesreg ... 155
- Brittanje – regsgeskiedenis ... 249 – 251, 255 – 256
- Brittanje – sakereg ... 722
- Brittanje – skadevergoeding ... 222 – 225, 232 – 233
- Brittanje – versekering ... 123 – 124
- Duitsland ... 629 – 632
- Duitsland – delik ... 148 – 150, 295, 500, 537, 751, 752
- Duitsland – kontrak ... 552 – 557, 696 – 702
- Duitsland – staatsreg ... 390 – 393, 506
- Duitsland – strafreg en strafprosesreg ... 118 – 119, 362 – 378, 579 – 584
- Frankryk – delik ... 295
- Frankryk – kontrak ... 167
- Kanada – delik ... 291, 296, 537
- Kanada – kinders ... 301 – 302
- Kanada – staatsreg ... 388, 393
- Kanada – strafreg en strafprosesreg ... 117 – 120
- Namibië – beslote korporasies ... 105 – 106
- Nederland – delik ... 500, 502
- Nederland – internasionale privaatreg ... 205, 211
- Nederland – kontrak ... 549, 557 – 559
- Nederland – skadevergoeding ... 225 – 226, 232 – 233
- Nederland – strafreg en strafprosesreg ... 117
- Nieu-Seeland – egskeidingsreg ... 285
- VSA – arbeidsreg ... 264
- VSA – delik ... 149, 290, 315 – 316, 537, 621 – 628
- VSA – egskeidingsreg ... 277, 284 – 285
- VSA – huweliksreg ... 450 – 452, 454, 457, 459
- VSA – internasionale privaatreg ... 202 – 204, 206 – 207, 216 – 218, 450 – 452, 454, 457, 459
- VSA – kinders ... 298 – 302
- VSA – kontrak ... 123, 167
- VSA – skadevergoeding ... 220 – 222, 232 – 233
- VSA – staatsreg ... 394, 505 – 506
- VSA – strafreg en strafprosesreg ... 117, 118, 120
- VSA – versekering ... 123
- Zimbabwe – beslote korporasies ... 104 – 105

Delik ... 355 – 356, 421 – 439
- aanklamping ... 131 – 136, 313 – 314, 316
- aanspreeklikheid weens 'n late ... 533 – 539

Delik (*vervolg*)
actio iniuriarum ..... 288 – 289, 292 – 296
aksie van die afhanklike ..... 136 – 144
animus iniuriandi 713
boni mores 317
diere ..... 750 – 752
genoegdoening ..... 289 – 290, 292
gesamentlike aanspreeklikheid ..... 434 – 435, 613 – 623
kousaliteit ..... 343 – 348, 434 – 438, 614, 618 – 621
laster ..... 496 – 499, 709 – 715, 745 – 750
mededinging ..... 131 – 136, 313 – 318
middellike aanspreeklikheid ..... 337 – 241, 613 – 632
motorongelukke ..... 219 – 233, 337 – 341, 343 – 344
nalatigheid ..... 622 – 623
onregmatigheid ..... 132 – 136, 528 – 532, 617
opset ..... 622 – 623, 712, 713
persoonlikheidsnadeel ..... 148 – 150
persoonlikheidsregte ..... 148 – 150, 499 – 503
reg op privaatheid ..... 98 – 99
regverdigingsgronde 538
risiko-aanspreeklikheid 623
skade ..... 530, 613 – 632
skadevergoeding ..... 144 – 148, 343 – 348, 528
skuld ..... 128 – 131
skuldlose aanspreeklikheid 623
verlies aan inkomste 145
verlies aan verdienvermoë ..... 145 – 147
Diere
regsubjektiwiteit ..... 750 – 752
Egskeidingsreg ..... 276 – 288, 472 – 478, 488 – 495
finansiële implikasies ..... 449 – 450
onderhoud ..... 452 – 454
Erfreg ..... 341 – 343, 355 – 356, 517 – 523
fideicommissum ..... 586 – 602
intestate erfopvolging 586
legitieme porsie 586
Meester 524
vruggebruik ..... 86 – 91
Familiereg ..... 152 – 153, 472 – 478, 702 – 708
Howe ..... 276 – 288
appèlafdeling 319
gesinshowe ..... 276 – 288
hooggeregshof ..... 91 – 100, 609
jurisdiksie ..... 323, 325, 488 – 495, 524
konstitusionele hof 524
nywerheidshof ..... 540 – 543
swart egskeidingshowe ..... 277, 279 – 280
toetsingskompetensie ..... 523 – 528

Huweliksreg ..... 189 – 191, 355 – 356
delik 308
domisilie ..... 488 – 495
egskeiding 307
gemeenskap van goedere ..... 190 – 191, 192 – 193, 756
huweliksgoedereg ..... 194 – 218, 302 – 310, 440 – 460, 513 – 517
kinders ..... 547 – 548, 756
minderjariges ..... 472 – 478
onderhoud ..... 210 – 211, 452 – 454
poligame verbindings 137, 303, 524, 706
verlowing 756
Inheemse reg ..... 355 – 358
delik ..... 355 – 356, 499
erfreg ..... 355 – 356
huweliksreg ..... 195, 302 – 310, 355 – 356
kontrak ..... 30, 355 – 357
lobola ..... 303, 306 – 307
personereg 355
Insolvensie ..... 187 – 188, 318 – 320, 547
trustees 608
Internasionale privaatreg ..... 440 – 460, 759 – 761
domisilie 198
huweliksreg ..... 194 – 218
Kinders ..... 296 – 302, 472 – 478
bloedtoetse ..... 91 – 100
hooggeregshof as oppervoog ..... 97 – 98, 297
ouerlike gesag 756
voogdy ..... 472 – 478
Kontrak ..... 16 – 30, 45 – 72, 121 – 127, 144 – 148, 157 – 176, 355 – 357, 482
boni mores ..... 29 – 30
borg ..... 358 – 359, 696 – 702
dwaling ..... 13 – 14
exceptio doli generalis 259
geldigheid ..... 549 – 567
herroeping ..... 184 – 187, 188 – 189
insolvensie ..... 187 – 188
kontrakbreuk ..... 14 – 15
kontrakteervryheid ..... 162 – 163, 166 – 176, 359, 730 – 732
kontraktuele bedinge ..... 177 – 193, 544
kontraktuele bedinge – geïmpliseerde bedinge ..... 170 – 171
koopkontrak ..... 461 – 472
lening ..... 16 – 30, 553
sessie ..... 180 – 181
uitleg ..... 326 – 329, 359, 696 – 702
voorwaardelike kontrak ..... 124, 461 – 472
waarborg ..... 124 – 126
wanvoorstelling ..... 124 – 126, 559
weddenskappe ..... 47 – 72
wilsooreenstemming ..... 16 – 30, 124

Bladsy

Koop en verkoop ..... 461 – 472
koopprys 545
Krediet
verbruikerskrediet ..... 169, 543 – 545
Maatskappye
aandele ..... 111 – 115
Maritieme reg
jurisdiksie ..... 721 – 725
Mededinging ..... 131 – 136, 313 – 318
Menseregte ..... 157 – 176, 296 – 302, 311 – 312, 380 – 383, 391 – 392, 395, 478 – 488, 496 – 499, 504 – 513, 702 – 708, 759 – 761
godsdiensvryheid ..... 684 – 695
reg op lewe 762
reg op privaatheid ..... 702 – 708, 762
regstellende aksie ..... 393 – 395
vryheid van assosiasie ..... 257, 259, 702 – 708
vryheid van beweging 762
vryheid van spraak ..... 496, 498, 709 – 715
Nalatigheid
aanspreeklikheid van banke ..... 733 – 744
duty of care (sorgsaamheidsplig) 530
professionele optrede ..... 532 – 539
redelike man-toets ..... 116 – 117, 128 – 131, 340 – 341, 532 – 539
voorsienbaarheid ..... 128 – 131, 345 – 347
werkgewer en werknemer ..... 338 – 341
Omgewingsreg ..... 152 – 153
Ongeregverdigde verryking ..... 331 – 336
condictio indebiti 13, 734, 735, 736, 744
condictio sine causa 734, 735, 736
Ouer en kind ..... 547 – 548
belang van die kind ..... 97 – 98, 472 – 478
vaderskap ..... 91 – 100
voogdy ..... 472 – 478
Prosesreg ..... 298, 310 – 312, 318 – 321, 478 – 488, 764,
appèlprosedure ..... 106 – 111, 318 – 321
bewyslas ..... 479 – 480, 487
hersiening ..... 322 – 325
hofreëls 764
hooggeregshof ..... 91 – 100
interdik ..... 155 – 156
koste 278
pleit 351
Regsfilosofie ..... 31 – 44, 158 – 160, 164 – 166, 168, 198 – 201
geregtigheid 549
Regsgeskiedenis ..... 86 – 91, 155, 234 – 236, 304 – 305
delik ..... 289 – 290
gemenereg ..... 45 – 72, 461 – 469
huweliksreg ..... 304 – 305
kontrak ..... 17 – 25, 45 – 72

Regsgeskiedenis (*vervolg*)
koop en verkoop ..... 461 – 469
Romeins-Hollandse reg ..... 19 – 25, 45 – 72, 86 – 91, 155, 200 – 201, 242 – 247, 255 – 256, 289 – 290, 293 – 294, 465 – 469
Romeinse reg ..... 17 – 19, 87, 155, 247 – 248, 461 – 465
sakereg ..... 4 – 8, 86 – 91, 398
strafreg en strafprosesreg ..... 363 – 367
versekering ..... 45 – 72
Regsopleiding ..... 354 – 355, 379 – 395
Regspluralisme ..... 355 – 358
delik ..... 355 – 356, 499
erfreg ..... 355 – 356
huweliksreg ..... 136 – 144, 195, 302 – 310, 355 – 356
kontrak ..... 30, 355 – 357
lobola ..... 303, 306 – 307
personereg 355
Regsprofessie ..... 354 – 355, 764
advokate ..... 310 – 312, 608, 612
gesinsadvokate 277, 280, 287
prokureurs 608, 612
regsverteenwoordiging ..... 487 – 488
Regsvergelyking ..... 201 – 218, 220 – 226, 232 – 233, 280 – 285, 290 – 292

Regswetenskap
boni mores ..... 413 – 416, 420, 498, 524, 529, 549 – 567
gemenereg ..... 4 – 8, 17 – 29, 45 – 72, 86 – 91, 92, 234 – 256, 289 – 290, 445 – 450, 461 – 469
hofverslae ..... 91 – 100, 107 – 111, 131 – 136, 136 – 144, 144 – 148, 313 – 318, 318 – 321, 322 – 325, 325 – 331, 331 – 336, 337 – 341, 341 – 343, 343 – 348, 472 – 478, 513 – 517, 517 – 523,
openbare beleid ..... 173 – 174
ou gesag ..... 17 – 25, 31 – 44, 45 – 72, 86 – 91, 121 – 123, 126, 138 – 139, 143, 234 – 256, 289 – 290, 461 – 469
regshervorming ..... 101 – 106, 142 – 143, 151 – 152, 234 – 256, 287 – 288, 293, 302, 313 – 318, 331 – 336, 361 – 378
regstaal ..... 73 – 74, 77 – 81, 100, 107, 139 – 140, 151 – 152, 158 – 160, 313, 323, 325 – 331, 430 – 434
regsvergelykende metode ..... 425 – 430, 438
regsvergelyking ..... 361 – 378, 388, 390 – 394
statute ..... 1 – 15, 83 – 85, 92 – 94,100 – 106, 111 – 115, 136 – 144, 160 – 162, 213 – 214, 234 – 256, 257 – 275, 296 – 302, 478 – 488, 496 – 499
statute – uitleg ..... 139 – 140, 322 – 325, 326 – 329, 341 – 343, 504 – 513, 518 – 523
subjektiewe regte-leer ..... 10 – 12, 15, 317 – 318, 402 – 410

Rekenaars ..... 354 – 355
Romeins-Hollandse reg ..... 242 – 247, 255 – 256
delik ..... 289 – 299, 293 – 294
erfreg ..... 86 – 91, 586 – 602
Hugo de Groot ..... 400, 403 – 408
internasionale privaatreg ..... 200 – 201
kontrak ..... 19 – 25, 45 – 72
koop en verkoop ..... 465 – 469
sakereg ..... 59, 86 – 91, 400, 402 – 408
versekering ..... 45 – 72
Romeinse reg ..... 247 – 248
delik 289
erfreg ..... 87, 587, 593 – 594
kontrak ..... 17 – 19
koop en verkoop ..... 461 – 465
sakereg 87
strafreg en strafprosesreg 119
Sakereg ..... 2 – 15
dorpsgebiede 528
eiendomsreg ..... 396 – 420, 721 – 725
fideicommissum 59
myne en minerale ..... 1 – 15, 325 – 331
onroerende sake 528
vruggebruik ..... 86 – 91
Sekerheidstelling ..... 358 – 359, 672 – 684, 696 – 702
borg 359
Sessie ..... 180 – 181
Skadevergoeding
delik ..... 288 – 296, 421 – 439
motorongelukke ..... 219 – 233, 337 – 341, 343 – 344
nie-nakoming van statutêre verpligtinge ..... 528 – 532
once and for all-reël ..... 229 – 233
toekomstige skade ..... 221 – 226, 228 – 232
Staatsreg ..... 379 – 395, 523 – 528
demokrasie 761
grondwet – konstitusionele beginsels ..... 709 – 715, 745 – 750, 755, 759 – 761, 761 – 763
grondwette ..... 296 – 302, 379 – 395, 478 – 488, 496 – 499, 504 – 513, 523 – 528, 661 – 672, 684 – 695, 709 – 715, 759 – 761, 761 – 763
menseregte ..... 380 – 383, 391 – 392, 395, 478 – 488, 496 – 499, 504 – 513, 523
Statute ..... 540 – 543
Strafreg en strafprosesreg ..... 73 – 85, 349 – 352, 427 – 428, 439, 482
appèl ..... 106 – 111
borg ..... 350 – 351
kinders 572
moord ..... 352, 574 – 575
noodweer ..... 116 – 121

Strafreg en strafprosesreg (*vervolg*)
opset ..... 361 – 378, 568 – 584
pleit – onskuldig 351
skuld ..... 119, 361 – 378
strafregtelike nalatigheid ..... 361 – 378
toestemming ..... 533 – 539
verkragting ..... 715 – 721
vonnis ..... 296 – 302, 322 – 325
Testamente ..... 341 – 343, 517 – 523
herroeping ..... 341 – 343, 517 – 523
veranderings van bepalings 587
Uitleg van wette ..... 523 – 528, 721 – 725, 745 – 750
Verband en pand ..... 114, 672 – 684
Verhandelbare dokumente
aanspreeklikheid van banke ..... 733 – 744
tjeks ..... 154 – 155, 733 – 744
Versekering ..... 86 – 91, 111 – 115, 121 – 127, 177 – 193
derde partye ..... 177 – 193
lewensversekering ..... 45 – 72, 144 – 148, 177 – 178
risiko ..... 124 – 127
uberrima fides 123, 125
Vroue ..... 136 – 144

Artikel 5(1) van die Mineraalwet 50 van 1991: 'n herformulering van die gemenereg?*

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SUMMARY

Section 5(1) of the Minerals Act 50 of 1991: a re-formulation of the common law?
The Minerals Act 50 of 1991 was promulgated on 1 January 1992. The entitlements of the holder of complete ownership or mineral rights (the so-called holders of a right of mineral exploitation) are set out in section 5(1) of the act as rights. Against the background of five legal questions which arise from the said subsection, it is contended in this article that: (a) the list of entitlements as set out in section 5(1) is not a restatement of entitlements in terms of the common law in the strict sense of the word; (b) the list does not represent a complete and conclusive list simply because additional entitlements can be identified; (c) these entitlements are the entitlements to dispose, encumber, alienate, resist any unlawful interference with the exercise of the right of mineral exploitation, and the reversionary entitlement; (d) the doctrine of private law rights, the method of the court in drawing an analogy between the content of rights of mineral exploitation and the content of well-known real rights, and the principles of legal comparison may serve to explain the existence of existing and future entitlements of mineral exploitation; and (e) despite section 68(5) of the Minerals Act, more or less entitlements than the "rights" referred to in section 5(1) of the Minerals Act can be granted by agreement.

1 INLEIDING

Die Mineraalwet 50 van 1991[1] het op 1 Januarie 1992 in werking getree.[2] Die Mineraalwet het kortliks as hoofoogmerke ten doel om: (a) die prospektering na en

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* 'n Samestelling en verwerking van 'n referaat deur eg outeur op 1993-06-11 te Unisa tydens 'n sakeregseminaar gelewer, en gedagtes deur lg outeur uitgespreek tydens 'n reeks mineraalregseminare vir die Vereniging van Prokureursordes gedurende 1992. Erkenning word verleen aan die kommentaar en voorstelle van prof PF Fèvrier-Breed van die Universiteit van die Noorde. Ons aanvaar egter verantwoordelikheid vir die korrektheid van die eindproduk.

1 Hierna aangehaal as "die Mineraalwet".

2 Prok 123 *SK* 13682 van 1991-12-20.

die optimale ontginning, verwerking en benutting van minerale te reël; (b) voorsiening te maak vir die veiligheid en gesondheid van persone betrokke by myne en bedrywe; en (c) die ordelike benutting en rehabilitasie van die oppervlak van die grond tydens en na prospekteer- en mynwerksaamhede te reël. Samevattend beskou, reguleer die Mineraalwet dus by uitstek die uitoefening van ontginningsbevoegdhede[3] deur die houer[4] van óf volledige eiendomsreg,[5] óf 'n mineraalreg, óf ander reghebbendes met die nodige skriftelike toestemming.[6] Geriefshalwe sal in plaas van voormelde subjektiewe regte ook na ontginningsregte verwys word as daardie saaklike regte wat ontginningsbevoegdhede tot inhoud het, naamlik volledige eiendomsreg of 'n mineraalreg.[7]

Tydens die vasstelling van die inhoud van 'n saaklike reg word gewoonlik nie net gelet op die inhoudsbevoegdhede wat uit hoofde van sodanige reg uitgeoefen kan word nie, maar ook op sowel die beperkinge waaraan bevoegdheidsuitoefening onderworpe is[8] as op inherente verpligtinge.[9] Hiervolgens moet by ontginningsregte gelet word op die ontginningsbevoegdhede as sodanig, beperkinge waaraan bevoegdheidsuitoefening onderworpe is en inherente verpligtinge.[10] Bevoegdheidsomlyning is van belang vir doeleindes van (i) bevoegdheidsuitoefening deur die reghebbende en (ii) bevoegdheidsverlening aan regsopvolgers in die lig van die *nemo plus iuris*-reël.[11]

Alhoewel die wetgewer al vantevore sommige van die ontginningsbevoegdhede as regte aangetoon het,[12] kan artikel 5(1) van die Mineraalwet as 'n omvattender omskrywing van die inhoud van 'n ontginningsreg aangemerk word.[13] Hierdie subartikel bepaal soos volg:

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3 Sien in die algemeen Badenhorst en Van Heerden "A comparison between the nature of prospecting leases in terms of the Precious Stones Act 74 of 1964 and prospecting permits in terms of the Minerals Act 50 of 1991" 1993 *TSAR* 159. Soos later sal blyk, het a 5(1) van die Mineraalwet 'n hervestiging (oftewel verkryging) van ontginningsbevoegdhede tot gevolg. Sien verder vn 16 en 18 hieronder.

4 Sien verder die definisie van "houer" in a 1(xii) van die Mineraalwet.

5 Dit is eiendomsreg waarvan die ontginningsbevoegdhede nog nie van die eiendomsreg geskei is nie.

6 Sien a 6(1)(*b*) 8 en 9(1)(*b*) van die Mineraalwet.

7 Volledigheidshalwe dien voorts in gedagte gehou te word dat ander saaklike regte soos 'n prospekteerreg of mynreg uit hoofde van onderskeidelik 'n geregistreerde prospekteerkontrak of mineralehuurkontrak ook verskillende ontginningsbevoegdhede tot inhoud kan hê.

8 Sien ook die benadering van Kleyn en Boraine *Silberberg and Schoeman: The law of property* (1992) 164 mbt die vasstelling van die omvang van eiendomsreg; sien ook Van der Merwe *Sakereg* (1989) 173.

9 Sien in die algemeen Van der Walt "The effect of environmental conservation measures on the concept of landownership" 1987 *SALJ* 479.

10 Bv die verpligting dat ontginningsbevoegdhede uit hoofde van 'n mineraalreg *civiliter modo* uitgeoefen word: *Hudson v Mann* 1950 4 SA 485 (T) 488F–G; sien verder *Witbank Coliery Ltd v Lazarus* 1929 TPD 529 535; *Nolte v Johannesburg Consolidated Investment Co Ltd* 1943 AD 295 306 214–317; *Zuurbekom Ltd v Union Corporation Ltd* 1947 1 SA 514 (A) 531–532.

11 Soos uit par 5(e) hieronder blyk, slaan bevoegdheidsverlening streng gesproke ook op bevoegdheidsuitoefening, nl uitoefening van die vervreemdingsbevoegdheid.

12 Sien wetgewing na verwys in par 2 hieronder.

13 A 17 van die Departement van Mineraal- en Energiesake se Voorgestelde Mineraalwetsontwerp, 1989 (GN 856 van 1988 *SK* 11606 van 1989-12-15) het, soos voorafgaande wetgewing (sien par 2 hieronder), ook slegs verwys na die "reg" om na minerale te prospekteer, daarvoor te myn en daaroor te beskik.

"*Behoudens die bepalings van hierdie Wet het die houer van die reg op 'n mineraal ten opsigte van grond* of uitskot, na gelang van die geval, of enige persoon wat die toestemming van sodanige houer ooreenkomstig artikel 6(1)(b) of 9(1)(b) verkry het, *die reg om sodanige grond* of die grond waarop sodanige uitskot geleë is, na gelang van die geval, *te betree, tesame met die persone, installasie of toerusting wat nodig mag wees vir doeleindes van prospektering of mynbou en om op of in sodanige grond* of uitskot, na gelang van die geval, *na sodanige mineraal te prospekteer, daarvoor te myn en daaroor te beskik.*"[14]

As vertrekpunt kan die volgende bevoegdhede aangestip word:

(a) die bevoegdheid om die grond te betree vir doeleindes van prospektering en mynbou;

(b) die bevoegdheid om vir minerale te prospekteer;

(c) die bevoegdheid om minerale te myn; en

(d) die bevoegdheid om oor die minerale te beskik.

Die voorskrifte van die Mineraalwet verteenwoordig grootliks die statutêre beperkinge waaraan bevoegdheidsuitoefening onderworpe is. Die statutêre beperkinge en inherente verpligtinge van 'n ontginningsreg, asook die regsbeginsels van toepassing op uitskot,[15] val egter buite die omvang van hierdie ondersoek en sal nie verder bespreek word nie. Die doel van hierdie bespreking is 'n bevoegdheidsomlyning teen die agtergrond van artikel 5(1) van die Mineraalwet.

Daar dien terloops daarop gelet te word dat artikel 5(1) van die Mineraalwet ook tot gevolg gehad het dat die bevoegdheid om na aardolie te prospekteer en die bevoegdhede om aardolie, edelmetale en edelgesteentes te myn uit hoofde van statutêre mineraalregte, hervestig is in die geregistreerde houer van ontginningsregte.[16] Die bevoegdheid om na edelgesteentes, onedele minerale of edelmetale te prospekteer op vervreemde staatsgrond,[17] is hervestig in die staat as geregistreerde houer van mineraalregte,[18] onderworpe aan die oorgangsmaatreëls in die Mineraalwet vervat.[19]

Artikel 5(1) van die Mineraalwet aan die een kant en artikel 47(1)(e) en (2) aan die ander kant, het onderskeidelik tot gevolg dat die inhoud van 'n ontginningsreg voor 1 Januarie 1992 en 'n mynreg kragtens herroepe wetgewing gelykgestel word aan 'n mineraalreg ingevolge die gemenereg. Die vraag ontstaan nou wat presies

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14 Ons kursivering. By wyse van regsvergelyking word die regte van die houer van (volledige) eiendomsreg soos volg in a 6 van die State of Louisiana Mineral Code 50 van 1974 geskets: "The landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership." Sien ook a 8.

15 Sien verder Kaplan en Dale *A guide to the Minerals Act 1991* (1992) 10 25–28.

16 Sien verder Badenhorst "The revesting of state-held entitlements to exploit minerals in South Africa: privatisation or deregulation" 1991 *TSAR* 124–125; Kaplan en Dale *Minerals Act* 5–6; Badenhorst en Van Heerden 1992 *THRHR* 226–227, 1993 *TSAR* 164.

17 Dit is grond waarvan die reg op edelgesteentes, aardolie, edelmetale en onedele minerale ten gunste van die staat voorbehou is. Sien a 1(li) van die Wet op Mynregte 20 van 1967 en a 1(xliv) van die Wet op Edelgesteentes 73 van 1964.

18 Badenhorst "Benoemingsooreenkomste ingevolge die Wet op Mynregte" 1989 *TSAR* 539–541; Badenhorst en Van Heerden 1993 *TSAR* 164; vgl Kaplan en Dale *Minerals Act* 121–122. Kragtens a 46(1) is die reg op diamante tov grond wat ingevolge die Wet op Edelgesteentes alluviale delwerye uitgemaak het, ook "onteien" deur die staat. Sien verder Kaplan en Dale *Minerals Act* 7 85.

19 Sien a 43.

die inhoud van 'n ontginningsreg kragtens die gemenereg is.[20] Die vasstelling van die inhoudsbevoegdhede van 'n mineraalreg kan, in die lig van die uitdruklike verwysing in die Mineraalwet na die gemenereg,[21] beslis nie as 'n blote akademiese oefening afgemaak word nie.[22] Tydens registrasie in die akteskantoor kan die somtotaal van voormelde bevoegdhede (ingevolge 'n notariële sessie) of besondere bevoegdhede afsonderlik (ingevolge 'n notariële prospekteerkontrak of notariële mineralehuurkontrak) oorgedra word.[23] By eersgenoemde oordrag word die somtotaal van bevoegdhede omvat deur 'n mineraalreg terwyl by laasgenoemde oordragte die onderskeie bevoegdhede omvat word deur onderskeidelik 'n betredingsreg,[24] 'n prospekteerreg,[25] 'n mynreg en 'n beskikkingsreg.[26] Die afsonderlike bevoegdhede kan daarbenewens verleen word deur die sluiting van 'n onderhandse of ongeregistreerde notariële prospekteerkontrak, of 'n ongeregistreerde notariële mineralehuurkontrak.[27] [28]

Ingevolge artikel 68(5) van die Mineraalwet word die bepalings van die Mineraalwet nie geraak deur 'n beding of voorwaarde in 'n ooreenkoms nie. By verlening van bevoegdhede kragtens sessie, prospekteerkontrak of mineralehuurkontrak ontstaan 'n wisselwerking tussen artikel 68(5) en artikel 5(1) van die Mineraalwet.[29]

Die volgende regsvrae ontstaan vervolgens vir doeleindes van bevoegdheidsomlyning: (a) Is voormelde lys van bevoegdhede 'n herformulering van bevoegdhede ingevolge die gemenereg? (b) Verteenwoordig hierdie bevoegdhede 'n geslote en afdoende lys van bevoegdhede? (c) Indien laasgenoemde vraag ontkennend beantwoord word, welke ander bevoegdhede kan aangetoon word? (d) Welke metode word gebruik om hierdie bevoegdhede aan te toon? (e) En kan 'n ooreenkoms in die lig van artikel 68(5) van die Mineraalwet meer of minder bevoegdhede verleen as die "regte" vermeld in artikel 5(1) van die wet? Hierdie vrae geniet vervolgens aandag.

2 ARTIKEL 5(1) AS HERFORMULERING VAN BEVOEGDHEDE INGEVOLGE DIE GEMENEREG

Volgens Kaplan en Dale[30] het artikel 5(1) van die Mineraalwet 'n herlewing van al die bevoegdhede van die houer van ontginningsregte tot gevolg en word die subartikel as 'n herformulering van bevoegdhede ingevolge die gemenereg beskou.

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20 Sien Badenhorst en Van Heerden "Kaplan en Dale *A guide to the Minerals Act 1991*" 1993 *THRHR* 712.

21 A 47(2) van die Mineraalwet bepaal soos volg: "Die houer van 'n mynreg of sy opvolger in titel geniet dieselfde regte ten opsigte van die gebruik van die oppervlak van die grond waarop so 'n reg betrekking het as wat die houer van 'n reg op 'n mineraal ingevolge die gemenereg ten opsigte van sodanige gebruik het."

22 Badenhorst en Van Heerden 1993 *THRHR* 712.

23 Vir 'n bespreking van bevoegdheidsverkryging sien Badenhorst en Van Heerden "Prospekteer- en mynboukontrakte ingevolge die Mineraalwet 50 van 1991" 1992 *THRHR* 220 en par 5(e) hieronder.

24 Ingevolge 'n prospekteerkontrak of 'n mineralehuurkontrak.

25 Ingevolge 'n prospekteerkontrak of gewoonlik 'n mineralehuurkontrak.

26 Ingevolge 'n mineralehuurkontrak. 'n Beperkte myn- en beskikkingsreg word soms ingevolge 'n prospekteerkontrak verleen.

27 A 3(1) van die Algemene Regswysigingswet 50 van 1956.

28 Sodanige omvattende regte is bloot vorderingsregte.

29 Sien regsvraag (e) hieronder.

30 *Minerals Act* 5–6.

Om die ontginningsbevoegdhede ingevolge die gemenereg aan te toon, blyk egter problematies te wees: Eerstens word die identifisering en verfyning van 'n selfstandige ontginningsbevoegdheid nie in die gemenereg aangetref nie. Toegegee, kategorisering van (gewone) bevoegdhede voortspruitend uit volledige eiendomsreg was egter nie vreemd aan die gemenereg nie. So is aanvaar dat die volgende bevoegdhede uit eiendomsreg voortspruit: die genots-, gebruiks-, vernietigings-, beskikkings- en vervreemdingsbevoegdhede.[31] Die ontginningsbevoegdheid sou waarskynlik bloot deel uitgemaak het van die genots- en gebruiksbevoegdhede van eiendomsreg. 'n Ontginningsbevoegdheid as selfstandige bevoegdheid van eiendomsreg het voorts selfs op 'n indirekte wyse in die gemenereg na vore gekom in soverre erkenning daaraan verleen is dat vruggebruik ten aansien van grond ook die bevoegdheid om minerale te ontgin tot inhoud kon hê.[32] Hedendaags sou hierdie ontginningsbevoegdheid uit hoofde van vruggebruik na eiendomsreg as moederreg herleibaar moet wees.

Tweedens word kategorisering van bevoegdhede voortspruitend uit 'n mineraalreg as sodanig nie in die gemenereg aangetref nie aangesien 'n mineraalreg nog nie as afsonderlike en selfstandige saaklike reg bestaan het nie.[33] Hierdie ontwikkeling het sedert 1813 hier te lande plaasgevind, hoofsaaklik vanweë wetgewing wat óf uitdrukking verleen het aan die Britse praktyk om tydens die uitgifte van grond die mineraalregte ten gunste van die owerheid voor te behou,[34] óf die selfstandigheid van mineraalregte erken het.[35] [36]

Kategorisering van ontginningsbevoegdhede wat ingevolge die gemenereg bestaanbaar sou wees, het eerder deur (i) die wetgewer en (ii) die howe na analogie van die inhoud van eiendomsreg, die serwituut-figuur[37] en wetgewing plaasgevind.

Die wetgewer het 'n belangrike rol gespeel in die nadere identifisering van die ontginningsbevoegdhede wat vanuit ontginningsregte voortspruit deurdat hierdie bevoegdhede as selfstandige regte beskou is.

Eerstens is die reg om vir 'n besondere klas minerale te prospekteer en/of te myn en die reg om daaroor te beskik, deur wetgewing in die staat as houer van

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31 *D* 7 6 5*pr*; Van der Linden *Koopmans handboek* 1 7 1.

32 Sien Badenhorst "Vruggebruik ten aansien van ontginningsregte" 1993 *Stell LR* 395–396; "Inhoud van vruggebruik ten aansien van ontginningsregte" 1994 *TSAR* 107.

33 Joubert "Die regte op minerale" 1959 *THRHR* 29; Viljoen *The rights and duties of the holder of mineral rights* (LLD-proefskrif Leiden 1975) 5–9; Van der Merwe *Sakereg* 552.

34 Sir John Cradock se Proklamasie van 1813-08-06 bepaal soos volg: "Government reserves no other rights but those on mines of Precious Stones, Gold and Silver." Sien ook a 10(e) van die Crown Lands Act 14 van 1878 (K) en a 7(1) van die Crown and Land Disposal Ordinance 57 van 1903 (T); a 31(1) van die Land Settlement Act 12 van 1912 en a 48(1) van die Nedersettingswet 21 van 1956. Sir John Cradock se proklamasie is deur Wet 44 van 1968 afgeskaf.

35 A 3 van 'n Resolusie van die Volksraad van die ZAR gedateer 1881-11-08; a 14 Wet 7 van 1883 en a 30–32 van die Registration of Deeds and Titles Act 25 van 1909 (T).

36 Vgl Van der Merwe *Sakereg* 553; Houston *Handbook on the Minerals Act 1991* (1992) 2–5.

37 Die klassifikasie en kenmerke van mineraalregte as saaklike regte het oor die algemeen na analogie van en in kontrastering met die persoonlike serwitute en erfdiensbaarhede plaasgevind. Sien verder Badenhorst "Klassifikasie en kenmerke van mineraalregte" 1994 *THRHR* 34. Die inhoud van 'n serwituut het waarskynlik die howe beïnvloed in die vasstelling van die inhoud van 'n mineraalreg.

statutêre mineraalregte gevestig.[38] Opeenvolgende wetgewing van die Zuid-Afrikaansche Republiek het byvoorbeeld die beginsel neergelê dat die reg om vir bepaalde klasse minerale te prospekteer en te myn, by die staat berus.[39] Ingevolge artikel 1 Wet 1 van 1871 van die Zuid-Afrikaansche Republiek is die bevoegdheid om vir edelgesteentes en edelmetale te myn, in die staat gevestig: "Het mijnregt op allen edelgesteenten en edele metalen behoort aan den Staat." Die vestiging van hierdie reg is in latere wetgewing herhaal.[40] Die sogenaamde reg om oor edelgesteentes en edelmetale te beskik, is bygevoeg deur artikel 1 Wet 8 van 1885 wat soos volg gelui het: "Het mijn- en beskikkingsrecht op allen edelgesteenten en edele metaalen behoort aan den Staat." Die statutêre skepping van die myn- en beskikkingsreg ten aansien van edelgesteentes en edelmetale, ten gunste van die Staat, is in daaropvolgende wetgewing herhaal.[41] Die sogenaamde reg om onedele minerale te myn en daaroor te beskik, is egter behou deur die houer van óf volledige eiendomsreg óf 'n mineraalreg.[42] Artikel 1 Wet 17 van 1895 het bepaal:

> "Het eigendomsrecht van en het beschikkingsrecht over onedelen metalen en mineralen, zoowel op geproclameerde als ongeproclameerde gronden, behoort aan den eigenaar van den grond."

Hierdie benadering is in daaropvolgende wetgewing gehandhaaf.[43] In die Kolonie van Natal het die wetgewer dit raadsaam geag om die sogenaamde myn- en beskikkingsreg ten aansien van alle minerale in die kroon te vestig. Artikel 4 van die Natal Mines Law 17 van 1887 het soos volg bepaal:

> "The right of mining for and disposing of all gold, precious stones and precious metals, and all other minerals in the Colony of Natal is vested in the Crown for the purposes of and subject to the provisions of this Law."

Hierdie benadering is ook in daaropvolgende wetgewing herhaal.[44] Gedurende die bestaan van die Unie van Suid-Afrika en na Republiekwording is die reg om vir aardolie te prospekteer en om dit te ontgin,[45] asook die reg om voorgeskrewe materiaal van die uraanfamilie te soek of daarvoor te prospekteer, te myn, daaroor te beskik, dit te raffineer en te verwerk, of om atoomkrag voort te bring,[46] in die staat gevestig. Kragtens die Wet op Mynregte 20 van 1967 en die Wet op Edelgesteentes 73 van 1964 is (a) die reg om na aardolie te prospekteer en om aardolie te

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38 Sien Dale *An historical and comparative study of the concept and acquisition of mineral rights* (LLD-proefskrif Unisa 1979) 174–237; Franklin en Kaplan *The mining and mineral laws of South Africa* (1982) 333–334; Badenhorst 1991 *TSAR* 120–122.

39 Vgl *Turffontein Estates Ltd v Mining Commissioner Johannesburg* 1917 AD 419 428.

40 A 1 Wet 2 van 1872; a 1 Wet 7 van 1874; a 3 Wet 6 van 1875.

41 A 1 Wet 8 van 1889; a 1 Wet 18 van 1892; a 1 Wet 14 van 1894; a 1 Wet 19 van 1895; a 1 Wet 21 van 1896; a 1 Wet 15 van 1898; a 1 Wet 22 van 1898; a 3 van die Precious Stones Ordinance 66 van 1903; a 1 van die Precious and Base Metals Act 35 van 1908; a 1 van die Wet op Edelgesteentes 44 van 1927. Die Precious and Base Metals Act 35 van 1908 is kragtens a 2 van die Oranje-Vrystaatse Metaal-myn Wet 13 van 1936, soos gewysig deur a 6 van die Minerale-wysigingswet 15 van 1942, in die Vrystaat ingevoer.

42 Franklin en Kaplan *Mineral laws* 334.

43 A 1 Wet 14 van 1897; a 1 van die Precious and Base Metals Act 35 van 1908.

44 A 4 van die Natal Mines Law 34 van 1888; a 9 van die Natal Mines Act 43 van 1899.

45 A 2 van die Wet op Aardolie 46 van 1942.

46 A 2(1) van die Wet op Atoomkrag 35 van 1948; a 5 van die Wet op Atoomkrag 90 van 1967; sien a 19 van die Wet op Kernenergie 92 van 1982.

myn en daaroor te beskik,[47] en (b) die reg om edelmetale en edelgesteentes te myn en daaroor te beskik,[48] in die staat gevestig.

Tweedens is die reg om vir edelmetale, onedele minerale en edelgesteentes op vervreemde staatsgrond te prospekteer, in die eienaars van vervreemde staatsgrond gevestig.[49]

Soos reeds genoem is, het die howe bygedra tot die kategorisering van bevoegdhede deur analogieë te trek met die inhoud van ander saaklike regte. Hoofregter Innes wys in *Neebe v Registrar of Mining Rights*[50] daarop dat die houer van 'n prospekteerkleim (wat natuurlik nie 'n mineraalreg is nie) oor die "reg" beskik om die grond te betree en om minerale te win en toe te eien. Regter Wessels verwys ook na 'n gemeenregtelike "beskikkingsreg" ten aansien van edelmetale wat kragtens wetgewing in die staat gevestig is.[51] In *Lazurus and Jackson v Wessels, Olivier, and the Coronation Freehold Estates, Town, and Mines, Ltd*[52] bepaal hoofregter Innes dat die reg wat ingevolge 'n geregistreerde notariële ooreenkoms verleen is[53] om 'n tydperk van vyf jaar lank vir 'n mineraal te prospekteer en dit te myn, besondere bevoegdhede tot inhoud het:[54]

> "After all, the right in question involves the taking away and appropriation of portions of realty; it implies the exercise of certain privileges generally attached only to ownership . . ."

In *Le Roux v Loewenthal*[55] aanvaar hoofregter Innes dat in die geval van 'n sessie van 'n mineraalreg ten aansien van steenkool, die mineraalreg die bevoegdheid om steenkool te myn tot inhoud kan hê. In *Van Vuren v Registrar of Deeds*[56] verskaf hoofregter Innes die volgende duidelike, logiese omskrywing van die inhoud van 'n mineraalreg:[57]

> "The person in the enjoyment of them [these various mineral rights] is entitled to go upon the property to which they relate to search for minerals, and, if he finds any, to sever them and carry them away."

Hierdie formulering word nagevolg en bevestig in 'n reeks beslissings,[58] maar word nie gerugsteun deur gesag in die gemenereg nie. Die belangrikheid van die baanbrekerswerk van hoofregter Innes is daarin geleë dat die beginsel gevestig is dat 'n mineraalreg verskeie bevoegdhede tot inhoud het, en in besonder, bevoegdhede wat normaalweg uit volledige eiendomsreg voortspruit. Hierdie bevoegdhede word vroeg reeds geïdentifiseer as die bevoegdheid om die grond te

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47 A 2(1)(a) van die Wet op Mynregte.

48 A 2(1)(a) van die Wet op Mynregte; a 2 van die Wet op Edelgesteentes.

49 A 2 van De Wet op de Ontginning van Voorbehouden Mineralen 55 van 1926; a 5(1) van die Wet op Edelgesteentes 44 van 1927; a 12(1) van die Wet op Mynregte; a 5(1) van die Wet op Edelgesteentes 73 van 1964.

50 1902 TS 65 82 83.

51 85.

52 1903 TS 499.

53 509.

54 510.

55 1905 TS 742 745.

56 1907 TS 289.

57 294.

58 *Rocher v Registrar of Deeds* 1911 TPD 311 316; *Gluckman v Solomon* 1921 TPD 335 338; *Douglas Colliery Ltd v Bothma* 1947 3 SA 602 (T) 610; *Ex parte Pierce* 1950 3 SA 628 (O) 634C; *Erasmus v Afrikander Proprietary Mines Ltd* 1976 1 SA 950 (W) 956D–E.

betree in 'n soeke na minerale, die bevoegdheid om te soek na minerale, asook die bevoegdheid om minerale van die grond te skei en te verwyder.

Ten einde te bepaal watter bevoegdhede ingevolge die gemenereg bestaan het, verwys Kaplan en Dale[59] slegs na Franklin en Kaplan[60] en *Apex Mines Ltd v Administrator, Transvaal.*[61] Franklin en Kaplan steun op hulle beurt weer op die *Van Vuren*-[62] en *Gluckman*-[63] saak. In die *Apex*-saak is (onder andere) bloot vir doeleindes van *locus standi* ingevolge die Transvaalse Paaie Ordonnansie 22 van 1957 beslis dat 'n houer van "mineraalregte" kragtens 'n mineralehuurkontrak (of 'n mineraalreg) nie geregtig is op vergoeding tydens 'n padverklaring nie, omrede sodanige houer nie as 'n "eienaar" of "bewoner" ingevolge die definisies in artikel 1 van die Ordonnansie beskou kan word nie.[64] In die onderhawige konteks is die beslissing relevant in die sin dat aanvaar word dat 'n "huurder" ingevolge 'n mineralehuurkontrak (en by implikasie ook die houer van 'n mineraalreg)[65] net bevoeg is om die grond te betree en te gebruik in die mate wat dit noodsaaklik is om minerale te soek en te myn.[66] As gesag[67] word gesteun op beslissings wat die gebruiklike bevoegdhede voortspruitend uit mineraalregte[68] en 'n reg ingevolge 'n mineralehuurkontrak of analoë kontrakte[69] vermeld. Ook die kategorisering van bevoegdhede in hierdie beslissings geskied nie met verwysing na spesifieke gemeenregtelike gesag nie.

Derhalwe het kategorisering van bevoegdhede voortspruitend uit ontginningsregte in die regspraak in werklikheid plaasgevind na analogie van die sakeregteorie en nie ingevolge gesag in die gemenereg nie. Op grond van die voorgaande bespreking word dus aan die hand gedoen dat die eerste regsvraag slegs positief beantwoord kan word indien met gemeenregtelike bevoegdhede bedoel word daardie bevoegdhede wat hier te lande in ooreenstemming met die gemeenregtelike sakeregteorie ontwikkel is.

3 ARTIKEL 5(1) AS AFDOENDE EN GESLOTE LYS VAN BEVOEGDHEDE

Aansluitend by voorgaande standpunt word aan die hand gedoen dat artikel 5(1) (oftewel die lys van bevoegdhede) nie as 'n afdoende en uitputtende lys van bevoegdhede aangemerk kan word nie. In *Hudson v Mann*[70] wys regter Malan daarop dat, benewens die uitoefening van die primêre ontginningsbevoegdhede

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59 *Minerals Act* 6 vn 5.
60 *Mineral laws* 7.
61 1986 4 SA 581 (T); 1988 3 SA 1 (A).
62 *Supra* 295.
63 *Supra* 338.
64 Sien 589E–592C en 14J–16D onderskeidelik.
65 In *Hudson v Mann* 1950 4 485 (T) 488C word daarop gewys dat beide die houer van 'n mineraalreg en die huurder ingevolge 'n mineralehuurkontrak oor die bevoegdhede beskik om op die grond te gaan, te soek vir minerale en die minerale te verwyder. Sien ook die *Apex*-saak *supra* 590D en gesag aldaar aangehaal.
66 590A–B 591E–F en 15I–J onderskeidelik.
67 590B–C en 15I–J onderskeidelik.
68 Die *Hudson*-saak *supra* 488C; die *Afrikander Proprietary Mines Ltd*-saak *supra* 956D.
69 *Neebe v Registrar of Mining Rights* 1902 TS 65 83; *Drymiotis v Du Toit* 1969 1 SA 631 (T) 633A; *De Pinna v Carlin* 1984 2 SA 710 (T) 713C–E.
70 1950 4 SA 485 (T) 488C–D.

(welke bevoegdhede grootliks ooreenstem met artikel 5(1) van die Mineraalwet), die volgende ook vir die houer van mineraalregte geld:

> "In the course of his operations he is entitled to exercise all such subsidiary or ancillary rights, without which he will not be able effectively to carry on his prospecting and/or mining operations."

Daarbenewens is die houer van 'n ontginningsreg in die regswerklikheid byvoorbeeld bevoeg om sommige of al die ontginningsbevoegdhede waaroor hy beskik, te vervreem. Hy mag ook die ontginningsreg met 'n verband beswaar. Indien 'n ander regsubjek op bevoegdheidsuitoefening inbreuk maak, beskik die houer van 'n ontginningsreg oor remedies soos 'n interdik of 'n aksie vir skadevergoeding. Hierdie optredes geskied uit hoofde van bevoegdhede wat klaarblyklik nie tuisgebring kan word onder die lys van bevoegdhede genoem in artikel 5(1) van die Mineraalwet nie.

4 BYKOMSTIGE ONTGINNINGSBEVOEGDHEDE

Daar word ter oorweging gegee dat, benewens die primêre ontginningsbevoegdhede wat in artikel 5(1) aangestip word, ontginningsregte ook die volgende bykomstige ontginningsbevoegdhede tot inhoud het: (a) die beskikkingsbevoegdhede; (b) die beswaringsbevoegdheid; (c) die afweringsbevoegdheid; (d) die vervreemdingsbevoegdheid; en (e) 'n reversionêre of minimum bevoegdheid. Hierdie bevoegdhede sal na die vasstelling van 'n metode ter identifisering van die ontginningsbevoegdhede van naderby bekyk en verduidelik word.

5 METODE TER IDENTIFISERING VAN ONTGINNINGSBEVOEGDHEDE

Een benadering in die identifisering van die inhoudsbevoegdhede van 'n ontginningsreg sou wees om die inhoud daarvan ingevolge die gemenereg te probeer bepaal. Die probleme met hierdie benadering is reeds uitgewys.[71] Pogings tot 'n herontginning van die gemeenregtelike bronne het hoofsaaklik vanweë gebrek aan mynbou in die destydse Nederland[72] en 'n selfstandige mineraalreg tot dusver nie veel opgelewer nie. Die gewig wat aan die gemenereg as bron van die Suid-Afrikaanse reg toegeken word, is ook reeds besig om te taan.[73]

'n Tweede benadering sou wees om in navolging van die howe by wyse van die reeds gemelde analogieë, bykomstige ontginningsbevoegdhede te identifiseer.

'n Derde benadering sou wees, soos alreeds by implikasie gedoen is,[74] om deur regsvergelyking te fokus op die inhoud van ontginningsregte in vergelykbare mineraalregstelsels, soos die van die Amerikaanse staat Louisiana.[75]

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71 Sien par 2 hierbo.

72 Viljoen *Holder of mineral rights* 11–12; Viljoen en Bosman *A guide to mining rights in South Africa* (1979) 8. Tav die Romeinse reg sien verder Viljoen 5–9.

73 Sien in die algemeen Scott se presidensiële rede, Vereniging van Universiteitsdosente in die Regte (Stellenbosch) 1993-01-18.

74 Sien vn 14 hierbo; vn 83 hieronder.

75 Sien verder Badenhorst *Die juridiese bevoegdheid om minerale te ontgin in die Suid-Afrikaanse reg* (LLD-proefskrif UP 1992) 859–869 895–900; "A few fundamental aspects of Louisiana Mineral Law" 1993 *TSAR* 732; "Mineral rights under Louisiana law" 1993 *De Jure* 297.

Alhoewel die leerstuk van subjektiewe regte nie van kritiek ontbloot is nie,[76] sou 'n vierde benadering wees om met verwysing na die inhoud van eiendomsreg van grond, aan die hand van die leerstuk van subjektiewe regte en die moderne sakeregteorie, te poog om die inhoud van 'n mineraalreg te bepaal.[77] Hierdie metode is alreeds gebruik ten einde voormelde bykomstige ontginningsbevoegdhede aan te toon.[78] Die volgende ontginningsbevoegdhede van 'n ontginningsreg kan uitgewys word:[79]

(a) Die gebruiks- en genotsbevoegdheid, dit wil sê die bevoegdheid om die grond waarop die ontginningsreg betrekking het, te gebruik en te geniet vir doeleindes van die ontginning van minerale. In die besonder hou dit in: (i) die bevoegdheid om die grond te betree met die oog op die ontginning van minerale; (ii) die bevoegdheid om vir minerale te prospekteer; en (iii) die bevoegdheid om minerale te myn.

(b) Die beskikkingsbevoegdheid, dit wil sê die bevoegdheid om te bepaal wat met die grond gedoen mag word vir doeleindes van die ontginning van minerale. Die beskikkingsbevoegdheid ten aansien van die grond bestaan slegs met die oog op die ontginning van minerale (en nie met betrekking tot die gebruik van grond in die algemeen nie) en moet nie verwar word met die beskikkingsbevoegdheid ten aansien van afgeskeide minerale nie. Laasgenoemde bevoegdheid spruit eenvoudig voort uit die eiendomsreg van minerale as selfstandige sake, welke eiendomsreg verkry word tydens skeiding van die minerale van die grond.[80]

(c) Die beswaringsbevoegdheid, dit wil sê die bevoegdheid om die uitoefening van die ontginningsbevoegdhede met 'n beperkte saaklike reg te beswaar. Die beswaringsbevoegdheid hou in dat die houer van 'n ontginningsreg bevoeg is om hetsy volledige eiendomsreg hetsy 'n mineraalreg[81] met 'n verband te beswaar.

(d) Die afweringsbevoegdheid, dit wil sê die bevoegdheid om enige onregmatige inbreukmaking op die uitoefening van die ontginningsbevoegdhede af te weer. Die afweringsbevoegdheid kom ter sprake indien op 'n onregmatige wyse ingemeng word met die houer van 'n tradisionele mineraalreg se uitoefening van die ontginningsbevoegdheid. Indien die houer van blote eiendomsreg byvoorbeeld die ontginning van minerale deur die houer van 'n mineraalreg verswaar of bemoeilik, mag juridies deur laasgenoemde opgetree word uit hoofde van hierdie bevoegdheid.[82]

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76 Sien in die algemeen Van der Walt "The doctrine of subjective rights: a critical reappraisal from the fringes of property law" 1990 *THRHR* 316; Kleyn en Boraine *Property* 12–15.

77 Badenhorst en Van Heerden 1993 *THRHR* 712; sien verder Badenhorst *Bevoegdheid om minerale te ontgin* 107–146.

78 Sien par 4 hierbo.

79 Badenhorst *Bevoegdheid om minerale te ontgin* 118–119.

80 Sien verdere bespreking hieronder.

81 A 3(1)(e) en 50(1) van die Registrasie van Akteswet 47 van 1937, hierna aangehaal as die "Akteswet". Sien verder Badenhorst *Bevoegdheid om minerale te ontgin* 478–482.

82 *Witbank Colliery Ltd v Malan and Coronation Colliery Co Ltd* 1910 TPD 667 677; *Coronation Collieries v Malan* 1911 TPD 577 593; *Transvaal Property and Investment Co Ltd and Reinhold and Co v SA Townships Mining and Finance Corp and the Administrator* 1938 TPD 512 519–520; *Nolte v Johannesburg Consolidated Investment Co Ltd* 1943 AD 295 306–317; *Zuurbekom Ltd v Union Corporation Ltd* 1947 1 SA 514 (A) 531–532; *Hudson v Mann supra* 488E; *Yelland v Group Areas Development Board* 1960 2 SA 151 (T) 155B–C; *Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd* 1961 2 SA 505 (W) 521H–522A; *Aussenkjer Diamante (Pty) Ltd v Namex (Pty) Ltd* 1980 3 SA 896 (SWA) 900H–902A. Sien verder a 23 van die Mineraalwet.

(e) Die vervreemdingsbevoegdheid, dit wil sê die bevoegdheid om sommige of al voormelde ontginningsbevoegdhede aan 'n ander regsubjek te vervreem en oor te dra.[83] [84] Uit hoofde van hierdie bevoegdheid mag die houer van 'n ontginningsreg al die ontginningsbevoegdhede deur registrasie van 'n akte van sessie in die akteskantoor aan 'n volgende regsubjek oordra.[85] Prospekteer- en mynregte[86] mag ook deur die houer van 'n ontginningsreg oorgedra word deur middel van die sluiting en registrasie van onderskeidelik 'n prospekteerkontrak[87] en 'n mineralehuurkontrak[88] in die akteskantoor.

(f) 'n Reversionêre of minimum bevoegdheid,[89] dit wil sê die bevoegdheid om by die verlening van enige van voorgaande bevoegdhede[90] aan 'n ander regsubjek vir 'n beperkte tydperk, na afloop van die tydperk weer die houer van sodanige bevoegdheid te wees, of om 'n bevoegdheid waarvan die uitoefening op enige wyse beperk is, weer te kan uitoefen na opheffing van die beperking.[91]

Daar moet natuurlik in gedagte gehou word dat voorgaande bevoegdhede nie as 'n geslote en afdoende lys van bevoegdhede beskou moet word nie. Net soos ander *iura in re aliena* (byvoorbeeld 'n reg van weg) het 'n mineraalreg nie alleen bepaalde omskrewe bevoegdhede nie maar ook bykomstige bevoegdhede tot inhoud.

By skeiding van minerale van die grond word eiendomsreg van die minerale as selfstandige sake verkry[92] en het eiendomsreg die gebruiklike bevoegdhede van

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83 Van der Vyver "The doctrine of private-law rights" in Strauss (red) *Huldigingsbundel vir WA Joubert* (1988) 201 wys egter daarop dat die vervreemdingsbevoegdheid nie deur Dooyeweerd as 'n bevoegdheid nie maar eerder as 'n kompetisie beskou word. In die moderne Suid-Afrikaanse sakeregteorie word die vervreemdingsbevoegdheid inderdaad as 'n bevoegdheid beskou (sien bv Van der Merwe *Sakereg* 173; Kleyn en Boraine *Property* 162; Olivier, Pienaar en Van der Walt *Sakereg studentehandboek* (1992) 33). Derhalwe word in oorweging gegee dat die ontginningsreg wel sodanige bevoegdheid tot inhoud het. Regsvergelykend beskou, is die vervreemdingsbevoegdheid voortspruitend uit 'n ontginningsreg ook nie vreemd nie. Die bestaan van so 'n bevoegdheid blyk uit die volgende beskrywing van die houer van (volledige) eiendomsreg se bevoegdheid kragtens a 15 van die State of Louisiana Mineral Code 50 van 1974: "A landowner may convey, reserve, or lease his right to explore and develop his land for production of minerals and to reduce them to possession."

84 Die uitwerking van a 68(5) van die Mineraalwet op die vervreemdingsbevoegdheid word in par 6 hieronder bespreek.

85 A 16 van die Akteswet. Die somtotaal van bevoegdhede word deur 'n mineraalreg omvat.

86 Al die onderskeie regte word nie altyd in die praktyk afsonderlik aangedui nie. 'n "Prospekteerreg" of 'n "mynreg" omvat of impliseer ook die "betredingsreg" terwyl 'n "mynreg" die "beskikkingsreg" omvat of impliseer.

87 A 3(1)(q) van die Akteswet; sien verder Badenhorst *Bevoegdheid om minerale te ontgin* 344–355 436–446.

88 A 3(1)(m) van die Akteswet; sien verder Badenhorst *Bevoegdheid om minerale te ontgin* 369–434 436–446.

89 Sien in die algemeen Badenhorst *Bevoegdheid om minerale te ontgin* 164–182.

90 Tydens registrasie van sessie word die reversionêre bevoegdheid ook tesame met die ander bevoegdhede oorgedra.

91 Maw, hierdie bevoegdheid verklaar die kenmerk van elastisiteit van 'n ontginningsreg. Anders as Lewis "The modern concept of ownership of land" 1985 *Acta Juridica* 257 word in oorweging gegee dat elastisiteit nie slegs eie is aan eiendomsreg nie, maar ook kenmerkend is van 'n mineraalreg.

92 Sien Dale *Mineral rights* 79.

eiendomsreg tot inhoud.[93] Onder andere verkry die eienaar ook die beskikkings- en vervreemdingsbevoegdheid ten opsigte van minerale. Artikel 5(1) van die Mineraalwet verwys gesamentlik na hierdie bevoegdhede as die beskikkingsbevoegdheid. Daar word aan die hand gedoen dat hierdie "beskikkingsbevoegdheid" voortspruit uit die eiendomsreg van die minerale en nie uit die ontginningsreg nie. Eiendomsverkryging van minerale, wat voor skeiding van die grond aan die eienaar van die grond behoort,[94] is 'n gevolg van die uitoefening van die bevoegdheid om te myn.

6 WISSELWERKING TUSSEN ARTIKELS 5(1) EN 68(5) VAN DIE MINERAALWET

Vir sover dit die verlening betref van meer bevoegdhede as die "regte" in artikel 5(1) van die Mineraalwet vermeld, word ter oorweging gegee dat die verlening deur regswerking van die bykomstige bevoegdhede in paragraaf 4 hierbo vermeld, net soos voor inwerkingtreding van die Mineraalwet, in die gewone gang van sake plaasvind en dat sodanige oordrag deur regswerking nie in stryd sou wees met artikel 68(5) van die Mineraalwet nie. Of meerdere bevoegdhede wat kontraktueel verleen is, deur artikel 68(5) ingeperk word tot die bevoegdhede wat in artikel 5(1) vermeld word, is nie duidelik nie. As egter in ag geneem word dat die Mineraalwet onder andere optimale benutting van mineraalbronne ten doel het, word aan die hand gedoen dat die wetgewer nie die inperking van meerdere bevoegdhede wat kontraktueel verleen word, ten doel gehad het by die opstel van artikel 68(5) nie.

In die geval van die verlening van minder bevoegdhede as die "regte" in artikel 5(1) van die Mineraalwet vermeld, blyk die uitwerking van artikel 68(5) te wees dat geen beding of voorwaarde in 'n ooreenkoms 'n houer van ontginningsregte (of 'n persoon met toestemming) kan verhinder om enige van die betrokke bevoegdhede uit te oefen nie. Daar dien egter op gelet te word dat die Mineraalwet nie die sluiting van so 'n ooreenkoms verbied nie.

Die problematiek oor die wisselwerking tussen artikels 5(1) en 68(5) van die Mineraalwet kan met 'n voorbeeld toegelig word. Veronderstel die houer van volledige eiendomsreg vervreem (en sedeer) sy mineraalreg onderworpe aan die beperking dat die sessionaris nie geregtig sou wees om die grond te betree nie (maar slegs om ondergronds vanaf 'n aangrensende eiendom te myn), of die beperking dat die sessionaris nie oor minerale mag beskik wat tydens prospektering of mynbouwerksaamhede gevind word nie. Die uitwerking van artikel 68(5) is tog duidelik dat die houer van 'n mineraalreg geregtig is om sodanige bevoegdhede uit te oefen ongeag kontraktuele beperkings tot die teendeel. Beteken dit dat die eienaar eenvoudig moet aanvaar dat die verkryger van die mineraalreg geregtig is om iets te doen wat hy onderneem het om nie te doen nie?

Oorweging kan eerstens gegee word aan die geval waar 'n ooreenkoms gesluit is ingevolge waarvan die houer van 'n mineraalreg verbied word om enige van die "regte" ingevolge artikel 5(1) uit te oefen, terwyl een of albei van die partye

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93 Sien verder Badenhorst *Bevoegdheid om minerale te ontgin* 147–149.

94 *London and SA Exploration Company v Rouliot* (1891) 8 SC 75 91; *Neebe v Registrar of Mining Rights* 1902 TS 65 85; die *Van Vuren*-saak *supra* 295; *Rocher v Registrar of Deeds* 1911 TPD 311 315 316; *Odendaalsrus Gold, General Investments and Extentions Ltd v Registrar of Deeds* 1953 1 SA 600 (O) 604E; *Erasmus and Lategan v Union Government* 1954 3 SA (O) 417D.

onbewus was van die bestaan van artikel 68(5) van die Mineraalwet. Die algemene regsvraag wat dan ontstaan, is of 'n party kontraktuele aanspreeklikheid kan ontduik deur hom op 'n regsdwaling te beroep. Meer in die besonder, kan die sessionaris van die mineraalreg in ons voorbeeld regsgeldig aanvoer dat die ooreenkoms ongedaan gemaak is vanweë sy onbewustheid van die bestaan of uitwerking van artikel 68(5)?

Daar word aanvaar dat die stelreël *ignorantia iuris neminem excusat*, anders as in die strafreg, steeds probleme veroorsaak in die kontraktereg met betrekking tot dwaling. Die verklaring hiervoor is klaarblyklik daarin geleë dat, ingevolge die *iustus error*-leerstuk, 'n regsdwaling nie as 'n verskoonbare dwaling of *iustus error* aangemerk word nie.[95] Die onderskeid tussen *error iuris* en *error facti* is soms moeilik, en soms selfs gekunsteld of onmoontlik.[96] Daar word egter aan die hand gedoen dat gevalle van regsdwaling op dieselfde grondslag beoordeel moet word as feitelike dwaling.[97] Hiervolgens sou die sessionaris van die mineraalreg in ons voorbeeld 'n beroep kon doen op sy onbewustheid van die bestaan of uitwerking van artikel 68(5).

Die appèlhof het daarbenewens in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue*[98] die konvensionele wysheid oor die uitwerking van 'n regsdwaling binne die konteks van die *condictio indebiti* heroorweeg. Appèlregter Hefer beslis:[99]

> "Accordingly, in my judgment, our law is to be adapted in such a manner as to allow no distinction to be drawn in the application of the *condictio indebiti* between mistake in law (*error juris*) and mistake of fact (*error facti*). It follows that an *indebitum* paid as a result of a mistake of law may be recovered provided that the mistake is found to be excusable in the circumstances of the particular case."

Daar word in oorweging gegee dat appèlregter Hefer se benadering ten opsigte van die *condictio indebiti* ook ten aansien van ander regsverskynsels in die algemeen toegepas sal word.

Indien vasgestel word dat die dwaling betrekking het op 'n veronderstelling waarvan die bestaan van die gehele ooreenkoms (of 'n betrokke kontraksbepaling) afhang, word die wilsooreenstemming tussen die partye deur die dwaling geraak en sal die gehele ooreenkoms (of slegs die betrokke bepaling, na gelang van die geval) met nietigheid getref word.[100] Indien die dwaling nie 'n wesenlike dwaling is nie, word die inhoud van die wilsooreenstemming nie daardeur geraak nie en bly die kontrak (of die tersaaklike bepaling) geldig.

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95 Gibson *South African mercantile and company law* (1988) 61; De Wet en Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* (1992) 28. Christie *The law of contract in South Africa* (1991) 385 verklaar: "[It] may not be fair (the complexity of law being what it is) to tell a party who enters into a contract as a result of a unilateral mistake of law that his mistake is due to his own carelessness or inattention, but a unilateral mistake of law certainly cannot be said to be *iustus*."

96 Vgl *Miller v Belville Municipality* 1971 4 SA 544 (K) 547H waar Van Winsen R sê: "No good purpose is to be served, in my view, by attempting comprehensive definitions of errors of law as opposed to errors of fact."

97 Van Warmelo 1975 *THRHR* 207–217; Joubert *General principles of the law of contract* (1987) 86; vgl ook De Wet en Van Wyk *Kontraktereg en handelsreg* 25 se kritiek op die siening wat 'n *error iuris* sonder meer as 'n *iniustus error* veroordeel.

98 1992 4 SA 202 (A) 223E–224A.

99 224B–C.

100 Sien verder Fèvrier-Breed *A critical analysis of mistake in South African law of contract* (LLD-proefskrif UP 1991) 216–218 279–283.

Oorweging kan tweedens geskenk word aan die geval waar 'n ooreenkoms voor inwerkingtreding van die Mineraalwet of na inwerkingtreding daarvan, maar met die volle wete van die bestaan en uitwerking van artikel 68(5), gesluit is. Die regsvraag voorhande is of die sessionaris kontrakbreuk sou pleeg indien hy bevoegdhede ingevolge artikel 5(1) uitoefen in stryd met sy kontraktuele verpligtinge.

In der waarheid doen die verkryger van die mineraalreg in ons voorbeeld deur bevoegdheidsuitoefening wat hy kontraktueel onderneem het om nie te doen nie: hy tree naamlik op in stryd met 'n *obligatio non faciendi*. Dit is geykte reg dat die verrigting van 'n handeling wat 'n kontraksparty gebonde is om nie te verrig nie, kontrakbreuk daarstel; die ander party is dan geregtig op die gewone remedies vir kontrakbreuk.[101] Dit is voorts argumenteerbaar of die blote feit dat artikel 5(1) van die Mineraalwet besondere bevoegdhede wat reeds bestaan het aan die houer van 'n ontginningsreg verleen, nie as regmatige verskoning beskou kan word vir die nie-nakoming van kontraktuele verpligtinge deur 'n sessionaris nie. Artikel 5(1) verleen slegs bevoegdhede aan die houer van 'n ontginningsreg maar verplig nie kontrakspartye om die bevoegdhede uit te oefen nie. Artikel 5(1) is met ander woorde magtigend en nie gebiedend nie.

'n Suiwer benadering sou waarskynlik wees om die uitwerking van die Mineraalwet op die regsgeldigheid van die ooreenkoms wat tans onder bespreking is, te oorweeg. Die Mineraalwet bepaal nie uitdruklik dat sodanige ooreenkoms onwettig of ongeldig is nie. Artikel 68(5) bepaal slegs dat die bepalings van die wet nie geraak word deur bedinge en voorwaardes in 'n ooreenkoms nie. Indien die wetgewer beoog het om bestaande ooreenkomste met onwettigheid of ongeldigheid te besoek, kon die wetgewer maklik sy bedoeling kenbaar gemaak het. Dit is in elk geval 'n fundamentele beginsel van wetsuitleg dat 'n verswarende bepaling, soos 'n voorskrif wat bestaande regte wegneem of daarop inbreuk maak, eng uitgelê moet word.[102] In *Transvaal Investment Co v Springs Municipality*[103] beslis appèlregter Solomon soos volg:

> "Moreover it is a well-established rule in the construction of statutes that where an Act is capable of two interpretations, the one should be preferred which does not take away existing rights, unless it is plain that such was the intention of the Legislature."

Tydens kontraksluiting gee die partye juis uitdrukking aan hulle bedoeling om regte en verpligtinge te skep. In die onderhawige geval kan nie aangevoer word dat die wetgewer bedoel om met die kontraktuele regte van die eienaar in te meng nie. Gevolglik word in oorweging gegee dat bedinge en voorwaardes in 'n ooreenkoms wat 'n verkryger van 'n mineraalreg verbied om bevoegdhede ingevolge artikel 5(1) van die Mineraalwet uit te oefen, of hom magtig om meerdere bevoegdhede uit te oefen as waarvoor in genoemde artikel voorsiening gemaak word, geldig is.

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101 Van Rensburg, Lotz en Van Rhijn "Contract" in 5 *LAWSA* 130; De Wet en Van Wyk *Kontraktereg en handelsreg* 177. Kerr *The principles of the law of contract* (1989) 445 voeg hieraan die kwalifikasie toe dat kontrakbreuk slegs voorhande is indien die kontraksparty doen wat hy kontraktueel onderneem het om nie te doen in die afwesigheid van 'n regmatige verskoning nie. Kerr steun op Lee en Honoré *The South African law of obligations* (1978) par 182. Lee en Honoré steun op hul beurt weer op *De Wet v Kuhn* 1910 CPD 263, welke beslissing nie steun bied vir die "without lawful excuse"-kwalifikasie nie.

102 Steyn *Die uitleg van wette* (1981) 103; Du Plessis *The interpretation of statutes* (1986) 83; Cockram *The interpretation of statutes* (1987) 81.

103 1922 AD 337 347.

Hierdie gevolgtrekking word versterk deurdat die vermoede teen die aantasting van bestaande regte soveel te meer toepassing vind indien elementêre regte soos kontrakteervryheid aangetas sou word.[104] Indien die verkryger van 'n mineraalreg in ons voorbeeld strydig met 'n kontraktuele onderneming bevoegdhede ingevolge artikel 5(1) van die Mineraalwet uitoefen, vind kontrakbreuk plaas. Die gewone kontraktuele remedies (uitgesonderd spesifieke nakoming of 'n interdik) blyk toepaslik te wees, naamlik 'n aksie vir skadevergoeding, 'n verklaring van regte of (indien toepaslik) kansellasie van die ooreenkoms. Ons meen egter dat artikel 68(5) tot gevolg het dat spesifieke nakoming van 'n kontraktuele verpligting in stryd met artikel 5(1) of 'n interdik wat die houer van die mineraalreg verbied om bevoegdhede ingevolge artikel 5(1) uit te oefen, nie toegestaan sal word nie.

In samehang met voorgaande ontstaan die vraag of 'n party wat in die onderhawige geval kontrakbreuk gepleeg het, hom op artikels 5(1) en 68(5) van die Mineraalwet kan beroep as verskoning vir kontrakbreuk. In die algemene beginsels van die kontraktereg word die vraag of statutêre magtiging om iets te doen 'n kontraksparty vrywaar van 'n kontraktuele verpligting om so-iets nie te doen nie, nie aangespreek nie. Ons is van mening dat dit nie as verskoning vir kontrakbreuk kan dien nie.

7 SLOTSOM

Die lys van bevoegdhede soos vermeld in artikel 5(1) van die Mineraalwet behoort nie gesien te word as 'n herformulering van bevoegdhede ingevolge die gemenereg in die streng sin van die woord nie. Dit is eerder 'n herformulering van bevoegdhede op 'n wyse wat bestaanbaar sou wees met die inhoud van ontginningsregte indien hierdie regte sterker in die gemenereg gefigureer het. Vermelde lys verteenwoordig nie 'n geslote en afdoende lys van bevoegdhede nie eenvoudig omdat bykomstige ontginningsbevoegdhede daarbenewens aangetoon kan word. Die bykomstige bevoegdhede is onder andere die beskikkingsbevoegdheid, die beswaringsbevoegdheid, die afweringsbevoegdheid, die vervreemdingsbevoegdheid en die reversionêre bevoegdheid. Die leerstuk van subjektiewe regte en die howe se metode waarvolgens die inhoud van ontginningsregte analoog aan die inhoud van bekende saaklike regte benader word, kan voorts dien om die bestaan van bestaande en selfs toekomstige ontginningsbevoegdhede teoreties te verklaar. Ook regsvergelyking kan in hierdie verband dienstig wees. In soverre die bykomstige bevoegdhede ook tydens registrasie van 'n ooreenkoms oorgedra word, kan 'n ooreenkoms meer bevoegdhede verleen as die "regte" waarna artikel 5(1) van die wet verwys. 'n Geldige ooreenkoms kan ook minder bevoegdhede verleen as die "regte" waarna artikel 5(1) verwys. 'n Hof behoort egter nie die uitoefening van sodanige "regte" te beperk tot dié omskryf in sodanige ooreenkoms nie, maar behoort skadevergoeding op grond van kontrakbreuk toe te ken by oorskryding daarvan.

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104 Du Plessis *Interpretation* 86.

The reality of real contracts*

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OPSOMMING

Die realiteit van reële kontrakte

Volgens die heersende opvatting word die kontraktereg oor die algemeen vandag beheer deur die leerstuk *pacta sunt servanda*. Dit beteken dat kontrakte in beginsel vormvry deur middel van wilsooreenstemming alleen tot stand kom. Dit was nie die geval in die Romeinse reg nie wat bekend was met 'n geslote sisteem van kontrakte. Die reële kontrakte vind hulle oorsprong in die Romeinse reg en behels die kontrakte van verbruikleen (*mutuum*), bruikleen (*commodatum*), bewaargewing (*depositum*) en pand (*pignus*). Hierdie kontrakte het eers na lewering van 'n saak tot stand gekom. Aangesien dié kontrakte vandag nog voorkom, ontstaan die vraag na die werking daarvan binne 'n sisteem van *pacta sunt servanda*.

Die werking van reële kontrakte in die Romeinse reg word bespreek en daar word gewys op bewegings in die rigting van konsensualisme as leerstuk. Vervolgens word die reële kontrakte in die Romeins-Hollandse reg behandel. Daar word aangetoon dat hulle hul reële karakter behou het ongeag die resepsie van die beginsel *pacta sunt servanda*.'n Ontleding van die Suid-Afrikaanse reg toon aan dat hierdie kontrakte oor die algemeen as reëel deur sowel skrywers as ons howe gesien word.

Die gevolgtrekking is dat die beginsel *pacta sunt servanda* nooit as leerstuk die kontraktereg in sy totaliteit beheers het nie. Daar bestaan geen afdoende gemeenregtelike of ander gesag dat die reële kontrakte tans konsensueel van aard is nie.

1 INTRODUCTION

According to modern Western European legal tradition, a contract may, in principle, be concluded by mere agreement (*consensus*). This approach is usually expressed by the medieval proverbs *pacta sunt servanda* and *ex nudo pacto oritur actio*. It implies an open system in which contracts are not restricted to certain types or categories. Any agreement may constitute a contract provided that it is in accordance with the law. It furthermore means that, in principle, contracts are concluded formlessly.[1] This is also the prevailing doctrine in South Africa[2] and the Netherlands[3] as regards the general theory of contract.

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1 Zimmermann *The law of obligations* (1990) 85–86 164 546; Feenstra and Ahsmann *Contract, aspekten van die begrippen contract en contractsvrijheid* (1988) 5; Feenstra *Romeinsrechtelijke grondslagen van het Nederlands privaatrecht* (1994) 135 no 231.

2 Joubert *General principles of the law of contract* (1987) 21–23; De Wet and Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* (1992) 130; Eiselen "Kontrakteervryheid, kontraktuele geregtigheid en die ekonomiese liberalisme" 1989 *THRHR* 516 *et seq*.

3 Feenstra and Ahsmann 5.

However, as is well known, most of the contracts concluded in everyday South African practice have their origin in Roman law, where the approach was quite the opposite: in general, a mere agreement did not constitute a contract – *ex nudo pacto non oritur actio*.[4] The Roman law of contract functioned within a closed system where only certain contractual types or categories were recognised, which were in principle bound by form.[5] One of these categories was the real contracts (*contractus re*), consisting of the contracts of loan for consumption (*mutuum*), loan for use (*commodatum*), deposit (*depositum*) and pledge (*pignus*). In these instances the contract was considered to be concluded only after the initial delivery of the thing (*res*) in question.

Certain of these contracts seldom feature before our courts today. The recently reported decision of *Saridakis t/a Auto Test v Lamont*[6] on the contract of loan for use, is therefore exceptional. This case did not touch on the nature and conclusion of the contract, but dealt only with the contractual liability of the borrower for use.

It nevertheless causes anyone acquainted with the "peculiarities" of the real contracts in Roman law, to ponder over their nature and essence within the modern system of consensualism.

Joubert[7] maintains that these are at present consensual contracts. Zimmermann,[8] on the other hand, comments that Joubert's submission rests "on a somewhat shaky basis". On the face of it, there consequently exists some doubt about the modern nature of these contracts. Seeing that this matter is governed by South African common law, and not by statute, it is necessary to turn briefly to Roman and especially to Roman-Dutch law.

2 ROMAN LAW

Although *consensus* formed the basis of every contract in Roman law,[9] this in itself did not suffice to render an agreement enforceable. Mere *consensus* established an unenforceable *pactum* only.[10] Something additional was required for an enforceable contract, usually referred to as the *causa contractus* or *causa civilis*.[11] In the light of the required *causa*, four types of contract were distinguished by Gaius[12] in the second century and by Justinian[13] in the sixth century as is apparent from their Institutes. These were the *contractus re* (real contracts), *verbis* (verbal contracts), *litteris* (written contracts) and *consensu* (consensual contracts). The *causae* for the different categories were respectively delivery of a thing, formal words, formal

4 *D* 2 14 7 4–5; *D* 15 1 49 2; *C* 2 3 10; *C* 4 65 27; *C* 5 14 1.
5 Kaser *Das römische Privatrecht* 1 (1971) 477.
6 1993 2 SA 164 (C).
7 "Loan" 15 *LAWSA* par 270; *Law of contract* 33 fn 61.
8 165 fn 66.
9 *D* 2 14 1 13; *D* 44 7 3 1.
10 The *pactum* could give rise to an *exceptio* (*D* 2 14 7 4).
11 Buckland *A textbook of Roman law from Augustus to Justinian* (1963) 429 describes the *causa* as "a pre-existing fact giving validity". See also *D* 2 14 7 14; *D* 15 1 49 2; Kotze *Causa in Roman and Roman-Dutch law of contract* (1922) 1; Stassen "Causa in die kontraktereg" 1979 *THRHR* 359.
12 *G* 3 89, 3 119a; *D* 44 7 1 1.
13 *Inst* 3 13 2.

writing and as an exception *consensus* as such, but in the last case, *consensus* about the *essentialia* of the particular contract.[14]

This means that in the case of the real contracts,[15] the agreement to lend something for consumption or use, for example, was not actionable. The contract was only concluded once the lender delivered the thing to the borrower, when the obligation of the borrower arose to return the thing or its equivalent at some stage in the future. The initial delivery of the thing therefore did not form part of the performance, but served as a means to render the agreement enforceable. This is clearly reflected in the definitions of the various real contracts in the sources, for example: "Someone to whom a thing is given for use is under a real obligation and liable to the commodatary action."[16] No obligation of the lender to deliver the thing is mentioned.

In Roman law and society, there was some logic behind this approach. Loans for consumption and for use were gratuitous acts of friendship. It was not customary or desirable to bring a suit against the promissor for the delivery of the goods. In the case of deposit, a depositee would never have insisted on taking possession of the thing nor would the depositor have compelled a reluctant depositee to accept the deposit. It would have been useless to take action on a promise to pledge because the judge's condemnation could (at least in classical law) only be in terms of money and not for specific performance.[17]

Such was the character of the real contracts in classical as well as Justinianic law. But there were certain developments in the Roman law of contract which may be considered as trends towards the establishment of a general theory of consensualism and freedom of contract.

First of all, the principle *ex nudo pacto non oritur actio* did not always constitute an inviolable rule. Certain informal bargains (*pacta*) which could not be classified within one of the four categories of contract, were made actionable by the praetor when they were added to contracts (so-called *pacta adieda*), and later even when they were not connected with contracts (so-called *pacta praetoria*). The latter approach was also followed by the emperors in specific instances (so-called *pacta legitima*).[18]

Secondly, in the case of the *stipulatio* which was the most verbal contract, the requirement of formal words was abolished by the Emperor Leo in 472. Any words sufficed as long as the parties reached agreement.[19] The practice of reducing the *stipulatio* to writing also became established.[20] This, as well as certain presumptions regarding the validity of written stipulations, watered the *causa* of the

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14 See in general Kaser 525–526.

15 In his *Institutiones* 3 90 Gaius mentions only *mutuum* as an example of *contractus re*. It is, however, accepted that the other three types were also known in his time: cf Gaius in *D* 44 7 1 3–6; De Zulueta *The institutes of Gaius* part II (1967) 147; Feenstra *Grondslagen* 139 no 237.

16 *Inst* 3 14 2: "si cui res aliqua utenda datur . . . re obligatur et tenetur commodati actione". Cf also *Inst* 3 14 1 3–4; *D* 44 7 1 2, 3, 5, 6.

17 Diósdi *Contract in Roman law from the twelve tables to the glossators* (1981) 44.

18 *D* 2 14 7 5; *D* 2 14 7 7; Buckland 527–533; Zimmermann 508–530. Zimmermann 33 regards the development with regard to *pacta* as the "doctrinal bridge towards the modern, general law of contract".

19 *C* 8 37 14 2; *Inst* 3 19 12.

20 Kaser 540–541.

old verbal *stipulatio* down to a fiction. The *consensus* expressed in the document became the most important element.[21] The kind of contract which Justinian presents as *contractus litteris* is nothing but a specific form of the written *stipulatio*.[22] The *contractus litteris* as a separate category of contract, which required formal writing, had in fact become redundant in his time.[23]

Thirdly, a group of contracts, usually referred to as the *contractus innominati*, took on form in classical law and was fully actionable in Justinian's time. In these cases the parties agreed to mutual performances as *quid pro quo*.[24] The bargain became enforceable with the *actio praescriptis verbis* after one of the parties had performed.[25] This represents a further inroad into the closed system of Roman contracts. During the Middle Ages a tendency started to equate these contracts with real contracts. But this equation is unrealistic: the performance in the case of the *contractus innominati* could also amount to the rendering of a service (*facere*), whereas it consisted only in the re-delivery of a thing in the case of real contracts. Furthermore, delivery of the thing did not constitute a counter-performance in the case of real contracts, because they did not relate to performances on the basis of *quid pro quo*.[26]

Despite the aforementioned developments, the final step towards consensualism as the norm was never taken in Roman law. This fact has at times been attributed to Roman traditionalism, conservatism and rigidity.[27]

3 ROMAN-DUTCH LAW

The departure from the Roman system of contracts and the final acceptance of the *pacta sunt servanda* principle, represents a development over centuries in Western European legal practice and theory.[28] This has been hailed as a valuable

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21 The written document usually contained a clause stating that the formalities of question and answer had been complied with. This then served as a presumption that the *stipulatio* was valid (*D* 2 14 7 12). Later it was laid down in imperial law that when a document did not contain such a clause, but where the parties had been in each other's presence, the *stipulatio* should be accepted as valid as if question and answer had been put (*C* 8 37 1; *Inst* 3 19 17). Justinian also created the presumption that a document stating that the parties were in each other's presence during the conclusion of the *stipulatio*, had to be accepted as valid. This presumption could be rebutted only if it was proved with absolute certainty that one of the parties was absent for the whole day (*C* 8 37 14 2; *Inst* 3 19 12).

22 *Inst* 3 21.

23 Even the *contractus litteris* mentioned by Gaius 3 128–134 fell into disuse in the classical age (Kaser *Das römische Privatrecht* II (1975) 382). Feenstra *Grondslagen* 239 no 374 explains that Justinian mentions *contractus litteris* as a trick to adhere to the classification of Gaius. Cf also Feenstra 140 no 239. See further *D* 46 1 8 1 and *D* 46 2 1 1 where the other three categories of contracts are listed but not the *contractus litteris*.

24 *Do ut des*, *do ut facias*, *facio ut des* and *facio ut facias* (*D* 19 5 5 *pr*).

25 See *D* 19 5; *C* 4 64.

26 See Feenstra *Grondslagen* 139; Buckland 521; Thomas *Textbook of Roman law* (1976) 311.

27 Ietswaart "Legal change in Roman law" in *Uit het recht, rechtsgeleerde opstellen aangeboden aan mr PJ Verdam* (1971) 113; Gordon "Legal tradition, with particular reference to Roman law" in *The legal mind, essays for Tony Honoré* (1986) 282; *Conradie v Rossouw* 1919 AD 279 306.

28 See in general Zimmermann 537–545 576–577; Feenstra and Ahsmann 12–14; Visser "The principle pacta servanda sunt in Roman and Roman-Dutch law, with specific reference to contracts in restraint of trade" 1984 *SALJ* 646–649.

accomplishment in the evolution of law.[29] Consensualism as the hallowed basis of contractual doctrine, implies that contracts are in principle formless and are concluded by mere agreement.[30] But this does not mean that every agreement constitutes a contract. The development of *pacta sunt servanda*, therefore, went hand in hand with the development of the doctrine of *causa*. It is the *causa* that provides the agreement with binding force, and this is a different *causa* from the Roman *causa contractus*. In Roman-Dutch law this requirement was usually satisfied by the serious intention of the parties to create an obligation.[31]

Feenstra[32] has shown how the principle of *pacta sunt servanda* came to be generally accepted in the Netherlands since the seventeenth century. In his contributions he deals with the works of a selection of authors from the sixteenth, seventeenth and eighteenth centuries. The same approach will be followed here, to illustrate how these old authorities perceived the real contracts of Roman law against the backdrop of *pacta sunt servanda*.[33] The *contractus innominati* will also be considered, because, as pointed out, they were often classified as *contractus re*.

Matthaeus Wesenbecius (1531–1586) is the only sixteenth-century author referred to by Feenstra. It is accepted that he provides the earliest authority for the general actionability of *nuda pacta* in the Dutch and German *usus modernus Pandectarum*.[34] In his commentaries on the Digest title *de pactis*,[35] he states that delivery of a thing is necessary to establish an obligation in the case of the *contractus innominati* and the *contractus re*.[36] He then observes that the subtle distinctions of Roman law have been dispensed with. According to the *communis opinio*, the canon law approach that a *nudum pactum* is actionable, is followed in the secular courts.[37] After this general remark, he discusses some of its consequences and returns to the *contractus innominati*. He points out that the *actio praescriptis verbis* is available only after delivery by one of the parties, and not to enforce the mere agreement before such delivery. The mere agreement to render mutual performances may, however, be enforced by means of a *condictio ex canone*.[38] In such a case it is clear that the *contractus innominati* obtains a consensual character. He does not return to the *contractus re*, which leads to the supposition that they retain their character as real contracts, notwithstanding his general remark on *nuda pacta*. This is confirmed in his commentaries on the Digest titles concerning *mutuum*,[39]

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29 Diósdi 20.

30 Cf Zimmermann 577.

31 See with regard to the development of the notion of *causa*, the work of Kotze (fn 11 *supra*) and Zimmermann 549–556.

32 "Pact and contract in the low countries from the 16th to the 18th century" in Barton (ed) *Towards a general law of contract* (1990) 197 *et seq*; "Die Klagbarkeit der pacta nuda" in Feenstra and Zimmermann (eds) *Das römisch-hollandische Recht, Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 123 *et seq*.

33 I shall deal with the majority of authors treated in Feenstra's works, as well as some others.

34 Feenstra *Towards a general law of contract* 198–199

35 *D* 2 14.

36 Wesenbecius *Commentarii in Pandectas juris civilis et Codicem Justinianeum olim dicti Paratitla*, with notes by Bachovius (1649) *ad D* 2 14 no 9.

37 *Ibid*. Feenstra *Towards a general law of contract* 200 points out that the *communis opinio* in Wesenbecius's time did not agree to the general application of this principle in the secular courts.

38 *Ibid*.

39 *Ad D* 12 1 no 5.

commodatum[40] and *depositum*[41] where delivery is required to conclude the contract in each case.

Hugo Grotius (1583–1645), one of the most important seventeenth-century authorities, makes the following classification in his *Inleidinge*: A personal right has two sources, *promissio* (*toezegging*) and inequality.[42] *Promissio* is either express or implied by law.[43] The express *promissio* can either be verbal or in writing.[44] Here Grotius has the Roman *stipulatio* and *contractus litteris* in mind.[45] But it is the *promissio* implied by law that is important for our purposes. This can either be with agreement or without agreement.[46] The former concept is translated by Grotius as *contractus*. He defines it in broad terms as the "agreement in intention of two or more persons for the benefit of one or all".[47] It is, however, not every "agreement in intention" that constitutes a contract. Here Grotius follows the closed system of Roman law. He points to the fact that each contract has its own form and that it is concluded either by delivery of a thing or by mere agreement. The former category embraces the four real contracts of Roman law.[48] In these cases there is the possibility of withdrawing from the transaction before initial delivery (a so-called *locus poenitentiae*), because no contract has yet been concluded.

Grotius classifies the *contractus innominati* under inequality, one of the main sources of a personal right.[49] These contracts are not consensual. They resemble the real contracts, in that the intervention of a thing (*zaaks tuschenkomst*) is required. Thus, before performance, a *locus poenitentiae* is also allowed.[50]

It is, however, possible for the parties to both real and innominate contracts to change the character of the contract by means of an express *promissio*. With such a *promissio* one party may grant another a right which excludes the *locus poenitentiae*. The other party can then enforce the mere agreement before any prior delivery or performance. In such a case the contract obtains a consensual character, but it is then enforced on the basis of the *promissio* and not as a real or innominate contract.[51]

Although Grotius did not succeed in escaping the Roman contractual doctrine, his *Inleidinge* still served as the most important inspiration for later authors to abolish the Roman law principle of *ex nudo pacto non oritur actio*.[52]

One such author was Arnoldus Vinnius (1588–1657). In his commentaries on Justinian's *Institutes*, he mentions that the principle that a *nudum pactum* is actionable, was received in the law of his time. The law was thus reduced to the

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40 *Ad D* 13 6 no 3.
41 *Ad D* 16 3 no 3.
42 De Groot *Inleidinge tot de Hollandsche rechts-geleertheid* (1895) 3 1 9.
43 3 1 49.
44 3 1 50.
45 Stassen 1979 *THRHR* 366; Feenstra *Towards a general law of contract* 208.
46 3 6 1.
47 3 6 2, translation Maasdorp *The institutes of Dutch jurisprudence of Hugo Grotius* (1888).
48 3 7 1.
49 3 31 1.
50 3 31 8.
51 3 6 11, 3 31 8.
52 Feenstra and Ahsmann 19–20; Stassen 1979 *THRHR* 367; Visser 1984 *SALJ* 650.

simplicity of the *ius gentium*.[53] His definition of a contract, as an agreement to create an obligation in accordance with the law, is fully on par with his general remark concerning *nuda pacta*.[54] But Vinnius closely follows Roman law when he classifies contracts into *contractus re, verbis, litteris* and *consensu*.[55] In *contractus re*, the delivery of a thing or a *factum* (performance) is required in addition to the agreement. He therefore includes *contractus innominati* in this category.[56] There is consequently a discrepancy between Vinnius' general views on pacts and contracts on the one hand, and the real contracts as such on the other.

Simon van Groenewegen van der Maade (1613–1652) provides much clearer authority for a general doctrine of consensualism. He observes that the old disputes with respect to some pacts which are actionable and others which are not, are settled. All pacts are actionable.[57] In his notes on Grotius' *Inleidinge*, he adheres to this line of thought when commenting on the real contracts. He points to a law of the city of Antwerp which disallows the *locus poenitentiae* before the initial delivery of the thing, but after the agreement between the parties. The parties are bound by the agreement, rendering real contracts consensual by nature.[58] The same applies to the *contractus innominati* which are consensual contracts in accordance with canon law. No *locus poenitentiae* is allowed after agreement.[59]

The Frisian jurist Ulricus Huber (1636–1694) reflects on the jurisprudence of his time by telling us that a person who is competent to bind himself, can create an obligation by any kind of promise or declaration. This approach is in accordance with the practice of nations which follows the simple principles of the law of nature. A promise is a debt.[60] He defines a contract broadly as "an agreement of two or more persons, out of which a demand and claim at law may arise against some one".[61] He subsequently distinguishes between proper (*veri*) and *quasi* contracts. Proper contracts are subdivided into nominate and innominate contracts. The nominate contracts are the *contractus consensu, re* and *litteris*. The *contractus verbis* has disappeared as a separate category because all promises by which a person binds himself, create an obligation.[62] His treatment of the real contracts is, however, purely Roman. The mere agreement, prior to the delivery of the thing has no force. For instance, a person who has promised to borrow money from another

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53 Vinnius *In quattuor libros Institutionum imperialium commentarius* (1709) *ad Inst* 3 13 2 no 11.

54 *Ad Inst* 3 13 2 (introductory *notae*): "Contractus est conventio obligationem pariens citra speciale legis adminiculum."

55 *Ad Inst* 3 13 2 no 12.

56 *Ad Inst* 3 14 (the introduction to the title). Zimmermann 157 refers to the following remark of Vinnius with respect to *mutuum*, *ad Inst* 3 15 *pr* no 1: "Constitutur mutuum non solo nudo consensu, sed rem intervenire ac tradi oportet." According to Zimmermann the accent here is clearly on *consensus*. This view cannot be shared – Vinnius is quite unambiguous.

57 *Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus* (1649) *ad D* 12 1 40; see also *ad C* 2 3 13.

58 De Groot *Inleidinge tot de Hollandsche rechts-geleertheid* with notes by S van Groenewegen van der Maade (1644) *ad Gr* 3 6 11 no 10.

59 *Tractatus de legibus abrogatis ad D* 1 2 4 5.

60 *Heedendaegse rechtsgeleertheyt, so elders als in Frieslandt gebruikelyk* (1742) 3 21 no 2–5.

61 3 1 no 20 (translation by Gane *The jurisprudence of my time by Ulric Huber* (1939)).

62 3 1 no 21–25.

at interest, is not afterwards bound to do so.[63] The innominate contracts, on the other hand, are consensual – the agreement binds the parties.[64]

In his commentaries on the Digest title *de pactis*, Johannes Voet (1647–1713) states that all nude pacts that are seriously entered into are actionable in the same way as contracts. This principle springs from the simplicity and good faith of the law of nations. He refers to Grotius, Groenewegen and Vinnius as authority. In this particular section, he also mentions that the mere agreement to give a thing in loan or in pledge is enforceable.[65] But when dealing with contracts as such, he distinguishes them from pacts:

> "Contracts are covenants (*conventiones*) underlain in their very nature by a ground of obligation for the giving, doing or making good of something."[66]

He differentiates between nominate and innominate contracts. Nominate contracts are the *contractus re, verbis, litteris* and *consensu*. The *contractus re* are concluded by the delivery of a thing.[67] Accordingly, in his commentaries on the contracts of loan for consumption, loan for use, pledge and deposit, he adheres strictly to the real character of these contracts.[68] This approach is clearly in conflict with his general statements regarding pacts. The innominate contracts, however, are consensual. No right to withdrawal (*locus poenitentiae*) is allowed after the agreement, because a nude pact gives rise to an action.

Remarking in general on the actionability of nude pacts, Voet[69] refers to another seventeenth-century authority, Simon van Leeuwen (1626–1682). Voet points to Van Leeuwen's erroneous observation in the *Censura forensis*,[70] that the Roman principle of *ex nudo pacto non oritur actio* has been received in the Netherlands. In his *Het Roomsch Hollandsch recht*,[71] Van Leeuwen closely follows Grotius' classification of personal rights arising from *promissio* and inequality etcetera, as explained above. His treatment of the real contracts also coincides with that of Grotius. Delivery of a thing is necessary for the conclusion of these contracts. He regards the four traditional *contractus re* as well as the *contractus innominati* as real contracts. Prior to delivery, the opportunity to withdraw (*locus poenitentiae*) exists. It is, however, possible to clothe the mere agreement as a *promissio*, in which case the parties are bound by the *promissio*, and the right of withdrawal is disallowed.[72] But Van Leeuwen observes that, after the agreement is entered into, the right to withdrawal does not exist in the case of the *contractus innominati*. The reason is that, like in common law, any *promissio* (*toezegging*) seriously made, is actionable.[73] According to this observation, the *contractus innominati* therefore

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63 3 16 no 2–3.
64 3 21 no 3.
65 *Commentarius ad Pandectas* (1698) *ad D* 2 14 no 9.
66 Gane's translation *The selective Voet being the commentary on the Pandects by Johannes Voet* (1955) *ad D* 12 1 no 1.
67 *Ad D* 12 1 no 1.
68 See with regard to *mutuum ad D* 12 1 no 1, *commodatum ad D* 13 6 no 1, *pignus ad D* 13 7 no 1 (here Voet distinguishes between five types of pledge, amongst others *conventionale* which is a *contractus re*), *depositum ad D* 16 3 no 1.
69 *Ad D* 2 14 no 9.
70 1 4 2 no 2.
71 With notes by Decker (1783) 4 1; cf also Feenstra *Towards a general law of contract* 213.
72 4 5 no 1–3.
73 4 14 no 3.

have a consensual character. This, however, does not correspond to Van Leeuwen's classification of the *contractus innominati* as real contracts.

As for the eighteenth century authorities, we can turn first to Dionysius van der Keessel (1738–1816). In his *Praelectiones* on Grotius' *Inleidinge* he makes the general observation that "ex nudo pacto apud nos nascitur actio".[74] He treats the real contracts in exactly the same way as Grotius does. They form part of the category of *promissiones* implied by law from an agreement, and are concluded by the delivery of a thing. Van der Keessel refers to Groenewegen who is of the opinion that these contracts are consensual and that no right to withdrawal exists prior to delivery, in accordance with the law of Antwerp. Van der Keessel, however, sides with Grotius, explaining that it will only be the case when there is an express *promissio* to such effect. In this way Van der Keessel retains the real character of these contracts.[75] Van der Keessel does, however, differ from Grotius in considering the *contractus innominati* as purely consensual.[76]

Johannes van der Linden (1756–1835) states that contracts are the most general source of obligations and that all contracts are based on agreeement.[77] But it is clear from his discussion on loan for consumption, loan for use and deposit, that delivery is required in each case for the conclusion of the contract.[78] He does not deal with *contractus innominati.*

In conclusion, we may refer to Cornelius Decker who was a practising advocate in Amsterdam at the end of the eighteenth century. In his notes on Van Leeuwen's *Het Roomsch Hollandsch recht*, he makes the following observations.[79] The Roman classification of contracts into four categories has lost its significance because all contracts are concluded by agreement alone. For a contract to be valid, the following three requirements must be met: (i) the parties must be capable of binding themselves; (ii) the agreement must be made deliberately and voluntarily; (iii) performance must be possible and there must be a reasonable cause. Decker questions the Roman law approach, namely that a deliberate and earnest promise to give a sum of money in loan, does not constitute a contract prior to the transfer of the money. According to him, this would put an end to all good faith and cause most serious and useful conventions to disappear in a puff of smoke. It is in conflict with common sense.

From the preceding discussion, it is clear that Roman-Dutch law was familiar with the principle of *pacta sunt servanda*, but that it did not serve as a general doctrine on which all contracts were based. The Roman *contractus innominati* experienced a development towards consensualism in the light of this principle, but the same cannot be said of the *contractus re*. Apart from the law of Antwerp referred to by Groenewegen, the conflicting statements of Voet and the observations of Decker, the other authorities treat these contracts as real contracts, in accordance with Roman law. It seems that the principle of *pacta sunt servanda* was

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74 *Praelectiones iuris hodierni ad Hugonis Grotii Introductionum ad iurisprudentiam Hollandicam* (ed Van Warmelo *et al*) (1964) *ad Gr* 3 6 2.

75 *Ad Gr* 3 6 1; 3 6 10–11.

76 *Ad Gr* 3 31 8–9; cf also *ad Gr* 3 31 6.

77 *Regtsgeleerd, practicaal en koopmans handboek* (1806) 1 14 II.

78 See 1 15 II on loan for consumption, 1 15 IV on loan for use, 1 15 V on deposit. At 1 15 VII on pledge, he does not mention delivery as requirement.

79 See *Het Roomsch Hollandsch recht* (fn 71 *supra*) 4 2 no 1 fn a.

applied selectively, either to specific agreements only such as the Roman *stipulatio*, or to all agreements apart from the four categories of Roman law contracts still in force in Roman-Dutch law.

Despite the general acceptance of the principle of *pacta sunt servanda*, the Roman law of contract influenced Western European law long after the reception of the said principle, and is still doing so today. The Roman distinction between *pacta* and *contractus* dominated legal science up to the eighteenth century.[80] The nineteenth century pandectists "entrenched the idea of the Roman real contracts as something logically necessary and conceptually cogent".[81] Even today the contracts of loan for consumption and loan for use are still regarded as real contracts in the Netherlands. This is particularly clear from the phraseology of the relevant sections in the *Burgerlijk Wetboek* where the delivery of a thing is emphasised, without mentioning the initial delivery by the lender as an obligation.[82] It is, however, possible for the parties to change the nature of the contract by binding themselves to the agreement as such by means of a so-called *voorovereenkomst*.[83] This is in line with the approach of Grotius, Van Leeuwen and Van der Keessel as set out above. Section 600 of the *Nieuw Burgerlijk Wetboek*, which only came into operation on 1 January 1994, however, renders the contract of deposit as consensual, as it no longer requires the acceptance of the thing by the depositee for conclusion of the contract, as was the case in the past.[84] Likewise, in Germany, Italy and France in particular loan for consumption has been regarded as a real contract in the light of the relevant articles in the respective civil codes according to which the essence of the contract lies in the borrower's obligation to return the money or fungibles.[85] With respect to the Hungarian civil code, which treats the four real contracts of Roman law as consensual, Diósdi[86] observed:

> "It is problematic if it was worth to pay a late homage, by disregarding the practical points of view, to the theory of the autonomy of will."

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80 Feenstra and Ahsmann 3

81 Zimmermann 164.

82 Reehuis and Slob (*infra* fn 83) 390.

83 Cf s 1777, on loan for use: "Bruikleening is eene overeenkomst, waarbij de eene partij aan de andere eene zaak om niet ten gebruike geeft onder voorwaarde, dat degene die deze zaak ontvangt, dezelve na daarvan gebruik te hebben gemaakt of na eenen bepaalden tijd zal terug geven"; s 1791, on loan for consumption: "Verbruikleening is eene overeenkomst, waarbij de eene partij aan de andere eene zekere hoeveelheid van verbruikbare goederen afgeeft, onder voorwaarde dat de laatstgemelde haar even zoo veel van gelijke soort en hoedanigheid terug geve." These articles form part of that section of the old *Burgerlijk Wetboek* which is still in force. See also Reehuis and Slob *Parlementaire geschiedenis van het Nieuwe Burgerlijk Wetboek, Invoering boeken 3, 5 en 6, boek 7 bijzondere overeenkomsten, Titels 1, 7, 9 en 14* (1991) 390.

84 S 600 reads as follows: "Bewaarneming is de overeenkomst waarbij de ene partij, de bewaarnemer, zich tegenover de andere partij, de bewaargever, verbindt, een zaak die de bewaargever hem toevertrouwt of zal toevertrouwen, te bewaren en terug te geven." Cf also Reehuis and Slob 391.

85 See Henrich *Vorvertrag, Optionsvertrag, Vorrechtsvertrag* (1965) 28 47 55 78–79; Zimmermann 164–165.

86 44.

4 SOUTH AFRICAN LAW

During the second half of the nineteenth century, Lord Henry de Villiers CJ introduced the English doctrine of valuable consideration into the courts of the Cape Colony. According to this doctrine, a promisee must furnish some or other *quid pro quo* to render the promise enforceable. This requirement applies to all contracts, except those concluded "by deed under seal".[87] This English common law principle probably has its origin in the Roman law principle of *ex nudo pacto non oritur actio*.[88] In a series of decisions handed down by Lord de Villiers, it was held that English consideration and the Roman-Dutch *causa* amounted to one and the same thing, an approach which also spread to Natal. On the other hand, the courts in the Transvaal and the Orange Free State rejected this approach. There it was advocated, under the influence of Sir John Kotze CJ, that the Roman-Dutch *causa* is tantamount to the serious intention to be bound, which differs considerably from valuable consideration.[89] Several authorities at the time commented on this moot point, showing the approach of the courts in Transvaal to be the correct one. This controversy continued until 1919.

During this period, it was not only contractual theory in general that was influenced by English law, but also the real contracts in particular. There was a tendency to equate the real contracts of Roman and Roman-Dutch law with "bailments" as they are known in English law. According to the old definition of Story, a bailment implies

> "a delivery of a thing in trust for some special object or purpose, and upon a contract express or implied to conform to the object or purpose of the trust".[90]

Bailments embrace loan for use, deposit and pledge, but also mandate and letting and hiring. However, the difference between bailments and real contracts lies in the fact that in the case of bailments the same thing has to be returned, so that loan for consumption is not included. Bailments, furthermore, only have a bearing on movables. However, authors on this topic usually point to the similarities between the two institutions, and when treating the real contracts of Roman-Dutch law as bailments, rely heavily on Roman and Roman-Dutch authority. Through this approach, the real character of these contracts was entrenched.[91]

During this time, however, there also existed the pure Roman-Dutch approach of the author Josson.[92] He states, with reference to Van der Linden and Van Leeuwen, that a reasonable cause (*redelijke oorzaak*) is enough to establish contracts in general. However, as far as the nominate contracts are concerned, some special and particular requirements have to be met in addition. Delivery of a thing is therefore required in the case of real contracts. The innominate contracts, on the other hand,

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87 See Zimmermann 504–507 554–556; Joubert 30–31. Cf Christie *The law of contract in South Africa* (1991) 11: "English law, in fact, unlike Roman-Dutch law, enforces bargains not promises."

88 Morice *English and Roman-Dutch law* (1903) 73; Nathan *Common law of South Africa* (1913) 593; Zimmermann 555.

89 Morice 71–74; Wessels *History of the Roman-Dutch law* (1908) 573–574; Roos and Reitz *Principles of Roman-Dutch law* (1909) 105–106; Nathan 593–601; Lee *An introduction to Roman Dutch law* (1953) 197–199. See also the note of Kotze in his translation of Van Leeuwen's *Het Roomsch Hollandsch recht: Commentaries on Roman-Dutch law* (1886) *ad* 4 2 no 13.

90 As quoted by Burge *Commentaries on civil law and the law of Holland* (1887) 216.

91 See in general Burge 216–236; Morice 104–112; Nathan 1112–1128.

92 *Schets van het recht van de Zuid-Afrikaansche Republiek* (1897) 218–229 291–295.

are governed by the general principles of the law of contract and are concluded by mere agreement. Nathan,[93] however, explains the enforceability of the innominate contracts in the light of English law, so that the reciprocal promise to perform provides the necessary consideration.

In 1910, the Union of South Africa was established and the Appellate Division of the Supreme Court instituted in Bloemfontein. This court, which had to ensure uniformity in the application of law, had to pass judgment on the controversy between the Cape and the Transvaal courts in 1919. In the famous case of *Conradie v Rossouw*[94] it was held that valuable consideration and the *causa* of Roman-Dutch law are not synonymous and that the former did not form part of South African law. The court ruled that as a general principle in our law, contracts are concluded in accordance with Roman-Dutch law by mere agreement, provided that there is a *iusta causa*. With respect to the latter requirement, the court accepted that

> "a good cause of action can be founded on a promise made seriously and deliberately and with the intention that a lawful obligation should be established".[95]

The court also remarked that, in the light of the principle of *ex nudo pacto oritur actio*, the real as well as the innominate contracts were concluded by mere agreement in Roman-Dutch law.[96] But it has been shown above[97] that this is correct with respect to the innominate contracts only. It is not a true reflection of the common law position regarding real contracts.[98] Furthermore, in so far as this remark might suggest that the real contracts are consensual by nature in modern South African law, it must be considered as *obiter dictum*. *Conradie v Rossouw* did not relate to any of the real contracts in particular. In the final instance it nevertheless cannot be said to have been a watershed decision, since the real contracts had by then lost their real character and had become consensual. This is apparent from the works of leading authors and from the approach of our courts since 1919.

On the one hand, there are those authors who advocate a general theory of contract, namely that contracts are concluded by mere agreement, but who at the same time explicitly treat the Roman *contractus re* as a different category. Wessels, for example, maintains that the serious intention of the contracting parties is required, and that in such a case an obligation is created immediately. He, however, distinguishes consequences that are common to all contracts from those that are particular to contracts which are concluded only after the delivery of a thing. The latter category consists of loan for consumption, loan for use, deposit and pledge.[99] Lee[100] points out that these contracts are governed by Roman law. Gane, in his selective translation of Voet, remarks that Voet's discussion of loan for consumption and loan for use, is an accurate account of the prevailing position and that the courts have not deviated from it.[101] In the ninth edition of Maasdorp's *Institutes*,

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93 562–563.
94 1919 AD 279.
95 The headnote of the report as well as 288 297 324.
96 310.
97 Par 3.
98 Cf also Western Bank Ltd v Registrar of Financial Institutions 1975 4 SA 37 (T) 43D: "At common law the contract known as 'verbruiklening', mutuum or loan for consumption, is classified as a contract founded on a thing (re) and is not completed without delivery."
99 Wessels *The law of contract in South Africa* (1937) 22–23 619–623.
100 *An introduction to Roman-Dutch law* 312–313.
101 Gane's introductory remarks *ad D* 12 1 and *D* 13 6.

loan for consumption is treated as a real contract.[102] Zimmermann[103] is of the opinion that the position of loan for use has for the greater part remained unchanged since Roman law, so much so that the Roman jurists Paulus and Gaius would have found their way in modern law with ease.

On the other hand, there are authors who do not specifically label the contracts under discussion as real, but from their general treatment of the subject-matter, no other deduction can be made. They – possibly unintentionally – define these contracts true to Roman tradition with the emphasis on the delivery of a thing, for example,

> "loan for consumption is a contract whereby one person delivers some fungible thing to another person who is bound subsequently to return to the former a thing of the same kind, quality and quantity".[104]

When the duties of the contracting parties are subsequently discussed, the duty of, for example, the lender to deliver, or that of the depositee to accept the thing, is never mentioned. Surely this ought to be the primary as well as a logical contractual duty, had the contract been consensual. The duty of the borrower and the depositee to return the thing is, however, always emphasised.[105] This approach corresponds to the treatment of these contracts in the Western European civil codes as explained above.[106]

The same approach is followed by our courts. In *Moser v Meiring*[107] the court relied on Voet when it defined loan for consumption as "a contract by which a fungible thing is delivered to another who undertakes to return a thing, of the same kind, quality and quantity". In *Minister of Posts and Telegraphs v Daddy Bros and Johnstone*[108] Lee and Honoré's definition of deposit, as "a contract whereby one person delivers to another a thing to be kept by him gratuitously or for reward and returned on demand" was accepted.[109] In *Adamson v Boshoff*[110] the court defined loan for use according to Cooper as "a contract whereby one person (the lender) delivers property to another person (the borrower) . . . to be returned to the lender . . ."

As mentioned at the outset,[111] Joubert maintains that the old real contracts presently have a consensual character. He also seems to be the only one who correctly attempts to treat these contracts accordingly. In his discussion on loan for consumption and loan for use, he consistently lists the duty of the lender to deliver as a duty flowing from the agreement between the parties.[112] But Joubert's approach does not rest on unquestionable foundations. First of all, it appears strange that he

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102 *Maasdorp's institutes of South African law* (ed Hall) (1978) 83.
103 203.
104 Hutchison *et al Wille's principles of South African law* (1991) 576.
105 See eg Lee and Honoré *The South African law of obligations* (2ed by Newman and McQuoid-Mason) (1978) 125–132; Bester "Deposit" 8 *LAWSA* 118–121; Hutchison *et al* 576–583.
106 Par 3 *in fine*.
107 1931 OPD 74 77.
108 1965 3 SA 394 (EC) 396.
109 This definition was followed in *Smith v Minister of Lands and Natural Resources* 1980 1 SA 565 (Z) 571; *Socrat v Electra Rubber Products* 1981 3 SA 722 (Z) 724.
110 1975 3 SA 221 (C) 225.
111 Fn 7 *supra*.
112 15 *LAWSA* 200–207.

nevertheless regards the borrower's duty to return the thing as the "main obligation".[113] Such a view corresponds to the real character of the contract in the light of which the emphasis is always on the duty of the borrower. Zimmermann,[114] for instance, criticises the modern-day real character of loan for consumption on the very basis that money is not primarily lent out in order to be returned, but rather to be used by the borrower. Secondly, the authority on which Joubert relies does not bear him out. In the light of the judgment in *Conradie v Rossouw*,[115] he submits: "From this it *appears* that a promise to lend . . . is enforceable by action".[116] It has been pointed out above that the remarks in *Conradie v Rossouw* concerning real contracts, do not reflect our common law position correctly and that they serve only as *obiter dicta* with respect to modern South African law on this point.

Joubert is correct in so far as he shows that pledge is considered to be a consensual contract today. This is the generally accepted view.[117] The same also applies to the innominate contracts and here his view is in full accord with the development in our Roman-Dutch common law.[118]

5 CONCLUSION

Apart from pledge and the innominate contracts, there is no conclusive common law or other authority in South Africa rendering the contracts of loan for consumption, loan for use and deposit consensual by nature. In this respect Roman law still exerts its influence via Roman-Dutch law.

These contracts originated as gratuitous services rendered among friends, and from that perspective their real character makes sense. However, the face of modern society cannot be compared with that of Roman or seventeenth and eighteenth century Dutch society. In the light of present socio-economic needs, a strong argument may be advanced for the loan of money, in particular, to be regarded as a consensual contract, at least in certain cases. But the question arises whether this argument is also valid for other forms of loan for consumption as well as for loan for use and deposit. On the one hand, the often friendly nature of these transactions must be considered. Bearing this in mind, a claim for specific performance based on mere agreement between the parties is sometimes undesirable. That is probably also why these cases seldom end up in court. A contract, on the other hand, cannot be enforced only by means of a claim for specific performance but also by a claim for damages. A party may, for example, suffer loss when a promise to lend money or to take a thing in deposit is not met. But even then the question is whether the *boni mores*, given the friendly and also gratuitous nature of such transactions, *always* requires damages to be paid.

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113 15 *LAWSA* 200 par 270.

114 164.

115 Fn 93 *supra*.

116 15 *LAWSA* 200 par 270 fn 2 (my italics).

117 See *Vasco Dry Cleaners v Twycross* 1979 1 SA 603 (A) 611; Lubbe "Mortgage and pledge" 17 *LAWSA* 366 485; Scott and Scott *Wille's law of mortgage and pledge in South Africa* (1987) 46–47; De Wet and Van Wyk 402.

118 Maasdorp *The Institutes of Cape law, book III: The law of obligations* (1924) 371–372.

As far as the *boni mores*, specifically in the South African context, are concerned, it should be noted that all customary law contracts are real contracts.[119] The new Constitution specifically provides for the application of customary law.[120] The opinion was recently expressed that serious attention should in future be paid to the integration of the Western and the indigenous law of contract.[121] In so far as such an integration would be necessary, the law relating to the real contracts of common law can offer a valuable contribution.

It is consequently doubtful whether it can be said that real contracts have no place within the modern paradigm. A historical perspective shows that consensualism has never functioned as an absolute rule governing the law of contract in its totality. And even at present, in the case of those contracts that do in fact function in accordance with the norm of consensualism, it cannot always be said that every such contract constitutes a celebration of the wills of the parties.[122]

BUTTERWORTHS-PRYS

Dit doen die redaksie genoeë om aan te kondig dat die Butterworths-prys vir die beste eersteling-bydrae van 1994 toegeken is aan:

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119 See eg Whelpton *Die inheemse kontraktereg van die Bakwena Ba Mogopa van Hebron in die ODI I distrik van Bophuthatswana* (LLD thesis Unisa 1991).

120 S 35(3) Act 200 of 1993.

121 Van Aswegen "The future of South African contract law" 1994 *THRHR* 448.

122 Often the terms of a contract are dictated by the state or some other authoritative body, and in some cases entering into a contract is obligatory (see Diósdi 19–22; Corder and Davis "Law and social practice: an introduction" in Corder (ed) *Law and social practice in South Africa* (1988) 11–13 25).

Wetenskapsfilosofie en die regswetenskap

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SUMMARY

Philosophy of science and legal science

Philosophy of science has received scant attention from South African jurists. This article attempts to situate philosophy of science and to summarise the most important philosophies in the human sciences, namely positivism, Karl Popper's critical rationalism, Thomas Kuhn's *Structure of scientific revolutions* and the Frankfurter Critical Theory. The reception or non-reception of these in legal science is discussed briefly. The conclusion is reached that Popper, Kuhn and the Frankfurter School have reintroduced man in the scientific process, which implies that subjectivity forms an integral part of the human sciences.

INLEIDING

Dit wil voorkom of wetenskapsfilosofie Suid-Afrikaanse regsgeleerdes min gepla het of pla. Regswetenskaplikes het oor die algemeen die benadering van hul leermeesters sonder bevraagtekening aanvaar en sowel leermeester as student was in baie gevalle selfs onbewus van die feit dat daar ander benaderings, sogenaamde paradigmas, moontlik is en inderdaad bestaan.

Andersyds is daar altyd 'n sekere relativisme aanwesig in die regswetenskap as gevolg van die besef dat die eksaktheid van die natuurwetenskappe nie bereik kan word nie en dat daar gevolglik verskillende menings ten aansien van bepaalde onderwerpe bestaan. Die goeie motivering van die verskillende menings speel 'n belangrike rol, maar die afwesigheid van kriteria in hierdie verband, onder andere as gevolg daarvan dat die bestudering van logika in die regsopleiding ontbreek, het tot gevolg dat die "Middeleeuse" beroep op gesaghebbende tekste en/of groot leermeesters 'n prominente plek inneem.

Regswetenskaplikes wat die kans gekry of geskep het om ook aan ander universiteite te studeer, het bewus geraak van die feit dat daar ook ander werkswyses, metodes, metodologieë, skole, stromings en paradigmas bestaan. Die gevolglike metode-relativisme lei amper vanself tot metode-eklektisisme, wat egter deur Maurer en Retief[1] as metodologiese skisofrenie getipeer is. Die verskillende metodes word naamlik los van hul filosofiese raamwerke in die navorser se eie (in die regswetenskap oor die algemeen versweë of onbewuste) filosofiese raamwerk gebruik wat tot spanning tussen uitgangspunte en resultate aanleiding gee. In die regswetenskap kry hierdie probleem weinig erkenning as gevolg van die onbekendheid met die onderskeie wetenskapsfilosofieë, asook die negering van die feit

1 "Metodologiese probleme in die sielkunde" 1985 (4) *SA Tydskrif vir Wysbegeerte* 20.

dat die eie mensbeskouing of samelewingsbeskouing implikasies ten aansien van keuses, uitgangspunte, metode en resultate het.

Die doel van hierdie artikel is derhalwe om 'n kort en onvolledige skets van die belangrikste wetenskapsfilosofieë in die geesteswetenskappe asook die resepsie of nie-resepsie daarvan in die Suid-Afrikaanse regswetenskap te gee met die oog op bewusmaking van die filosofiese konteks van die verskillende metodes. Die filosofiese agtergrond van die verskillende metodes het betrekking op besinning oor wetenskap; dit gaan oor die siening van die doel van die wetenskap, die groei van wetenskaplike kennis en die wyses van begronding van wetenskaplike uitsprake. Dit hou uiteraard verband met die opvatting oor die mens en samelewing.

SITUERING VAN WETENSKAPSFILOSOFIE

Daar kan vier verskillende vlakke (of ordes) van menslike denke onderskei word:

1 Lewensfilosofie
2 Wetenskapsfilosofie
3 Metodologie
4 Metodes en tegnieke

Ad 1: Lewensfilosofie mag min of meer bepaald, meer of min bewus wees. Dit is ongetwyfeld so dat iedereen die wêreld en die mens en sy samelewing volgens sy eie filosofie beskou; hierdie wêreld- en lewensbeskouing vorm deel van elkeen se eie private domein en bly gevolglik meestal buite die diskussie. Sy lewensfilosofie sal egter die wetenskaplike se wetenskapsfilosofie beïnvloed. So sal byvoorbeeld Marxiste 'n ander wetenskapsfilosofie as Christene huldig.

Ad 2: Wetenskapsfilosofie is, soos genoem, in 'n groot mate afhanklik van 'n persoon se lewens- en wêreldbeskouing. In sy opstel "Contending images of social knowledge and the politics of truth"[2] onderskei Mouton die dominerende wetenskapsbeelde in die moderne geesteswetenskappe en toon aan dat die wetenskaplike navorsing binne elkeen van hierdie paradigmas intrinsiek politiek- of waardegelaai is. Hy bevestig dat die Weberiaanse vereiste van 'n waardevrye wetenskap as onbereikbaar in die geesteswetenskappe bewys is.

Ad 3: Metodologie verteenwoordig die vlak tussen wetenskapsfilosofie en die metodes en tegnieke wat in 'n bepaalde wetenskap of dissipline beoefen word. Metodologie waarborg wetenskaplike resultate, met ander woorde bevindinge wat die groots moontlike relatiewe waarheidgetrouheid het. Dit beteken dat die metodologie in albei rigtings opereer. Eerstens op die vlak wetenskapsfilosofie: die metodologie lê bepaalde spelreëls neer wat dit moontlik maak om ondanks die waardegelaaide wetenskapsfilosofieë tog tot wetenskaplike bevindinge te kom. Tweedens op die vlak van tegnieke en metodes: die metodologie dikteer op hierdie gebied die reëls wat die generering van geldige data maksimaliseer.

Ad 4: Metode en tegnieke het betrekking op kwessies van alledaagse praktyke: hoe om materiaal te versamel, kennis van relevante bibliografieë, gesaghebbende tydskrifte, aanhalings ensovoorts.

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2 In Mouton en Joubert (reds) *Knowledge and method in the human sciences* (1990) 43–59.

HISTORIESE OORSIG

Die sienings oor wetenskap en wetenskaplike praktyk is antwoorde op vrae gestel na aanleiding van vroeëre wetenskapsfilosofieë en -praktyke; 'n reaksie en verset teen daardie opvattings en praktyke. Gevolglik is 'n kort historiese oorsig noodsaaklik.

As gevolg van die enorme sukses behaal in die natuurwetenskappe, was die oorheersende vraag sedert die sewentiende eeu of daar 'n verband tussen die natuurwetenskappe en die geesteswetenskappe bestaan. Natuurwetenskaplikes soos Bacon, Descartes, Newton en Einstein het deur middel van eksperimentering en kwantifisering algemeen geldige wette ontdek waarby die uitsluiting van bestaande vooroordele 'n belangrike rol gespeel het. Gevolglik het die wetenskap 'n hoë premie gestel op objektiwiteit, in die sin van die uitsluiting van vooroordele, afstand neem, neutraliteit of waardevryheid. Afhangende van die antwoord op bogestelde vraag, kan daar sedert die sewentiende eeu twee tradisies in die wetenskapsfilosofie onderskei word. Enersyds die positivisme of naturalisme met as beroemdste protagoniste Bacon, Hobbes, Adam Smith, Comte en Mill, wat die vraag positief beantwoord het en die tradisie van die natuurwetenskappe in die geesteswetenskappe naboots. Hulle twintigste eeuse opvolgers was die Weense Sirkel (1992-1936) en die logiese empirisme (1936-1960). Die anti-positivisme of anti-naturalisme word verteenwoordig deur die humanisme, Vico (17de eeu), Herder (18de eeu), die Hermeneutiek (Dilthey (19de eeu), Heidegger, Gadamer, Ricoeur), die Kritiese Teorie (Marx, die Frankfurtse Skool, Habermas) en die Fenomenologie.

Vanaf 1960 het daar egter 'n nuwe debat oor die filosofie van die natuurwetenskappe losgebrand, met Popper en Kuhn as die belangrikste name en die Edinburgh School en die Realisme as die belangrikste stromings.

Uit bostaande oorsig kan twee afleidings gemaak word. Eerstens: die positivisme het deur die eeue sekere veranderings ondergaan en word sedert 1960 in die natuurwetenskappe bevraagteken. Tweedens: die verskeie filosofieë in die geesteswetenskappe is in 'n groot mate 'n reaksie op die positivisme.

POSITIVISME

Aan die begin van die sewentiende eeu het Francis Bacon (1561-1626) as reaksie op die gangbare wetenskapstradisie wat finale gesag aan Aristoteles (384-422 vC) toegeken het,[3] die moderne wetenskapsmodel ontwikkel.[4] Die model waarteenoor Bacon hom gestel het, die deduktivisme, neem sy uitgangspunt in reeds geformuleerde teorieë en probeer om die werklikheid in hierdie teorieë in te pas. Bacon se model gaan egter uit van empiriese feite en probeer om deur induktiewe veralgemening en abstrahering teorieë te skep. Die aldus geformuleerde teorieë moet aan nuwe empiriese feite getoets word. Bacon se model, die induktivisme,[5] plaas die nadruk op empiriese feite as vertrekpunt vir navorsing en ook as toets vir

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3 Reeds die humaniste het die reg opgeëis om met Aristoteles te verskil en 'n onafhanklike oordeel te vorm.

4 *Novum organum: sive indicia vera de interpretatione naturae* (1620).

5 Waarneming en induksie is uiteraard so oud soos menslike redenasie. Bacon het dit geanaliseer, die wyse waarop Artistoteles dit hanteer het, gekritiseer, en sekere reëls en waarskuwings neergelê. Bevraagtekening van gesag asook die seleksie van waarnemings in plaas van *inductio per enumerationem simplicem* vorm sentrale punte van sy model.

teorieë. Hierdie induktivistiese navorsing was volgens Bacon op alle wetenskappe van toepassing;[6] sodanige studie van die mens en sy samelewing sou sosiale hervorming en vooruitgang tot gevolg hê.[7] Ook Thomas Hobbes (1588-1679) sien die rekonstruksie van die samelewing op wetenskaplike gronde as die uiteindelike doelwit van wetenskapsbeoefening.[8]

In die agtiende eeu ontwikkel wetenskaplikes soos Vico, Voltaire, Turgot, Gibbon, Condillac en Condorcet[9] teorieë oor menslike vooruitgang wat 'n belangrike bydrae tot die positivisme lewer. Bacon se "kennis is mag" word die slagspreuk van die aanhangers van die vooruitgangsgeloof. Deur middel van die wetenskap het en sal die mens homself meer en meer losmaak van die boeie van onkunde, vooroordeel, tirannie en onderdrukking. Die menslike rede is die middel tot bevryding wat die mens in staat stel om mondig te word en sy omgewing te beheers.

In die negentiende eeu het Henri Saint-Simon (1760-1825) en sy leerling Auguste Comte (1798-1857) bogenoemde komponente van die positivisme in 'n filosofie uitgewerk.[10] Die idees van die onvermydelike vooruitgang van die menslike rede en die wetenskappe staan sentraal in hulle werk. Die empiriese werklikheid word as die enigste basis vir alle wetenskaplike wette en teorieë onderskryf. Comte benadruk egter die wedersydse verhouding tussen teorie en empiriese werklikheid, dit wil sê sinvolle waarneming vind nie sonder voorafgaande teoretisering plaas nie;[11] die teorieë moet uiteindelik aan die empiriese werklikheid getoets word alvorens dit as wetenskaplike kennis kan kwalifiseer. Ook die eenheid van die wetenskappe vorm deel van Comte se filosofie en die uiteindelike ideaal van geesteswetenskaplike navorsing is die rekonstruksie van die samelewing.[12]

Die doel van wetenskapsbeoefening is volgens Comte om die samelewing op rasionele en wetenskaplike gronde te vestig. Die metode om dit te realiseer, is om dieselfde metode en metodologie in die geesteswetenskappe as in die natuurwetenskappe te gebruik en dit impliseer dat alle navorsing met waarneembare empiriese feite begin en eindig.

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6 *Novum organum* I 127.

7 Bacon skryf *Novum Atlantis* in 1624 en dit word na sy dood in 1627 gepubliseer. Hy beskryf die eiland Bensalem waar Solomon-huis gevestig was en die visie van die latere Royal Society sou beliggaam.

8 Vgl *Leviathan, or the matter, form, and power of a commonwealth, ecclesiastical and civil* (1651). Mouton "Die positivisme" in Snyman en Du Plessis (reds) *Wetenskapbeelde in die geesteswetenskappe* (1987) 3.

9 *L'Esquisse d'un tableau historique des progrès de l'esprit humain* (1795). Condorcet het die teorie van vooruitgang deur rede en vryheid op elke gebied van menslike aktiwiteit toegepas.

10 Comte *Cours de philosophie positive* vol 6 (1830–1842); *Discours sur l'ensemble du positivisme* (1848).

11 Comte *Cours* I (geen jaartal) 14: "(si) d'un côté toute théorie positive doit nécessairement être fondée sur de observations, il est également sensible, d'un autre côté, que pour se livrer à l'observation, notre esprit a besoin d'une théorie quelconque". Vgl egter Spiller *A history of the district and supreme courts of Natal* (1986) 109: "The structure of this book has been determined by my conviction that one must allow the facts to suggest their own significance and not try to shape historical material according to predetermined convictions."

12 Mouton "Positivisme" 9.

Die laat negentiende eeuse positivis Durkheim het as eerste empiriese navorser die positivistiese beginsels in werklike geesteswetenskaplike navorsing geïmplementeer.[13] Die Weense Kring publiseer in 1929 hul manifes "Wissenschaftliche Weltauffassung: Der Wiener Kreis", en ontwikkel die logiese positivisme (later bekend as die logiese empirisme) wat bepaalde ideale van die positivisme probeer moontlik maak en bepaalde dilemmas oplos.[14] Dit versprei na die Engelssprekende wêreld en bly tot die sestigerjare die aanvaarde Anglo-Saksiese wetenskapsfilosofie.

Die positivistiese wêreld-, mens- en samelewingsbeskouing is die geloof in vooruitgang deur middel van die menslike rede. Dit sal die mens bevry van metafisiese slawerny en die bande van onkunde, vooroordeel en onderdrukking losmaak. Die mondige mens sal deur middel van die wetenskap 'n beter samelewing met vrede, harmonie en orde vestig.

Uiteraard was daar voortdurend kritiek op die positivisme.[15] Ek wil slegs twee van die belangrikste kritici, Karl Popper en Thomas Kuhn, kortliks bespreek aangesien hulle van die bekendste filosowe van die twintigste eeu is.

KARL POPPER

Popper het nie slegs bekendheid as wetenskapfilosoof[16] verwerf nie, maar ook as kampvegter van die "open society",[17] met ander woorde as gevolg van sy mens- en samelewingsbeskouing. Hy beliggaam gevolglik die wedersydse verhouding tussen lewens- en wetenskapsfilosofie en verdien daarom ons aandag.

Popper se filosofieë is gebaseer op die postulaat van rasionaliteit.[18] Die mens is 'n sosiale wese en rasionaliteit is die band wat alle mense wêreldwyd aan mekaar bind.[19] Sy wêreldvisie is evolusionêr en die evolusieproses is 'n lang reeks eksperimente, van leer deur "trial and error".[20] Popper se wetenskapsfilosofie van kritiese rasionalisme is terselfdertyd die instrument waarmee die sosiale en politieke werklikheid verstaan en geëvalueer word.

DIE FILOSOFIE VAN DIE "OPEN SOCIETY"

"Open society" of goeie samelewing staan teenoor die "closed society" van die totalitarisme. Die kenmerk van laasgenoemde samelewing is dat daar slegs een enkele en absolute doel vir die burgers voorgehou word. Op grond van die regerende groep se besondere vermoëns om die samelewing se spesiale roeping te

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13 *Der Selbstmord* (1897).

14 Fisikalisme, die ideaal van 'n eenheidswetenskap; die reduksie van terme en begrippe moet 'n basiese wetenskapstaal daarstel; logiese analise moet die wetenskap van spekulasie en metafisiese reste suiwer; slegs stellings wat verifieerbaar is, is wetenskaplike stellings (Mouton "Positivisme" 12 ev).

15 *Idem* 24.

16 Hy publiseer in 1934 sy *Logik der Forschung*, waarvan die Engelse vertaling *Logic of scientific discovery* in 1959 verskyn. *Conjectures and refutations* (1963) en *Objective knowledge: an evolutionary approach* (1972) vul eg werk aan.

17 *The open society and its enemies* wat in 1945 en *The poverty of historicism* wat in 1957 verskyn.

18 *Open society* II (1974) 231 ev.

19 Faure en Venter "Karl Popper se kritiese rasionalisme" in *Wetenskapbeelde in die geesteswetenskappe* 37.

20 *Open society* II 222.

realiseer, word absolute ondersteuning vir die regeerders vereis. Die "closed society" vind sy rasionaal in die filosofie van die historisme,[21] wat daarop aanspraak maak dat daar spesifieke historiese wette of wetmatighede is wat deur die mens ontdek kan word. Kennis van daardie wette stel die historis in staat om die toekoms te voorspel en gevolglik die politiek te bepaal asook die politieke programme wat hy weet suksesvol sal wees.[22] Implementering van hierdie programme noem Popper utopiese "social engineering". Hierdie kombinasie van historisme en utopisme is volgens Popper gebaseer op wanopvattings met betrekking tot die menslike rede. Die leerstellings van historisme en utopisme is dogmaties en bring rigiede en onbevraagtekenbare strukture teweeg. Die hierargiese "closed society" ken aan die individu slegs 'n spesifieke rol en plek toe. Dit verleen egter 'n geborgenheid en verminder die druk op die individu.[23]

In die "open society" moet owerheidsdoelwitte egter voortdurend aan kritiek onderwerp word. Aangesien daar nooit finale konsensus bereik sal word oor een enkele en absolute doelwit nie, sal die owerheid slegs selektiewe programme implementeer om die geldende doelwitte van 'n gegewe tydstip op 'n voorlopige basis te realiseer: "piecemeal social engineering".[24] Aangesien die regering noodwendig nie aan alle verwagtings van alle burgers kan voldoen nie, moet hulle vervang kan word wanneer 'n betekenisvolle gedeelte van die burgers dit verlang. Die demokrasie waarin partye en groepe deur middel van gereelde verkiesings en gewaarborgde regte verseker dat die meerderheid die rigting bepaal waarin die samelewing beweeg, is volgens Popper die metode om 'n "open society" te verwerklik. Popper se vraag is nie "wie gaan die regeerders wees?" nie, maar "hoe gaan ons die regeerders kontroleer?". "Piecemeal social engineering" se doel is om teenstrydighede uit te skakel en sosiale en politieke probleme op te los. Alhoewel dit owerheidsinmenging meebring wat die vryheid van die individu beperk,[25] beskerm dit terselfdertyd die vryheid van almal deurdat dit die regeerders kontroleer.

In die "open society" bestaan rasionele bespreking oor idees en instellings en 'n bereidwilligheid om veranderings te bewerkstellig. Daar bestaan die moontlikheid van sosiale mobiliteit en mededinging volgens gelyke spelreëls. Die "open society" verteenwoordig die morele waardes van die Westerse beskawing: respek vir die individu, vryheid, gelykheid, rasionaliteit, maar vra as prys onsekerheid en afwesigheid van geborgenheid.[26]

Popper sien vooruitgang nie as 'n natuurlike wet of wetmatigheid nie, maar as 'n moontlikheid wat die beste gerealiseer kan word deur 'n geloof in die "open society" en die menslike rede. Aangesien dit onmoontlik is om geluk te bepaal, bepleit Popper 'n vermindering van ongeluk.[27]

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21 *The poverty of historicism.*

22 *Open society* I (1977) 7–10.

23 Lessnoff "The political philosophy of Karl Popper" 1980 *British Journal of Political Science* 117.

24 *Open society* II 222; O'Hear *Karl Popper* (1980) 154 ev.

25 Dit mag egter slegs aangewend word om die swakkeres teen die sterkeres te beskerm (Faure en Venter 45).

26 *Idem* 44.

27 *Idem* 45.

KRITIESE RASIONALISME

Popper se wetenskapsfilosofie, die kritiese rasionalisme, is voorskriftelik van aard. Dit betref veral hoe wetenskaplikes wetenskaplike kennis behoort voort te bring, met ander woorde die korrekte aanwending van metodes, en konsentreer op die metodes waarvolgens die betroubaarheid en geldigheid van die kennis getoets moet word. Die toename van wetenskaplike kennis bestaan volgens hom in hoofsaak uit die aanpassing van reeds bestaande kennis, waarin foute ontdek en uitgeskakel word. Dit beteken dat die wetenskaplike op geen gesaghebbende kennisbronne kan of mag staatmaak nie, maar dat alle kennisbronne oop is vir kritiese ondersoek. Kritiese rasionalisme is 'n keuse vir die menslike rede, vrye ondersoek, verdraagsaamheid en Sokratiese beskeidenheid, wat 'n kritiese ingesteldheid tot selfondersoek impliseer.[28]

Feilbaarheid en weerlegbaarheid is volgens Popper die kriterium om tussen wetenskap en nie-wetenskap te onderskei.[29] Wetenskaplikheid berus op die weerlegbaarheid, toetsbaarheid of feilbaarheid van stellings, hipoteses en teorieë. Wetenskap bestaan dus daaruit dat die wetenskaplike al sy kennis as voorlopige vermoedens beskou wat aan streng toetse onderwerp moet word. 'n Teorie of hipotese word allereers geformuleer en dien as voorlopige vermoedens. Dit word vervolgens getoets: eerstens die interne konsekwensie, vervolgens die logiese vorm, derdens aan soortgelyke teorieë en ten slotte deur empiriese toepassing.[30] Indien dit die toetse weerstaan het, word dit as wetenskaplike kennis aanvaar maar hierdie aanvaarding is altyd voorlopig en voorwaardelik. Dit kan te eniger tyd deur nuwe toetse weerlê word of deur 'n nuwe teorie met 'n groter waarheidgetrouheid vervang word.[31] Rasionele kritiek elimineer foute en teenstrydighede, met ander woorde vals teorieë. Die kritiese rasionalis laat die teorieë sterf, in teenstelling met die dogmatikus wat irrasioneel aan sy teorieë bly vashou en saam met hulle omkom. In Popper se wetenskapsfilosofie is alle wetenskaplike kennis feilbaar; daar bestaan nie seker en vasstaande waarhede, teorieë en hipoteses nie; alles is in beginsel aan falsifikasie onderworpe.[32]

Een van Popper se mees basiese uitgangspunte is dat alle persepsies in ooreenstemming met teorieë gestruktureer word. Alle waarnemings word deur teoretisering voorafgegaan en niks word bloot waargeneem nie.[33] Daar is in hierdie wetenskapsfilosofie geen verskil tussen die natuur- en die geesteswetenskappe nie.[34] Die logiese struktuur van die wetenskap verander nie met die studieterrein nie. Die objektiwiteit van die geesteswetenskappe word in die aanvaarding van die kritiese rasionalisme gevind. Objektiewe wetenskapsbeoefening kan nie van die objektiwiteit van die navorser afhang nie. Die idee dat waardeoordele, partydigheid en subjektiwiteit van 'n wetenskaplike weggeneem kan word, is volgens Popper absurd. Dit is deel van menswees en om dit weg te neem sal die navorser se menslikheid ontneem. Objektiwiteit is volgens Popper geleë in die navolg van sy voorskrifte van wetenskapsbeoefening, in wedersydse kritiek, kritiese

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28 *Open society* II 227.
29 *Logic* (1959) 40 ev.
30 *Idem* 32 ev.
31 *Idem* 33.
32 Faure en Venter 35.
33 *Logic* 94 ev 106 ev; *Objective knowledge* 71 ev; O'Hear 68–89.
34 *Open society* II 222.

werkverdeling, rasionele ondersoek en kompeterende teoriekonstruksie en toetsing. Dit kan slegs sukses bereik binne 'n samelewing wat kritiek teen heersende dogmas gedoog.[35]

THOMAS KUHN

In teenstelling met Popper se wetenskapsfilosofie wat voorskriftelik van aard is, is Kuhn se bydrae beskrywend. Kuhn, as historikus van die natuurwetenskappe, bestudeer die geskiedenis van die wetenskap en publiseer in 1962 *The structure of scientific revolutions* waarin hy verskeie van die positivistiese standpunte aanval. Sy kritiek is veral gerig teen die siening van wetenskapsgroei deur akkumulasie asook die standpunt dat die wetenskapsproses 'n objektiewe rasionele proses is.

Volgens Kuhn toon die geskiedenis van die wetenskap (hy verwys na die natuurwetenskappe) dat bepaalde teorieë as oorsprong van bepaalde wetenskappe gesien kan word.[36] Daardie teorieë blyk in staat te wees om probleme op te los en word gevolglik deur die wetenskaplike gemeenskap as basis vir navorsing aanvaar. Die wetenskapstradisie wat aldus ontstaan, noem Kuhn 'n paradigma. Dit gee die betrokke groep wetenskaplikes leidrade oor wat hulle moet navors, hoe hulle moet navors en water oplossings aanvaarbaar is. Die bande wat die groep wetenskaplikes bind, is hulle aanvaarding van die betrokke teorie, die metodologie, metodes en tegnieke asook bepaalde aannames en veronderstellings.[37]

Desnietemin leer die geskiedenis dat in elke wetenskap belangrike nuwe ontdekkings gemaak is wat die wetenskap verander het juis omdat die beroemde wetenskaplikes die aanvaarde wetenskaplike beginsels van hul tyd verkrag het. Hierdie radikale vernuwing noem Kuhn wetenskaplike rewolusies. Die oorsprong hiervan is geleë in die bewuswording van teenstrydighede. Dit lei meestal tot aanpassing van die paradigma, maar wanneer daar onoplosbare empiriese en teoretiese probleme ontstaan, lei dit op die lang duur tot die ontwikkeling van 'n alternatiewe paradigma en omverwerping van die bestaande. Die nuwe paradigma het sy eie teorie, metodes en aannames en die aanvaarding daarvan is 'n wetenskaplike rewolusie. Kuhn benadruk die subjektiewe element van paradigmakeuse en vergelyk dit met 'n geloofskeuse.[38] Die paradigmakeuse bepaal die wetenskaplike se navorsingsraamwerk. Die implikasie is dat nie slegs die idee van wetenskaplike vooruitgang deur akkumulasie onhoudbaar word nie, maar selfs die hele idee van wetenskaplike waarheid.

In die tweede uitgawe van die werk (1970) bring Kuhn as reaksie op die kritiek sekere verfynings aan,[39] maar die sentrale punte van sy filosofie bly in stand, naamlik dat die keuse vir 'n bepaalde paradigma 'n subjektiewe keuse is en dat 'n paradigma die strukture en waardes behels wat 'n groep wetenskaplikes in 'n bepaalde dissipline regeer.[40]

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35 Faure en Venter 40.
36 Mouton "Thomas S Kuhn" in *Wetenskapbeelde in die geesteswetenskappe* 59.
37 Kuhn *The structure of scientific revolutions* (1970) 40 ev.
38 *Idem* 157 ev.
39 Mouton "Kuhn" 66 ev; "Postcript-1969" in *Structure* 174–210.
40 "Objectivity, value judgment and theory choice" in *The essential tension* (1977) 320–339.

DIE FRANKFURTSE NEO-MARXISME; KRITIESE TEORIE

Die Frankfurtse Skool begin in 1923 met die stigting van die Instituut vir Sosiale Navorsing aan die Universiteit van Frankfurt. Die doelstelling van die instituut was om sosiale vraagstukke te bestudeer in die gees van Marx maar nie op die wyse van die ortodokse Marxisme nie. In 1933 gaan die instituut in ballingskap en vestig hom uiteindelik in Los Angeles. Na die Tweede Wêreldoorlog keer sommige lede na Frankfurt terug terwyl ander in Amerika bly. Die Frankfurtse Skool verwerf veral bekendheid met die studente-opstande van 1968 en name soos Marcuse, Adorno, Horkheimer en Habermas het ook buite akademiese kringe bekendheid verwerf.[41]

FILOSOFIE MET BETREKKING TOT MENS EN SAMELEWING

Die neo-Marxiste bring Marx op datum. Marx se voorspelling met betrekking tot die disintegrasie van die kapitalistiese samelewing het nie gerealiseer nie as gevolg van die betrekking van die werker by die instandhouding van die produksieproses deur hom in die winste te laat deel. Die sosiale antagonismes (klassestryd) wortel volgens die neo-Marxiste tans in magsverhoudings.[42] Die nuwe konflik in die samelewing bestaan tussen die besondere belang van die kapitaalkragtige monopolieë wat veralgemeen word en waarmee die samelewing moet identifiseer, en die belang van die individu. Die gesentraliseerde maghebber beheers van verbruiksprodukte tot gedagtes. Die wêreld word vir die mens as die enigste moontlike wêreld voorgehou. Die kultuurindustrie asook reklame met hul dwang tot nabootsing, aanvaarding en konsumpsie stomp die mens se denkvermoë af. Die positivisme met sy aanbidding van die "feite" is die denkhouding van hierdie samelewing.[43]

Die neo-Marxiste glo in Marx se elfde Feuerbachstelling wat inhou dat die filosowe tot dusver die wêreld slegs verskillend geïnterpreteer het; die belangrike is egter om die wêreld te verander.[44] Hulle wil nietemin nie die wêreld verander deur na identifikasie van die probleme met 'n bloudruk vir die toekoms vorendag te kom nie, aangesien dit die kwaad van die bestaande samelewing, naamlik die mag van mense oor mense, sal herhaal. Geïnspireer deur Georg Lukacs se *Geschichte und Klassenbewusstsein* (1923) wil die Frankfurtse Skool die probleme van die samelewing identifiseer en 'n bewussynsverandering teweegbring, 'n verandering van onder en van binne en nie van bo nie.[45] Hierdie siening van die selfbepaling van die mens en die implisiete selfbewuste betrokkenheid by die historiese proses, verwerp die beskouing dat daar patrone in die geskiedenis is wat 'n voorspelbare reëlmatigheid daaraan verleen. Laasgenoemde opvatting aanvaar onkrities die selfstandigheid van die feite ten koste van die menslike betrokkenheid by die feite.[46]

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41 Snyman "Die wetenskapsopvatting van die Frankfurtse Skool" in *Wetenskapbeelde in die Geesteswetenskappe* 155.

42 *Idem* 165 ev.

43 *Idem* 166.

44 Marx "Theses on Feuerbach" in *Karl Marx and Friedrich Engels selected works* II (1950) 367: "The philosophers have only interpreted the world, in various ways; the point, however, is to change it."

45 Snyman 166.

46 Horkheimer *Critical theory* (1972) 188–243.

WETENSKAPSFILOSOFIE VAN DIE KRITIESE TEORIE

Die doel van die (geestes)-wetenskappe is volgens die Frankfurtse Skool terapeuties, naamlik om die positiewe wetenskap te genees van sy sogenaamde objektiwiteit en rasionaliteit. Hulle beklemtoon dat wetenskap self ideologie kan word en die gegewe feite regverdig. Positivistiese wetenskaplikes moet hulself die vraag stel of hulle nie 'n besondere belang ten koste van die algemene belang bevorder nie.

Die grootskaalse industriële navorsing wat deur owerhede geïnisieer is, toon 'n duidelike verband tussen wetenskap en politiek, en die beklemtoning van die streef na verbetering maskeer die bevordering van politieke kontrole. Die rasionaliteit van die positivisme is doel-rasionaliteit, die rasionaliteit van tegnies-reguleerbare handelinge; maatskaplike kwessies word gereduseer tot vraagstukke van tegniese organisasie.[47] Die wetenskap wat die mens moet bevry, word gebruik om hom in bedwang te hou; wetenskap wat die wêreld onttower het, betower nou die mens.[48] Toepassing van die natuurwetenskapsmodel op die samelewing beteken dat mense verdinglik, voorspelbaar en beheerbaar word sodra die brute feite sosiale wetmatighede soos natuurwetmatighede opgelewer het; dit verhoed verandering wat die wêreld mensliker kan maak.

Die Kritiese Teorie bepleit die betekenis van waardes in wetenskapsbeoefening. Volgens die positivistiese feit/waarde-onderskeiding sou feite 'n onafhanklike bestaan in die werklikheid hê, terwyl waardes van menslike besluitneming afhanklik sou wees. Feite en waardes is egter vir hulle aanvaarding en bestaan van mekaar afhanklik. Wetenskaplike feite word bepaal deur die waardes wat die wetenskap hanteer om feite van skimme te onderskei, terwyl kritiese bespreking van waardes altyd 'n beroep op die feite insluit.[49] Gevolglik konsentreer die Kritiese Teorie nie op die goeie nie; die slegte is die onderwerp van studie. Sy element is die vryheid, sy tema die onderdrukking.[50]

Die Kritiese Teorie is geïnteresseerd in 'n redeliker organisasie van die samelewing op grond van die ervaring van die nood van die huidige toestand. 'n Kritiese teorie kom tot stand as gevolg van 'n negatiewe ervaring. Die inhoud van die ervaring is pyn; die pyn en lyding beteken dat die samelewing nie is wat hy behoort te wees nie. Om die spanning te verklaar wat die pyn en lyding veroorsaak, moet teorieë ontwerp word.[51] Hiervoor het die Frankfurtse Skool 'n organisatoriese navorsingsproses wat die mure tussen die vakwetenskappe onderling en tussen vakwetenskappe en filosofie afbreek. Filosofiese spekulasie en wetenskaplike navorsing bepaal mekaar wederkerig. 'n Voldoende rekonstruksie van die sosiale werklikheid kan slegs verkry word as soveel moontlik interafhanklike faktore met mekaar in verband gebring kan word, en nie deur bevindings in een dissipline as grondliggend te beskou en daarvandaan te veralgemeen nie. Op grond van vermoedens wat gevorm word na aanleiding van bestaande vakwetenskaplike navorsing, word 'n algemene filosofiese teorie oor die samelewing geformuleer.

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47 Snyman 168 ev.

48 Horkheimer en Adorno *Dialectic of enlightenment* (1992) 3–43.

49 Habermas "Rationalism divided in two" in Giddens (red) *Positivism and sociology* (1974) 213 ev.

50 Horkheimer en Adorno *Dialektik der Aufklärung. Philosophische Fragmente* (1969) 258 aangehaal deur Snyman 168.

51 Snyman 169 ev.

Hierdie teorie kry substansie deur te kontroleer in hoeverre verdere vakwetenskaplike navorsing reeds bestaande kennis bevestig en/of kritiseer.[52]

Die Kritiese Teorie beland egter in 'n doodloopstraat deur sy impuls tot verandering tot bewussynsverandering te beperk. Dit bied geen praktiese hulp aan die lydende individu nie en beland in esoteriese meditasie en elitisme.[53] Gevolglik stuur Habermas die Kritiese Teorie in 'n nuwe rigting. Habermas benadruk die emansipasie belang;[54] die wyses waarop kennis oor die samelewing gevorm word, moet duideliker word sodat die mens sy eie situasie kan verstaan en op grond van die begrip self die omstandighede kan begin verander. In sy *Erkenntnis und Interesse* (1968)[55] probeer hy om die belange wat onderliggend is aan die strewe na kennis bloot te lê en wys daarop dat kennis nooit 'n suiwer weerspieëling van die werklikheid is nie. Die sogenaamd objektiewe wetenskap het nooit die belange erken wat hom lei nie, met die resultaat dat die mens toelaat dat hy deur die sogenaamd objektiewe kennis bepaal word. Die mens is onbewus van die feit dat ander belange en ander doeleindes ander kennis kan produseer, met ander woorde sogenaamd objektiewe wetenskaplike kennis wat as waarheid aangebied word, is in der waarheid konstruksies wat op 'n besondere belang gebaseer is.[56] Habermas probeer om die belange bloot te lê (naamlik voorspelling en kontrole) en daardeur aan te toon dat die sogenaamde feite deur menslike ingrype verander kan word; dat die mens die sosiale lewensproses selfbewustelik kan beheer.[57] Sy sosiale wetenskap is afgestem op die emansipasie belang en moet ruimte skep vir die mens se aktiewe bemoeiing met die geskiedenis.[58] Kennis ingevolge hierdie belang word erken as 'n produk van menslike doelstellings wat in die ope gebring en aan debat onderwerp word. Hierdie kennis is inderdaad waardegelaai deurdat dit die waarde van 'n goeie en ware lewe vir die mensdom bevorder.[59]

'n Kritiese Teorie se taak is om aan die lede van die samelewing 'n interpretasie te bied van hulle eie vermoëns ten opsigte van die historiese proses. Die bekragtiging van die teorie vind plaas deur die teweegbring van selfrefleksie wat tot die emansipasie van die lede van die samelewing lei. Sy geldigheid hang daarvan af of die morele ideaal van onbelemmerde debat en diskussie bereik word. Habermas beweer egter dat die huidige samelewing vanweë die verwronge kommunikasie nie geskik is om oor die geldigheid van sy teorie te beslis nie.[60]

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52 *Idem* 171 ev.
53 *Idem* 173 ev.
54 Romm "Habermas se Wetenskapsteorie" in *Wetenskapbeelde in die geesteswetenskappe* 190 ev.
55 *Knowledge and human interest* (1972).
56 Romm 180.
57 *Idem* 179 ev.
58 Herstrukturering van die sosiale struktuur deur te ontsnap aan die wetenskaplike wette van die sosiale lewe wat die positivistiese sosiale wetenskappe "ontdek" het. Habermas "Analytische Wissenschaftstheorie und Dialektik" in Adorno ea (reds) *Der Positivismusstreit in der deutschen Soziologie* (1975) 155 ev.
59 *Knowledge* 317.
60 *Theorie und Praxis* (1974); Romm 192.

WETENSKAPSBEELDE IN DIE REGSWETENSKAP

Natuurregsfilosofie

Die oudste filosofie (meer as 2500 jaar oud) in die regswetenskap is die natuurregsfilosofie.[61] Dit bestryk 'n wye verskeidenheid denkstrominge maar daar is sekere gemeenskaplike grondtrekke.

Dit is gebaseer op 'n statiese wêreldbeskouing wat daarvan uitgaan dat die wêreld en alles in en op die wêreld bepaal is en word deur 'n metafisiese entiteit, God, die Goddelike rede, die natuur, die menslike rede.

Die uitvloeisel van hierdie wêreldbeskouing is dat die bestaan van 'n hoëre regsorde (naas die positiewe regsorde) aanvaar word.[62] Hierdie natuurregsorde geld universeel en is kenbaar. Dit beliggaam 'n sisteem van waardes sodat daar geen onderskeid tussen reg en moraal of etiek is nie. Die positiewe regsorde word teenoor die natuurregsorde gestel en moet die waardes van laasgenoemde bereik.[63]

Alhoewel in die negentiende eeu die Historiese Skool en ook regsvergelyking die natuurreg ondermyn het deur aan te toon dat geen reg orals en altyd as reg erken is nie,[64] en die natuurreg as 'n godsdienstige idee bewys het wat die filosofie op 'n rasionele basis probeer fundeer, was en is die regswetenskap deurspek met (onbewuste) natuurregsgedagtes en -opvattings. Selfs juriste wat die natuurreg bestry, aanvaar regsbeginsels en -opvattings as "natuurlik", of kritiseer die positiewe reg met 'n beroep op "geregtigheid". Dit blyk dat ook in die regswetenskap 'n gemeenskaplike geloof in sekere fundamentele waardes noodsaaklik is.[65] In besonder na die Tweede Wêreldoorlog het die natuurreg 'n opbloei beleef.[66] Die groot verskeidenheid opvattings omtrent die natuurreg vertroebel egter die totaalbeeld.

Regspositivisme

Die positivisme het met aansienlike aanpassings[67] die mees algemene denkrigting in die Suid-Afrikaanse regswetenskap en regspraak geword. Dit verskyn in 'n aantal variasies, byvoorbeeld die positivisme van Austin,[68] die "reine Rechtslehre" van Kelsen,[69] die historisme[70] asook die realisme,[71] maar al hierdie variasies huldig

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61 Van Apeldoorn *Inleiding tot de studie van het Nederlandse recht* (1972) 373–396; Van Dyk ea *Van Apeldoorn's Inleiding tot de studie van het Nederlandse recht* (1985) 484 ev; Kunst *Historische ontwikkeling van het recht* I (1967) 88 ev.

62 Cicero *De republica* III 22 (Lactantius *Instit* VI 8); De Groot *Inleiding* I 2 5, I 2 9; *De iure belli ac pacis* Prolog 6, 11, 12; I I 10 1; I I 10 5; I I 12 1.

63 Du Plessis "Navorsingsmetodes en -tendense" in Venter ea (reds) *Regsnavorsing* (1990) 62.

64 Van Apeldoorn 385 ev 388.

65 *Idem* 389 ev.

66 *Idem* 395.

67 Vgl Du Plessis 63 88; Wieacker *Privatrechtsgeschichte der Neuzeit* (1967) 432 452 ev 563 ev.

68 *The province of jurisprudence determined* (1832); *Lectures on jurisprudence* (1863). Austin bestudeer slegs die juridiese gegewens wat sintuiglik waarneembaar en kontroleerbaar is; elimineer spekulasie en abstraheer dmv induksie wat sintuiglik waargeneem is. Dit beteken dat die studie van die reg slegs op bevele van die wetgewer toegespits is en dmv induksie by 'n algemeen-wetmatige sisteem uitkom (Du Plessis 63 ev; Van Dyk 437).

69 Wat alle buite-juridiese groothede elimineer en sodoende die regswetenskap rein hou omdat buite-juridiese faktore soos moraal en etiek buite beskouing bly (Van Apeldoorn 363 ev; Van Dyk 437 ev 484 ev; Du Plessis 64 ev).

dieselfde basiese beginsels: Die reg moet hom by die harde feite hou; die positivistiese feit/waarde-onderskeiding elimineer waardevrae uit die wetenskap. Dit bring mee dat die regswetenskaplikes bly vashou aan die valse opvatting dat hulle navorsingsresultate 'n waardevrye weerspieëling van die werklikheid is terwyl hulle die wyse waarop hulle help om die *status quo* voort te sit, verberg.

Hierdie sogenaamde neutraliteit of objektiwiteit van die juris verlos hom van die verpligting om ideologiese, filosofiese, sosiale, ekonomiese, politieke en ander faktore in sy werk en denke te betrek, terwyl hierdie faktore almal integrale bestanddele is van die werklikheid waarmee die reg hom besig hou. Dit beteken dat die regswerklikheid van die positiviste slegs betrekking het op die werklikheid soos dit deur hulleself gekonstrueer word.

Die onderskeid wat Wieacker maak tussen "Gesetzespositivismus" en "Wissenschaftliche Positivismus" is relevant.[72] Die "Gesetzespositivismus" is 'n blote doel en magspositivisme wat daarop gebaseer is dat alle reg en geregtigheid in die bevele van die wetgewer setel.[73] Die wetenskaplike positivisme lei regsnorme af uit die algemene regswetenskaplike begrippe en leerstellings; die regskultuur is die bron van reg en geregtigheid. Buite-juridiese faktore soos godsdiens, politiek, filosofie, ekonomie ensovoorts het in hierdie opset geen waarde nie, met ander woorde die reg is 'n outonome sisteem wat in isolasie "suiwer wetenskaplik" bestudeer kan word.

Dit beteken geensins dat die positiviste geen oog vir regverdigheid het nie, maar hulle beheptheid met die "feite" lei tot 'n eensydige visie met betrekking tot die ontstaansbronne van die reg (wetgewerswil of regskultuur); dit is die vertrekpunt van die regswetenskap en hierin word die reg en geregtigheid gevind.[74] Bostaande oorsig van die verskillende wetenskapsfilosofieë toon egter dat ook die regspositivisme nie objektief of neutraal is nie maar lewensbeskoulik medebepaal is.

"Critical legal studies movement"[75]

Die regsvariant van die Kritiese Teorie[76] beklemtoon uiteraard die ideologiese, politieke en ander waardes wat die regswetenskap bepaal. Ook verwerp die beweging die sogenaamde regswerklikheid en stel dat die regswetenskap nie in afsondering van die sosiale, politieke, ekonomiese en ander werklikhede beoefen kan word nie. Die reg as 'n objektiewe normkompleks hou geen verband met die werklikheid nie. Regskwessies is sosiaal-maatskaplik bepaal en moet sosiaal-maatskaplik beskou word. Die dialektiek tussen reg en samelewing is die sentrale fokuspunt. Die Kritiese Teorie kritiseer die maatskappy en gevolglik die

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vervolg van vorige bladsy

70 Wat die regswetenskap as 'n wetenskap van historiese feite sien, los van jurisdiese of morele waardes (Van Apeldoorn 110–119; Du Plessis 65 ev; Van Dyk 119–128).

71 Wat nie begaan is met wat goed of regverdig is nie, maar slegs belangstel in wat in die konkrete geval gaan gebeur (Van Apeldoorn 19 ev; Du Plessis 67).

72 431–468 558–586.

73 Du Plessis 89.

74 *Idem* 90.

75 Roberto Unger *The critical legal studies movement* (1983); Du Plessis 67 ev 95–98; Kairys "Introduction" in Kairys (red) *The politics of law* (1990) 1–9; Gordon "New developments in legal theory" in *The politics of law* 413–424.

76 As gevolg van die invloed van die teorieë van Derrida en Foucault omtrent dekonstruksie, konsentreer die "Critical Legal Studies" op mikro-analise en hang nie enige "Groot Teorie" aan nie.

regswetenskap en regspraktyk vanuit 'n sosiaal-maatskaplike oogpunt. Unger wil die spanning tussen die reg en die onderliggende belange onthul. Hy gebruik die konflikte binne die regstelsel om die disharmonieë in die stelsel uit te wys. Op daardie wyse hoop hy om die gevoel van noodsaaklikheid in die regswetenskap te ondermyn. Deur aan te toon dat die reg en regswetenskap binne 'n kulturele konteks bestaan ('n konteks waarin die samelewing eerder gekonstrueer as gegewe is), probeer hy om die reg te herskep.[77]

KONKLUSIE

Die verskillende doelstellings van die wetenskap van die onderskeie wetenskapsfilosofieë het een gemeenskaplike kenmerk, naamlik wetenskap word bedryf om die kwaliteit van die menslike lewe te verbeter.

Tradisionele wetenskap het egter die mens uit die wetenskapsproses verdring. Popper, Kuhn en die Kritiese Teorie bring die mens weer in die wetenskapsproses terug. Dit impliseer dat aannames en waardeoordele, die sogenaamde subjektiwiteit, deel van die wetenskap is. Bowendien werk die tradisionele wetenskap met 'n verskraalde eendimensionele werklikheid.

Wat die sogenaamde metode-skisofrenie betref, kan met die volgende opmerking volstaan word. Min wetenskaplikes het 'n sistematies uitgewerkte lewensfilosofie. Die resultaat is dat hul wetenskapsfilosofie (indien enige) bestaan uit bestanddele van die aan hulle bekende wetenskapsfilosofieë en geen sistematies konsekwente geheel vorm nie. Die onbewustheid van die moontlike teenstrydighede kan metodiese of metodologiese probleme oplewer maar dit is nie noodwendig die geval nie.

'n Passende afsluiting kan gevind word by Feyerabend[78] wat van mening is dat wetenskaplike kennis toeneem as gevolg van die kreatiewe wisselwerking van hardnekkig gehandhaafde private oortuigings. Alle wetenskaplikes is vry om te glo wat hulle wil, om enige standpunt in te neem. Vir hom is daar geen verskil tussen kreatiewe kuns en wetenskap nie: "anything goes".

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77 Visser "The legal historian as subversive or: Killing the capitoline geese" in Visser (red) *Essays on the history of law* (1989) 20.

78 *Against method. Outline of an anarchistic theory of knowledge* (1975).

The conclusion of life insurance contracts in Roman-Dutch law*

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OPSOMMING

Die sluit van lewensversekeringskontrakte in die Romeins-Hollandse reg

In die Suid-Afrikaanse reg word die stelling vry algemeen gemaak dat lewensversekeringskontrakte nie in die Romeins-Hollandse reg erken is nie. In hierdie bydrae word die beginsels van die Romeins-Hollandse lewensversekeringsreg, soos vervat in versekeringswetgewing, die werke van die ou skrywers, beslissings en regsopinies ten opsigte van geskille oor versekeringskontrakte en polisse wat uit hierdie tydperk dateer, ondersoek. Daar word tot die gevolgtrekking gekom dat alhoewel die vroeëre versekeringswetgewing en skrywers skynbaar die sluit van lewensversekeringskontrakte verbied het, die verbod eintlik gerig was teen die sluit van weddenskapskontrakte op lewens in die vorm van versekeringskontrakte. In latere wetgewing is die sogenaamde verbod teen die sluit van lewensversekeringskontrakte nie herhaal nie en skrywers maak dit ook duidelik dat die sluit van lewensversekeringskontrakte wel geoorloof was. Die sluit van weddenskapsooreenkomste in die vorm van versekeringskontrakte was egter steeds verbied. Polisse wat uit hierdie tydperk dateer, regsopinies en hofbeslissings ten opsigte van geskille oor lewensversekeringskontrakte bevestig dan ook dat in die Romeins-Hollandse regspraktyk lewensversekeringskontrakte wel erken is.

1 INTRODUCTION

Roman-Dutch law is the common law of South Africa.[1] In the discussion which follows, the connotation of Roman-Dutch law is used in the context of a wider West-European *ius commune*.[2] This approach has been approved, at least as far as

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* This contribution is based on the author's LLD thesis, *The origins and nature of the life insurance contract in South African law with specific reference to the requirement of an insurable interest* (Unisa 1993).

1 De Vos *Regsgeskiedenis* (1992) 3; De Wet *Die ou skrywers in perspektief* (1988) 1 *et seq*; Pauw "Die Romeins-Hollandse reg in oënskou" 1980 *TSAR* 32; Van Zyl *Geskiedenis van die Romeins-Hollandse reg* (1983) 41 *et seq*; Visser "Daedalus in the supreme court – the common law today" 1986 *THRHR* 128; Zimmermann "Synthesis in South African private law: civil law, common law and usus hodiernus pandectarum" 1986 *SALJ* 259.

2 See De Vos 3 272; Pauw 1980 *TSAR* 32 *et seq*; Van Niekerk "Sources of insurance law" in Feenstra and Zimmermann *Das römisch-holländische Recht* vol 7 of *Schriften zur Europäischen Rechts- und Verfassungsgeschichte* (1992) (Van Niekerk "Insurance law") 310; Visser 1986 *THRHR* 135; Zimmermann 1986 *SALJ* 259 *et seq*; contra De Wet 79. See also De Roover "Early examples of marine insurance" 1945 *Journal of Economic History* (*JEH*) 198 who states that "there was a considerable degree of uniformity in the legal interpretation of the standard provisions of the insurance contract". For example, a court in Bruges would consider the mercantile customs in Italy before coming to a decision (*idem* 199).

insurance law is concerned, by the Appellate Division in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*.[3]

In the context of life insurance the fact that Roman-Dutch law is the common law may present a problem, for it is commonly declared that "Roman-Dutch law apparently did not even recognise life assurance".[4] This article will investigate the position of the life insurance contract in Roman-Dutch law and determine whether or not our common law is in fact irrelevant to a study of the life insurance contract in modern South African law.

The principles of Roman-Dutch insurance law are found in insurance legislation, treatises dealing with insurance law, decisions and opinions on insurance disputes, and extant policies.[5] In this regard it may be noted that a divergence often existed between the law as reflected in legislation and in the works of some authors, and the law in practice.[6] This also seems to have been the position with regard to life insurance.[7] In the discussion which follows, each of these sources will be examined to determine the principles and the continuing relevance of Roman-Dutch law relating to life insurance contracts. However, before these sources are examined to determine the relevance of Roman-Dutch law for the conclusion of life insurance contracts, the effect of wagering on lives and the role it played in the development of life insurance must be analysed briefly.[8]

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3 1985 1 SA 419 (A) 427F–I 429D–H. See also Van Niekerk *The decline, revival and future of the Roman-Dutch law of insurance in South Africa* (1986) (Van Niekerk *Decline*) 73–74. *Gordon and Getz on the South African law of insurance* (1993) by Davis are of the opinion (5) that the judgment in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* is "substantial authority for the view that our courts have begun to accept a *ius commune* orientated approach to our law of insurance in which English law will remain an integral part. Whether this recourse to a broader-based common law will have a tangible effect upon our law of insurance remains extremely doubtful".

4 Reinecke and Van der Merwe *General principles of insurance* (1989) par 39 fn 4. See also 12 *LAWSA* par 268 where it is stated that "[i]n fact life insurance was apparently not recognised as a lawful agreement in Roman-Dutch law". For a similar statement, see Gordon and Getz 92 fn 2.

5 *Mutual and Federal Insurance Co Ltd v Oudsthoorn Municipality supra* 4261I–430D. See Van Niekerk *Decline* 73 *et seq* where this aspect of the judgment is discussed. See also Van Niekerk *An introduction to and some perspectives on the sources and development of Roman-Dutch insurance law with appendices containing the more important Roman-Dutch insurance legislation* (1988) (Van Niekerk *Sources*) 1 *et seq* – also published without appendices in Visser (ed) *Essays on the history of law* (1989) 105–158 – for a discussion of the historical, political and socio-economic factors which influenced the development of Roman-Dutch insurance law.

6 The prohibition on insurance of expected profit, the prohibition of full-value insurance and the prohibition of insurance of wages are some examples in this regard (see Van Niekerk "Insurance Law" 310; Van Niekerk *Sources* 74 *et seq*).

7 Van Niekerk *Sources* 77 fn 196.

8 For other factors that influenced the development of life insurance, such as marine insurance and the development of the actuarial science, see Havenga 23 *et seq*.

2 THE EFFECT OF WAGERING ON LIVES ON THE DEVELOPMENT OF LIFE INSURANCE

Wagering contracts on lives[9] were quite common at the time when life insurance on a commercial basis was developing.[10] Wagers were concluded on the sex of children at birth and on the life or death within a certain time of monarchs, popes or other public persons.[11] Wagers on lives were furthermore concluded in the guise of insurance contracts on lives.[12] These wagering contracts are referred to as wagers on lives in the form of insurance on lives or life insurance by way of wagering. The important point that must be stressed is that, outwardly, wagers on lives took the form of insurance contracts on lives and attempts were made from early on to prohibit these contracts.[13] But, since wagers on lives in the form of insurance on lives or insurance by way of wagering were not distinguished from proper insurance contracts,[14] life insurance in general was (seemingly) prohibited and not only wagers on lives in the form of insurance on lives.[15] The Statutes of Genoa, for example, provided in 1588 that insurances or wagers on the lives of the

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9 See also *idem* 63 where the effect of wagering on lives is discussed in the context of English law.

10 Braun *Geschichte der Lebensversicherung und der Lebensversicherungstechnik* (1962) 55 *et seq*; Seffen *Die Entstehung und Entwicklung der Versicherung im ausgehende Mittelalter und in der beginnende Neuzeit* (unpublished dissertation University of Cologne 1963) 49. Wagering contracts were not limited to wagers on lives. During the period when life insurance was developing, gambling and wagering were rife and wagers were concluded on every conceivable event (see Bezemer "Een weddenschap om een huis" 1892 *Rotterdamsch Jaarboekje* (*RJ*) 221 *et seq*; Brenner and Brenner *Gambling and speculation* (1990) 1 *et seq*; Daston "The domestication of risk: mathematical probability and insurance 1650–1830" in Krüger, Daston and Heidelberger (eds) *The probabilistic revolution. Volume 1: ideas in history* (1987) 244; Fokker *Geschiedenis der lotterijen in der Nederlanden* (1862) 1 *et seq*; Huisman and Koppenol *Daer compt de lotery met trommels en trompetten! Loterijen in de Nederlanden tot 1726* (1991) 7 *et seq*; Merens "Weddingschap-contracten" 1937–1939 *Economisch-Historisch Jaarboek* 190 *et seq*; O'Donnell *History of life insurance in its formative years* (1936) 264 *et seq*; Pieck "Rotterdamse weddenschappen van 1600 tot 1672 in historisch perspektief " 1976 *Rotterdams Jaarboekje* 187 *et seq*; Van der Fluit "Weddenschapen en handelsovereenkomsten met bijzondere voorwaarden in het notarieel archief van Enkhuizen (1597–1630)" 1980 *West-Friesland's Oud en Nieuw Jaarboek* 29 *et seq*. The difference between wagering and gambling contracts is that a wager is a contract in which two parties undertake that, depending upon the determination of an uncertain event, one will win from the other a sum of money or other stake (see 10 *LAWSA* par 425). A gambling contract, on the other hand, denotes a contract in terms of which the competitors, in playing for a stake, promise to transfer the stake according to the result of the game (*idem* 415). It has been said that the essential difference is that in the case of a wager the parties conclude a contract to decide an existing dispute, while in the case of gaming the parties create a dispute (Aquilius "Immorality and illegality in contract" 1942 *SALJ* 123).

11 Braun 59; De Roover 1945 *JEH* 196; Du Saar "Een en ander uit de geschiedenis van de levensverzekering" 1914 *Zonneschijn* 261; Jack *An introduction to the history of life insurance* (1912) 201; O'Donnell 264 *et seq*; Pieck 1976 *RJ* 194; Santerna *Tractatus de assecurationibus et sponsionibus mercatorum* (1552) 2 1, 2 7, 2 16, 2 27, 2 28; Seffen 50; Scaccia *Tractatus de commerciis et cambio* (1619) 1 1 88; Straccha *Sponsionum tractatus* in *De mercatura decisiones et tractatus varii* (1971) 435 438.

12 De Roover 1945 *JEH* 196; Seffen 50.

13 De Roover 1945 *JEH* 197; Seffen 50.

14 See Santerna 2 1–29; Straccha *Sponsionum tractatus* 433.

15 Seffen 51.

pope, kings, cardinals, dukes, sovereigns, bishops or other persons of spiritual or royal nature were prohibited,[16] and in Venice wagering on the pope's life was already forbidden in 1419.[17]

In England prior to 1774, wagering in the form of insurance was rife.[18] The situation was exacerbated by the fact that wagers were legal and enforceable at common law.[19] Wagers on lives in the form of insurance contracts were concluded on the life of public persons; for example, when George II fought in battle at Dottingen, twenty five per cent was paid against his return.[20] Contracts were also concluded on the lives of political offenders, especially those who were incarcerated in the Tower of London.[21] The Life Assurance Act, 1774[22] was passed to curb these practices. The main purpose of the Act of 1774 was to stamp out wagers on lives in the form of insurance on lives. This was accomplished by providing that the insured had to have an interest in the life being insured.[23]

The important point which may be made at this stage is that the generally-held moral view at the time was that the life of a person was not capable of monetary valuation.[24] But in the case of life insurance contracts concluded in the form of marine insurance contracts,[25] it was possible to place a monetary value on the life concerned. For example, the life of a slave could be valued in accordance with the price he or she would fetch on being sold, and the life of a debtor could be valued at the amount of the debt.[26] In contrast, it was not possible to place a monetary value on a life other than a mere arbitrary one where the contract was a wager. For example, in the case of a wager on the life of the pope in the form of an insurance on life on whether the pope would live or die, no acceptable pecuniary measure existed.[27]

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16 See Grosse "Die Anfänge des Lebensversicherungs-Wesen" 1885 (2) *Assekuranz-Jahrbuch* 3 6.

17 Stefani *Insurance in Venice from the origins to the end of the Serenissima* (1958) vol 1 237.

18 See O'Donnell 264 *et seq*, where the scale on which these wagers were concluded is noted.

19 Birds *Modern insurance law* (1993) 33; Evans "The operation of the Life Assurance Act 1774 (UK) in relation to the insurance of buildings in England and Australia" 1983 *Melbourne University LR* 265; Merkin "Gambling by insurance – a study of the Life Assurance Act 1774" 1980 *Anglo-American LR* 333; *Halsbury's Laws of England* vol 25 par 557; Parkington *et al MacGillivray and Parkington on insurance law* (1988) par 14. See eg the decision in *Andrews v Herne* (1660) 1 Lev 33, 83 ER 283 where a wager between two parties on the question whether Charles II would be King of England was held to be valid.

20 O'Donnell 265.

21 *Idem* 268.

22 (14 Geo 3 c 48). See also Havenga 67 *et seq* where this act is discussed in detail.

23 However, it seems that the 1774 Act was not wholly successful in preventing wagering on lives in the form of insurance on lives from being concluded. Gallix provides an example of a contract concluded on 1813-05-21 in which one William Dorrington "insured" the life of Napoleon Bonaparte "in case he shall cease to exist, or be taken Prisoner on or before the 21st day of June 1813": Gallix *Il Ettait Une Fois . . . L'Assurance* (1985) 88. It does not appear from the policy that Dorrington had an interest in Bonaparte's life.

24 Braun 60.

25 See Havenga 23 *et seq*.

26 Seffen 49.

27 This was also because the actuarial science was not fully developed at this stage (see Havenga 28 *et seq*).

After the Reformation, the church also did not view wagers in a favourable light.[28] Since wagering on lives was usually disguised as insurance, this also contributed to the general suspicion in which the insurance of lives was held. Generally, wagering on lives hindered rather than assisted the development of life insurance.[29] Once again, it must be emphasised that it was wagering on lives in the form of insurance on lives, that is, life insurance by way of wagering, that was prohibited and not (proper) insurance contracts on lives. It is submitted that the conclusion of life insurance contracts in Roman-Dutch law can be evaluated only if due consideration is given to the effect that the conclusion of wagering on lives in the form of insurance contracts had on the development of proper life insurance contracts.

3 SOURCES OF ROMAN-DUTCH LAW

3 1 Roman-Dutch insurance legislation

Roman-Dutch insurance legislation relevant to life insurance may conveniently be discussed with reference to the period in which it was passed.[30] The first period is represented by legislation passed during the Spanish occupation of the Low Countries, including the future Republic of the Netherlands.[31] The second period contains municipal legislation which was passed after the formation of the United Provinces of the Netherlands in 1579 and up to the end of the seventeenth century. The third period contains municipal legislation passed during the eighteenth century and up to the process of codification commenced in the earlier part of the nineteenth century.[32]

3 1 1 Legislation during the Spanish period

Several legislative measures dealing with insurance were promulgated during the Spanish period.[33] For present purposes, the first enactment of importance was passed on 31 October 1563.[34] Section 4 of the placcaat of 1563 provided as follows:[35]

> "Ende en sullen van nu voortaen geen asseurantien gedaen mogen werden, 't zy by forme van verseekeringe, weddinge, oft andersints, in eenigerhande manieren, op Schepen, goeden, Koopmanschappen, huyre, vrachtloon, oft andere dingen, niet uytgesondert, die ten tyde vander Asseurantie sullen wesen ghepericlitteert, noch oock tegens die baratterye, dieverye, oft eenich misbruyck vanden Schipper ofte Schiplieden."

In terms of this section, insurance in any form was prohibited, such as insurance policies or wagers on goods and freight already at risk, and against the barratry of

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28 Braun 57; Daston 239.

29 Jack 205. Cf De Roover 1945 *JEH* 196 who states that wagers also had an adverse effect on the development of marine insurance.

30 See Van Niekerk "Insurance law" 311 *et seq*; Van Niekerk *Sources* 31 *et seq* for a historical background to Roman-Dutch insurance legislation. See also Van Niekerk *Sources* 91 *et seq* for appendices which contain the more important Roman-Dutch insurance legislation. Legislation referred to in the discussion which follows may be found in these appendices.

31 Van Niekerk "Insurance law" 312; Van Niekerk *Sources* 35.

32 Van Niekerk *Sources* 51 *et seq*.

33 See *idem* 37 *et seq*.

34 *GPB* vol I 796–829; see also Van Niekerk *Sources* Appendix B 103 *et seq*.

35 *GPB* vol I 823; Van Niekerk *Sources* Appendix B 106.

the master and crew. This section is relevant, since it contained the first legislative enactment in which both insurance and wagering on something was prohibited.

Insurance specifically on the lives of persons was first mentioned in the placcaat of 20 January 1571[36] (old style 1570).[37] Section 32 of the placcaat of 1571 provided as follows:[38]

> "Ende om te verhoeden die abuysen, frauden, bedroch ende crimen, die ghecommitteert zijn gheweest inde asseurantien ende verseeckeringen, op't leven vande Lieden ende Persoonen, oock op weddingen van reysen oft voyagien, ende dierghelijcke inventien, hebben Wy alle die selve gheprohibeert ende verboden, prohiberen ende vereden by desen, als der ghemeyne welvaert schadelijck ende hinderlijck wesende, ende van quaden exempel."

In terms of this section insurances on the lives of persons and also wagering on travels and voyages[39] and similar inventions were prohibited. It is important to note that once again the prohibition of insurance and wagering is contained in the same section.

The placcaat of 1563 prohibited insurance contracts or wagers on goods or freight already at risk and against the barratry of the master and crew, but did not specifically mention insurance on the lives of persons. In contrast, the placcaat of 1571 not only prohibited insurance on the lives of persons but also prohibited wagering on travels and voyages and similar inventions. But it must be remembered that at the time when the placcaat of 1571 was enacted, wagering on lives in the form of insurance on lives was common.[40] The question therefore arises what the correct interpretation of the 1571 placcaat is: did it prohibit life insurance in general or only wagering on lives in the form of insurance on lives? It seems that the true purpose of the placcaat of 1571 was to prohibit wagering on lives in the form of insurance on lives. The basis of this interpretation is that at the time a distinction was not made between proper insurance contracts on lives and wagering on lives in the form of insurance on lives.[41] For example, both Santerna and

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36 *GPB* vol I 828–841; see also Van Niekerk *Sources* Appendix C 111 *et seq*.

37 Although this placcaat is dated 1570-01-20, it was actually passed on 1571-01-20. The reason for this is that, until the end of the sixteenth century, the Low Countries calculated the calendar year according to the "old style", according to which the calendar year ran from Easter in one year to Easter in the next. It was only towards the end of the sixteenth century that the calendar year was calculated according to the "new style", by which the calendar year ran from 1 January to 31 December: see Van Niekerk *Sources* 37 fn 84, where the difference between the old and new style is discussed in greater detail.

38 *GPB* vol I 836; see also Van Niekerk *Sources* Appendix C 116.

39 During the Middle Ages pilgrimages were a form of punishment. Wagering contracts were concluded on the travels and voyages which had to be undertaken as a consequence of the pilgrimage. The wager was about whether the person would return from the pilgrimage and it was wagers on these travels and voyages which were prohibited (see Goris *Étude sur les colonies marchandes méridionales* (1971) 285 *et seq*; Hermesdorf "Roomsche reijsen. Opmerkingen over een merkwaardigen vorm van weddenschap" 1941 *Tijdschrift voor Rechtsgeschiedenis* 214 *et seq*; Hoetink "Weddingschap op reizen" 1941 *Tijdschrift voor Rechtsgeschiedenis* 343 *et seq*; Merens "Weddingschap-Contracten" (1937–1939) 21 *Economisch-Historisch Jaarboek* 190 *et seq*; Van Herwaarden *Opgelegde bedevaarten* (1978) 1 *et seq*; Van Herwaarden *The effects of social circumstances on the administration of justice: the example of enforced pilgrimages in certain towns of the Netherlands (14th–15th centuries)* (1978) 2 *et seq*).

40 See par 2 *et seq* above.

41 *Ibid*.

Straccha, whose treatises on insurance law were published in 1552 and 1569 respectively, discuss wagering on lives in the form of insurance on lives, but not insurance contracts on lives.[42] Since jurists writing at the time recognised only wagering on lives in the form of insurance contracts on lives, it follows that it was these contracts which were prohibited.

A further indication that this is so is found in the fact that the prohibition was enacted in conjunction with a prohibition on the conclusion of certain wagering contracts. The introductory sentence states that since abuses, frauds and crimes had been committed as a result of the conclusion of certain insurance and wagering contracts, the conclusion of such contracts was prohibited. The introductory sentence makes sense only if it is accepted that the section in fact refers to wagering on lives in the form of insurance on lives.

3 1 2 Municipal legislation in the sixteenth and seventeenth centuries

On 31 January 1598 the first municipal insurance legislation was passed by the Amsterdam legislature.[43] Section 24 of the keur of 1598 stated as follows:[44]

> "Oock en sullen geene Asseurantien mogen ghedaen worden op't leven van eenige Luyden ofte Persoonen, noch op weddingen van reysen ofte voyagien, ende diergelijcke inventien: Ende indien sulcks ghedaen werde, sal al't selve nul ende van geender waerden wesen."

The Amsterdam example was followed in 1600 by the town of Middelburg[45] and in 1604 by the town of Rotterdam.[46] Section 2[47] of the Middelburg keur of 1600 was identical to section 24 of the Amsterdam keur of 1598, and section 10[48] of the Rotterdam keur of 1604 briefly provided that "[o]p 't leven van eenige Persoonen ofte weddinghe . . . sullen gheen asseurantie gedaen mogen werden". In contrast to section 32 of the placcaat of 1571, the provisions contained in the municipal keuren did not differ in effect. The distinction between proper insurance contracts on lives and wagering on lives in the form of insurance contracts on lives was only beginning to emerge at the time when these provisions were passed. For example, Scaccia, the first author to distinguish between wagers on lives and insurances on lives, published his treatise on insurance law only in 1619.[49] The effect of the provisions contained in the municipal keuren was therefore to prohibit only wagering on lives in the form of insurance on lives and not insurance on lives in general.[50]

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42 See par 3 2 1 *et seq* below.

43 The keur is reproduced in Van Niekerk *Sources* Appendix D (1) 122 *et seq*.

44 *Idem* Appendix D (1) 126.

45 The insurance keur of Middelburg was promulgated on 1600-09-30 (*GPB* vol I 866–875; Van Niekerk *Sources* Appendix J 251 *et seq*).

46 The insurance keur of Rotterdam was passed on 1604-03-12 (*GPB* vol I 858–865; Van Niekerk *Sources* 212 *et seq*). See also Van Niekerk *Sources* 59 where the legislative history of the 1604 Rotterdam keur is discussed.

47 *GPB* vol I 866; Van Niekerk *Sources* Appendix J 252.

48 *GPB* vol I 861; Van Niekerk *Sources* Appendix H 214.

49 See par 3 2 3 *et seq* below.

50 See also par 3 1 1 *et seq* above.

The Amsterdam keur of 1598 was amended or amplified on numerous occasions.[51] An important amendment to section 24 was brought about with the passing of the Amsterdam keur of 1693.[52] Section 2 of the 1693 keur provided[53]

> "[d]at van gelijke mede geassureert sal mogen werden op de simple Rantsoenen van Schippers en Bootsgesellen tegens de Zee-Rovers . . . werdende het 24 Articul van de voorsz. Ordonnantie by desen vernietigt voor so veel als 't selve met dit Articul komt te contrarieren, en verders nog anders niet".

In so far as the prohibition of wagering on lives in the form of insurance on lives in section 24 of the keur of 1598 could be construed to prohibit ransom insurance, section 2 of the 1693 keur specifically permitted ransom insurance. In terms of the keur of 1693 a ransom policy had to be drafted in conformity with the example provided.[54] The policy made provision for ransom insurance "op 't Lijf en den Persoon" of a specific insured.[55]

Mention may also be made of the keur of 1601 which was passed to regulate the conclusion of certain wagers.[56] This was necessary because people concluded these wagers for such large amounts that they were in danger of losing a large portion of their estate resulting in indigence that was a burden on and detriment to the common welfare.[57] The keur of 1601 provided[58]

> "[d]at niemant van nu voortaen op het innemen van eenige Steden, Sterckten, leven van Prinzen, Reysen ofte eenige andere conditien, hoedanigh die sullen mogen wesen, geld uyt doen ofte nemen sal mogen . . ."

The keur of 1601 also provided that persons who concluded wagers contrary to the provision of the keur were to be punished according to the circumstances. These wagers were furthermore not enforceable. This keur is important since it represents the first legislative enactment which prohibited wagering *per se* and not only wagering on lives in the form of insurance on lives.

In conclusion, it may be said that municipal insurance legislation passed at the end of the sixteenth and the beginning of the seventeenth century merely confirmed the position which existed during the earlier Spanish period. Insurance on the lives of persons was seemingly prohibited and this prohibition was always enacted in conjunction with a prohibition on the conclusion of certain wagering contracts. But as was the case in the earlier Spanish period, the prohibition was directed at wagering on lives in the form of insurance on lives and not at life insurance in general.[59] Towards the end of the seventeenth century the position changed and a keur was passed in Amsterdam permitting ransom insurance. The ransom insurance policy made provision for insurance of a person and for this purpose the portion of the section which had apparently prohibited insurance on the life of a person was revoked. The importance of this repeal was that it

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51 See Van Niekerk *Sources* Appendix E 136 *et seq* where the amendments are reproduced.

52 *Idem* Appendix E (18) 156–157.

53 *Idem* Appendix E (18) 156.

54 S 2. See Van Niekerk *Sources* Appendix 157, where the policy is reproduced.

55 Van Niekerk *Sources* Appendix E (18) 157.

56 Amsterdam keur of 1601-12-08. It appears that, otherwise than is suggested by Van Niekerk, the keur of 1601 was not an amendment to the insurance keur of 1598 (see Van Niekerk *Sources* 57 fn 133).

57 See Van Niekerk *Sources* Appendix E (4) 140.

58 *Ibid.*

59 See par 3 1 1 *et seq* above.

acknowledged that in certain circumstances the life of a person could be the subject of an insurance contract.

3 1 3 Municipal legislation in the eighteenth century

In 1721 a new Rotterdam keur was passed which consolidated and updated the earlier Rotterdam insurance keur of 1604.[60] Section 26 provided for ransom insurance[61] and section 28 stated that one could not insure any wager.[62] Insurance on the life of a person was, however, not specifically prohibited nor even mentioned by the keur. One may argue that in terms of this keur it was therefore possible to insure the life of a person but only if the insurance was not concluded by way of a wager.[63] The keur also contained a model policy for ransom insurance to obtain the release of a person from the bondage of slavery. This policy provided that "[w]y ondergeschreven verzekeren aan U . . . voor de somme by ons hier onder geteykent op de Persoon ende voor de vryheit van . . ." A ransom insurance policy in this form therefore provided further recognition of the fact that it was possible that the life of a person could be the subject of insurance.

The Rotterdam example was followed by Amsterdam in 1744 when a new insurance keur was passed which repealed and updated the insurance law contained in the 1598 keur and its amendments.[64] Section 13 of the keur of 1744 provided for ransom insurance,[65] and also provided that "[m]en sal niet mogen laten versekeren op Weddinge van Reysen ofte Voyagien, en diergelyke inventien".[66] As in the case of the Rotterdam keur, insurance on the life of a person was not specifically prohibited nor even mentioned in the Amsterdam keur.[67] The keur also contained a model policy which provided for ransom insurance "op 't lyf van den persoon".[68]

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60 The keur was passed on 1721-01-28 (see Van Niekerk *Sources* 59). See also Van Niekerk *Sources* Appendix I 219 *et seq* where the keur is reproduced.

61 S 26 stated that "[g]elijk ook geasseureert zullen mogen werden . . . de Rantcoenen tot lossinge uyt slavernye . . ." (see Van Niekerk *Sources* Appendix I 222).

62 S 28 provided that "[m]en zal niet mogen asseureren eenige weddingschappen . . ." (see Van Niekerk *Sources* Appendix I 222).

63 Wagers on lives were concluded in the guise of insurance contracts on lives. These wagering contracts are referred to as wagers on lives in the form of insurance on lives or life insurance by way of wagering. See par 2 *et seq* above.

64 Van Niekerk *Sources* 61. The keur was passed on 1744-03-10. See Van Niekerk *Sources* Appendix 169 *et seq* where the keur is reproduced.

65 See *idem* Appendix F 174. See also s 14 which provided for the method of payment of the sum insured for the ransom.

66 Van Niekerk *Sources* Appendix F 174.

67 In contrast to the Rotterdam and Amsterdam keur, the Hamburg insurance ordinance of 1731 specifically permitted insurance on a person's life (see Knittel "Alte Assecuradeure und alte Gefahren" in *Beiheft zum Jahrbuch der Hamburgischen Wissenschaftlichen Anstalten XXXV 1917. Abhandlung und Mitteilungen aus dem Seminar für Versicherungswissenschaft* (1918) 30–32; Roccus *Reglement der Assurantien en Haveryen* 10 1–6 in *Responsorum legalium cum decisionibus centuria secunda ac mercatorium notabilia* vol 1–2 (1655), vol 2 translated as *Franciscus Roccus Merkwaardige aanmerkingen vervat in twee tractaaten waar van het eene is handelende over schepen en vragtgelderen en het andere over assurantien ofte verzekeringen met aanmerkingen door Johan Feitama* (1741) and Feitama's comment in Roccus *Tractaat over assurantien ofte verzekeringe* no 269 fn (a)); see also text at fn 105 below.

68 See Van Niekerk *Sources* Appendix F 188.

Municipal insurance legislation passed in the eighteenth century therefore no longer specifically prohibited nor mentioned insurance of the person. It was on the contrary recognised in ransom policies that a person's life could be the subject of insurance. But wagering on lives in the form of insurance on lives was still prohibited. The fact that insurance on lives was no longer specifically mentioned may be an indication that wagering on lives was no longer as prevalent as it was in earlier times.

Furthermore, at the time when the keuren of the eighteenth century were passed, a distinction was made between insurance contracts on lives and wagering contracts on lives.[69] Insurance contracts on lives were no longer treated as a species of wagering contracts and for this reason as unacceptable. In practice, insurance contracts on lives were in fact concluded but the prohibition on wagering insurance on lives in the form of insurance contracts remained.[70]

3 2 Treatises dealing with insurance law

Various legal treatises dealing with insurance law were published in Europe during the periods under discussion. The authors of works mentioned below were not always Dutch, but this does not mean that they are irrelevant for present purposes: the Dutch themselves often referred to these foreign authors as sources in their own treatment of Roman-Dutch insurance law;[71] furthermore, if a *ius commune* approach is followed,[72] these treatises cannot be ignored. In consequence, the number of treatises to which reference may be made, is considerably and beneficially enlarged by this approach.[73] For practical purposes, the discussion which follows is restricted to the works of such foreign authors as are in fact referred to by Dutch jurists themselves.

3 2 1 Pedro de Santarém

The first treatise on insurance law was that of the Portuguese-born Pedro de Santarém or Petrus Santerna entitled *Tractatus de assecurationibus et sponsionibus mercatorum* of 1552.[74] Insurance on lives is not mentioned in this work, but wagers on lives are discussed in detail.[75] The problem which Santerna examines is whether wagers on lives are valid and numerous examples of such wagers are given.[76] He concludes that wagers on lives are valid, but only if they are not contrary to good morals and if the person whose death is the subject of the wager consents to its conclusion.[77]

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69 See par 3 2 3 below.
70 See in general par 3 2 9 *et seq* below and in particular par 3 3 *et seq* below.
71 See eg Voet *Comm ad Pand* 22 2 3; see also par 3 2 10 below.
72 See par 1 above.
73 See Van Niekerk *Sources* 64 *et seq* where some of these treatises are cited.
74 This work was reprinted in 1971 with translations in Portuguese, English and French. It is referred to by the court in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality supra* 427H–I.
75 Santerna 2 1–29.
76 See *idem* 2 1, 2 7, 2 16, 2 27, 2 28.
77 *Idem* 2 7, 2 19, 2 28.

3 2 2 Benvenuto Straccha

The contract of insurance is discussed by Straccha in his work *Tractatus duo de assecurationibus et proxenetis atque proxeneticis* of 1569.[78] Insurance on lives is not mentioned in this work, but wagers on lives are discussed in his *Sponsionum tractatus*.[79] Straccha states that in general "in honesta causa sponsiones fieri licere: at in inhonesta non licere", that is, wagers with a proper cause are permitted but those with an improper cause are not.[80] He also gives examples of a number of wagers that are lawful, such as a wager on whether an unborn child would be a male or female.[81] A wager on the life of the emperor or the pope is also valid, but a wager on the life of a private person will only be valid if the latter's consent has been obtained.[82]

3 2 3 Sigismundus Scaccia

Scaccia discusses the contract of insurance in detail in his *Tractatus de commerciis et cambio* of 1619.[83] This work does not deal only with insurance and it is important to note that Scaccia was the first author to distinguish between wagers on lives and insurance on lives.

Wagers and gambling contracts are discussed in the section which immediately precedes his exposition of the insurance contract.[84] Scaccia makes the point that wagers are lawful if they are honest or founded on an honourable cause.[85] He then gives an example of a wager on the life of a person which was held to be lawful, it seems, by a Florentine court, even though the person on whose life it was concluded did not consent.

In the first paragraph dealing with the insurance contract, Scaccia makes it clear that the discussion is not limited to marine insurance contracts but that insurance on the life of a person is also included therein.[86] According to the author the nature of insurance is that a risk is transferred from one party to another.[87] The reason for the transfer of the risk is also the distinguishing factor between a wager and an insurance contract, because in the case of an insurance contract the insured seeks to minimise his losses by transferring the risk.[88] But in the case of a wager the reason for the transfer for the risk is not clear. Scaccia then sets out the requirements for a

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78 This work seems to have made an important contribution to the law of insurance and was included in other works and also republished long after the author's death. Eg, the copy which was available to me was published in 1751, one hundred and seventy three years after the author had died. It is also included in the *Tractatus universi juris* (1584) (see *Mutual and Federal Insurance Co Ltd v Oudtshoorn Muncipality supra* 427I).

79 This work is included in the *De mercatura decisiones et tractatus varii* which was reprinted in 1971.

80 Straccha *Sponsionum tractatus* 433.

81 *Idem* 438.

82 *Idem* 435.

83 This work is also referred to by the court in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality supra* 428C.

84 See Scaccia 1 1 84 *et seq*.

85 *Idem* 1 1 88.

86 *Idem* 1 1 128.

87 *Idem* 1 1 131.

88 *Ibid*.

policy of insurance and states that it should be clear what the risk is and whether it is on the life of a person.[89]

Two examples of insurance policies are provided, namely a policy of marine insurance[90] and a life insurance policy.[91] The life insurance policy dates from 1610 and was taken out by John Baptista Seminus on the life and person of the Knight Fernandus Ruijz de Coral, a Knight of Jerusalem.[92] The risk was against Fernandus dying from any cause during a period of six months after the contract was concluded. The premium appears to have been calculated at three and a quarter per cent.

Scaccia also makes it clear that the statutes or principles which apply to marine insurance are not limited to that sphere, but are equally applicable to insurance on human lives.[93] He then provides the example of a person who intends to undertake a journey to Jerusalem or any other place. Such a person insures his life for a period of one year and values his life in the amount of ten thousand scudo.[94] The insurer undertakes to pay this amount should the insured die within the year. In return for the insurer's undertaking, the insured pays an amount of twelve hundred scudo, that is, a premium rate of twelve per cent.[95] The contract provides that if the insured does not die within the year, the insurer makes a profit of twelve hundred scudo, but if the insured does die, the insurer must pay the ten thousand scudo to the insured's heirs. Lastly, Scaccia notes that a creditor may insure the life of his debtor and illustrates this with a number of examples.[96]

3 2 4 Hugo de Groot

De Groot[97] was the first Roman-Dutch author of note who considered the insurance contract.[98] His *Inleidinge tot de Hollandsche rechtsgeleerdheid*, published in 1631, reflects only the Dutch insurance legislation of the Spanish period and municipal legislation passed up to that time.[99] It is therefore not surprising that De Groot merely notes the general prohibition on insurance on lives and on wagers by stating that[100] "[m]en mag alles doen verzekeren, uitgezeid 's menschen leven, weddingen . . ."

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89 *Idem* 1 1 133.
90 *Idem* 1 1 141.
91 *Idem* 1 1 142.
92 The reason for the conclusion of the insurance contract is not apparent from the policy.
93 Scaccia 1 1 292.
94 A scudo is a coin of gold or silver issued in various Italian states from the sixteenth into the nineteenth century.
95 The amount of the premiums seems to have differed from case to case. In discussing the question whether the premium must be reasonable, Scaccia 3 3 51 mentions another case where the premium was calculated at four per cent.
96 *Idem* 2 3 3 52.
97 For a discussion of the life and works of De Groot, see De Vos 171 *et seq*; De Wet 128; Van Zyl 346 *et seq*.
98 Van Niekerk "Insurance law" 314; Van Niekerk *Sources* 69.
99 See par 3 1 1 and par 3 1 2 above.
100 De Groot 3 24 4.

3 2 5 Simon van Groenewegen van der Made

Groenewegen,[101] in his commentary on De Groot,[102] does not add anything of significance to De Groot's statement quoted above but merely refers to legislation which provides the authority for it.[103]

3 2 6 Francesco Rocco

The seventeenth century Italian jurist Francesco Rocco or Franciscus Roccus, made a valuable contribution to insurance law in his work entitled *Responsorum legalium cum decisionibus centuria secunda ac mercatorium notabilia* of 1655. Insurance law is dealt with in the second volume under the title *De navibus et naulo, de assecurationibus, de decoctione mercatorum*. This work was translated into Dutch[104] as *Merkwaardige aanmerkingen vervat in twee tractaaten waar van het eene is handelende over schepen en vragtgelderen en het andere over assurantien ofte verzekeringe* and supplied with notes and annotations by Johan Feitama in 1741.[105]

Roccus notes that the life of a person may be insured on the uncertainty of his being either dead or alive at a certain future date. He explains as follows:[106]

> "Men kan ook op het leven van een mensch Assurantie doen, te weten, indien zodanig een Heer komt te sterven in dit Jaar, zoo beloof gy my tien gulden, en indien hy niet komt te sterven, zoo beloof ik u honderd guldens . . . gelyck ook Assurantie kan werden gedaan op 't leven of 't overleven van een mensch voor een zekere bepaalde tyd . . ."

It is not readily apparent from the example given in this quote to illustrate how insurance on the life of a person may be concluded, exactly what the difference between a wager and an insurance on the life of a person is. It also seems that one of the essential requirements for the conclusion of a valid insurance contract, that is, payment of a premium, is absent. The problem is compounded by the fact that in Roccus's view, wagers are valid in principle.[107] But this is qualified by the statement that a wager will not be valid if a shameful cause is involved. However, Roccus does not indicate what he would regard as a shameful cause. In the final instance, it seems that Roccus provides an example of wagering on life in the form of insurance on a life and not of a proper life insurance contract.

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101 On the life and works of Groenewegen, see De Vos 181–182; De Wet 135; Van Zyl 356–357.

102 See Groenewegen *Inleydinge tot de Hollandsche rechts-geleertheyt beschreven by Hugo de Groot met aenmerckingen door Simon van Groenewegen van der Made* (1667) 3 24 fn 5. This work was apparently first published in 1644 (De Wet 135).

103 Groenewegen *ad Gr* 3 24 fn 5. Groenewegen refers to s 24 of the Amsterdam keur of 1598, s 2 of the Middelburg keur of 1600 and s 10 of the Rotterdam keur of 1604 where insurance on lives are prohibited. Conspicuous by its absence is any reference to s 32 of the placcaat of 1571.

104 See Van Niekerk *Sources* 66 fn 160; *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality supra* 428A.

105 Apart from the two tracts, the translated work also contained a translation of a number of selected cases (*Uytgesogten gewysdens*) on insurance law as well as a Dutch version of the 1731 Hamburg insurance ordinance.

106 Roccus *Tractaat over assurantien ofte verzekeringe* no 276–279. See also *idem* no 156, where the method by which the premium may be calculated for different types of insurance, including insurances on person's lives, is set out.

107 Roccus *Tractaat over assurantien ofte verzekeringe* no 269.

3 2 7 Gerard van Wassenaer

The insurance contract is discussed by Wassenaer in his *Practyk notariael* of 1650.[108] He merely mentions that everything can be insured excluding, amongst other things, human lives and wagers but he cites no authority in support of this statement.[109]

3 2 8 Simon van Leeuwen

Van Leeuwen in his *Het Roomsch Hollandsch recht* of 1664 reaffirms that the lives of persons could not be insured.[110] He states:[111]

> "Dat men alle saken en Koopmanschappen mag doen versekeren, uit gesondert . . . Menschen, Leven . . ."[112]

It is notable that Van Leeuwen omits to mention that insurance on wagers is also prohibited. This omission does not reflect a change in the law of his time, and Van Leeuwen's statement is merely incomplete.

3 2 9 Reinold Kuricke

The German author Kuricke discusses the contract of insurance in his *Diatriba de adsecurationibus*, published in 1667. Interestingly enough, Kuricke refers mainly to Roman-Dutch insurance legislation[113] and to De Groot as authority for his statements.[114] This is also true of his discussion of insurance of a person's life. For the statement that insurance on lives, wagers on voyages and on similar inventions are prohibited, he refers to De Groot[115] and the Amsterdam keur of 1598.[116] He writes:[117]

> "[A]dsecurationes in vitam homonis, aut in sponsiones itinerum, et similes inventiones inhibitae sunt . . . Hodie tamen nil frequentius fieri solet."

Because Kuricke relies mainly on Roman-Dutch authority, it is important to note his observation that these insurances were frequently concluded in everyday practice. It seems that even at this early stage in the development of the Roman-Dutch law on life insurance there was a conflict between formal law and practice.

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108 This work is sometimes bound with Wassenaer's other work, *Practyck judicieel*, under the title *Praxis judiciaria*. Insurance is discussed in *Praxis judiciaria* vol 2 8 1–12. On the life and works of Wassenaer, see De Vos 190; De Wet 150; Van Zyl 378–379.

109 Wassenaer *Praxis judiciaria* vol 2 8 2.

110 On the life and work of Van Leeuwen, see De Vos 182–184; De Wet 139; Van Zyl 357–359.

111 Van Leeuwen *RHR* 4 9 6.

112 As authority for this statement, Van Leeuwen refers to s 8 and 9 of the placcaat of 1563 and s 10, 12, 17 and 24 of the Amsterdam keur of 1598. For present purposes only the reference to s 24 is relevant, as insurance on lives is prohibited by this section. No reference is made to either the placcaat of 1571 or other municipal legislation.

113 The references are to the placcaat of 1563 and to the Amsterdam keur of 1598.

114 Apart from referring to De Groot, Kuricke also frequently refers to Santerna and Scaccia. See par 3 2 1 and par 3 2 3 above.

115 See par 3 2 4 above.

116 Kuricke wrongly refers to s 23 of the keur and not to s 24; see par 3 1 2 above.

117 Kuricke 833.

3 2 10 Johannes Voet

In his *Commentarius ad Pandectas*, published in 1698-1704, Voet[118] does not provide an exhaustive discussion on the law of insurance,[119] but refers to Dutch[120] and French[121] legislation and to the works of Santerna[122] and Straccha.[123] However, in his commentary on De Groot's *Inleidinge*,[124] Voet makes a number of remarks on the contract of insurance.[125] On the question of insurance of a person's life, Voet notes:[126]

> "[V]ita assecurari placitis vetatur, tamen inter honestiores fides servatur: Id autem fit E.g. hoc modo, aliquis fideicommisso gravatus, si ante 30 annum moriatur, potest cum assecurante convenire, ut assecuret ipsi vitam usque ad 30 annum, hujusque effectus est, quod si antea moriatur, assecurans fideicommissum debeat praestare."

Voet therefore makes it clear that even though insurance on a life was prohibited by the placcaat, the custom to insure lives was observed between honourable persons. To illustrate the use of a contract of life insurance, the example given is of a fiduciary who is burdened with a *fideicommissum* until his thirtieth year. The fiduciary may agree with an insurer to insure his life until he reaches that age, with the effect that, should he die earlier, the insurer will be liable to carry out the *fideicommissum*.

The significance of this example is that it recognises that a person could insure his own life for a certain term. Exactly what the insurer undertook is not clear. Voet states that the insurer undertook to carry out the *fideicommissum*, but any performance which could be made the content of an obligation could equally well be the object of a *fideicommissum*. In view of this it seems highly unlikely that an insurer would always have been able to carry out the *fideicommissum*. However, Voet's view is worthy of note, since it confirms that a divergence between formal law and practice existed.

3 2 11 Eduard van Zurck

The prohibition against insurance on the lives of persons and on wagers is repeated by Van Zurck in his *Codex Batavus* of 1711[127] in the now familiar form that "[m]en mag alles doen verzekeren, uitgenomen 's menschen leve, weddingen . . ."[128] In a note to the main text, this statement is further explained by Van

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118 For a discussion on the life and works of Voet, see De Vos 184 *et seq*; De Wet 154–156; Van Zyl 362 *et seq*.

119 See Voet *Comm ad Pand* 22 2 3.

120 Voet refers to the placcaat of 1563, the placcaat of 1571, the Amsterdam keur of 1598, the Middelburg keur of 1600 and the Rotterdam keur of 1604 (see par 3 1 *et seq* above).

121 He refers to the Marine Ordinance of Louis XIV of 1681. Insurance on lives is prohibited by par 3 6 10 of the Ordinance: for a translation of the Ordinance, see "The Marine Ordinance of Louis XIV" 1897 *Federal Cases* 1203–1216. For the influence of French law on Dutch law, see fn 192 below.

122 See par 3 2 1 above.

123 See par 3 2 2 above.

124 The exact date when these comments were made is unknown. See De Wet 156 where this work is discussed.

125 See Voet *Obs ad Gr* 3 24.

126 3 24 fn 5.

127 On the life and work of Van Zurck, see De Vos 189; De Wet 157; Van Zyl 389.

128 Van Zurck *Codex Batavus* "Asseurantie" par IV.

Zurck:[129] "Op 's menschen leven en weddingen worden anders assurantien van waerden gehouden, en is zulks niet buiten gebruik."

It seems, therefore, that elsewhere insurance on the lives of persons and wagers was recognised and also in use. Van Zurck's statement is elaborated on in the *Codex Batavus*, published in 1764, by the editor Van der Schelling.[130] At the end of Van Zurck's note stating that insurance on lives and wagers was recognised and in use, the reader is now referred to a new paragraph where it is unequivocally stated that generally wagers were not valid;[131] but significantly the statement that elsewhere insurance on the lives of persons was recognised and in use is not contradicted.

3 2 12 Arent Lybreghts

The insurance contract is also briefly discussed by Lybreghts[132] in his *Redenerend vertoog over 't notaris ampt* of 1734[133] and in his *Burgerlyk, rechtsgeleerd, notariaal en koopmans handboek* of 1761.[134] However, his exposition of the insurance law is superficial. In the first work he merely states that insurance cannot be concluded on a person and a life.[135] As authority for this statement, Lybreghts relies on Van Leeuwen[136] and inadvertently omits to mention that insurance on wagers was also prohibited. In the second work, the prohibition of insurance on lives and insurance on wagers is not referred to.

3 2 13 Cornelis van Bijnkershoek

Van Bijnkershoek[137] discusses the insurance contract extensively in his *Quaestiones juris privati*[138] of 1744, but the question whether insurances on lives are permitted is only indirectly referred to in his consideration of ransom insurance.[139] Van Bijnkershoek's discussion of ransom insurance centres on the interpretation of

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129 *Idem* par IV fn 1. Roccus *Tractaat over assurantien ofte verzekeringe* is quoted as authority for this statement (see par 3 2 6 above).

130 See Van der Schelling *ad van Zurck* "Assurantie". Van der Schelling, who was also responsible for the third edition of 1738, had died in 1751 (De Wet 158 fn 164). The fourth edition seems to be a reprint of the third and therefore represents the law as it was in 1738.

131 Van der Schelling *ad van Zurck* "Assurantie" par IV fn 1 where the reader is referred to par VIID.

132 On the life and works of Lybreghts, see De Vos 205; De Wet 163–164; Van Zyl 401.

133 Lybreghts *Redenerend vertoog* vol 2 ch 17. The sixth edition of this work appeared in 1780, some 22 years after the death of Lybreghts (see De Wet 163).

134 Lybreghts *Koopmans handboek* ch 5.

135 Lybreghts *Redenerend vertoog* vol 2 17 2. The commentary on *Redenerend vertoog*, which was published in 1778 by Kramp under a pseudonym, also does not add anything (see *Aanmerkingen over het redeneerend vertoog over het notaris-ampt van Arent Lybreghts door een rechtsgeleerden* vol 2 40 and De Wet 170). The reader is merely referred to the *Aanhangzel tot het Hollandsch rechtsgeleerd woordenboek* (also by Kramp under a pseudonym) where, it is said, insurance is comprehensively treated (see text at fn 164 below).

136 Van Leeuwen *RHR* 4 9 6; see par 3 2 8 above.

137 For a discussion of the life and works of Van Bijnkershoek, see De Vos 200 *et seq*; De Wet 160 *et seq*; Van Niekerk "Insurance law" 316; Van Niekerk "Enkele bibliografiese gegewens oor Cornelis van Bynkershoek en die Romeins-Hollandse versekeringsreg" 1988 *THRHR* 27–28; Van Zyl 367 *et seq*.

138 The original Latin text was translated into Dutch as *Verhandelingen over burgerlyke rechts-zaaken* in 1747.

139 Van Bijnkershoek *Quaest jur priv* 4 1 (764) of the Dutch translation.

section 8 of the placcaat of 1563[140] and section 27 of the placcaat of 1571.[141] The author interprets these sections to mean that the ransom could only be recovered from the insurer if a person was captured by the enemy, but not if he was taken prisoner by pirates[142] or friends.[143] The possibility that the prohibition on the insurance on lives would in general also prohibit ransom insurance, is denied by Van Bijnkershoek and this prohibition is therefore not discussed by him.[144] The prohibition on insurance of wagers is not mentioned at all.

3 2 14 Gerlach Scheltinga

In the same vein as Van Bijnkershoek, is the commentary of Scheltinga on De Groot dating from 1755/1756.[145] The prohibition on life insurance is not discussed pertinently, but rather the question whether ransom insurance is also affected by this prohibition.[146]

Scheltinga furthermore discusses the insurance of wagers with reference to section 24 of the Amsterdam keur of 1598,[147] section 2 of the Middelburg keur of 1600 and section 10 of the Rotterdam keur of 1604.[148] According to him, these keuren prohibited the insurance of wagers, as did section 32 of the placcaat of 1571. But the first two keuren and the placcaat only prohibited wagers on travels and voyages and similar inventions. In contrast, the Rotterdam keur prohibited the insurance of wagers in general. The question therefore arises whether the insurance of wagers in general or only a particular type of wager, namely wagers on travels and voyages, was prohibited. Scheltinga is of the opinion that the inclusion of the

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140 *GPB* vol I 824; Van Niekerk *Sources* Appendix B 107.

141 *GPB* vol I 835; Van Niekerk *Sources* Appendix C 115.

142 Pirates were not considered to be enemies (see Van Bijnkershoek *Quaest jur priv* 4 1 (761) of the Dutch translation; Van Bijnkershoek *Quaest jur publ* 1 25 fn 3).

143 Van Bijnkershoek *Quaest jur priv* 4 1 (761) of the Dutch translation. In this regard Van Bijnkershoek's discussion does not seem to reflect the law of his time, as he fails to discuss the effect of s 26 of the 1721 Rotterdam insurance keur which specifically allowed ransom insurance (see fn 61 above). The absence of any reference to s 13 of the 1744 Amsterdam keur to the same effect (see text at fn 65 above) is explicable since it was not available to Van Bijnkershoek at the time when he wrote *Quaestiones juris privati* (see Van Bijnkershoek *Quaest jur priv* 4 1 (753) of the Dutch translation).

144 Van Bijnkershoek *Quaest jur priv* 4 1 (764) of the Dutch translation. In this regard Van Bijnkershoek seems to agree with the opinion given in the *Nedl advb* (see Van den Berg *Neder advb* vol 2 *Consul* 170 and see also text at fn 202 below). But in contrast to the opinion in the *Nedl advb*, Van Bijnkershoek seems to be of the opinion that the fact that ransom insurance is not prohibited, does not necessarily mean that the contract is generally enforceable (Van Bijnkershoek *Quaest jur priv* 4 1 (763) of the Dutch translation). According to Van Bijnkershoek, the contract would be enforceable only if it could be proved that the insured valiantly resisted capture (Van Bijnkershoek *Quaest jur priv* 4 1 (765) of the Dutch translation). The reason for this is that a person is insured against the power of the enemy and not against his own cowardice.

145 *Scheltinga se "Dicta oor Hugo de Groot se 'Inleiding tot de Hollandsche rechtsgeleerdheid'"* arranged by De Vos and Visagie (1986). See also De Vos 206–207; De Wet 165–166; Van Zyl 406.

146 Scheltinga *Dictata ad Gr* 3 24 4.

147 Scheltinga also indicates that the provision contained in s 13 of the Amsterdam keur of 1744 with regard to wagers is the same as that contained in s 24 of the Amsterdam keur of 1598 (*Dictata ad Gr* 3 24 4).

148 See par 3 1 2 above.

words "of diergelyke inventie" in the keuren of 1598 and 1600 and also in the placcaat of 1571, had the effect that insurance of wagers in general was prohibited and not only insurance on wagers on travels and voyages.[149]

The point that must be made is that, even though the prohibition on life insurance is not discussed pertinently, Scheltinga is the first Roman-Dutch author who clearly indicates that the true purpose of the sections prohibiting certain types of insurances was to prohibit wagering in the form of insurance.

3 2 15 Willem Schorer

In 1767, Schorer[150] was responsible for a further edition of Groenewegen's comments on De Groot,[151] to which he added his own notes.[152] He states that it is not possible to insure a person's life,[153] referring to Van Bijnkershoek,[154] section 2 of the Costumen van Antwerp[155] and the Frisian Statute[156] as authority for this statement. Schorer states that interpreters of these statutes gave as reason for the prohibition that a person's life could not be endangered.[157] The author leaves the weight that should be attached to this reason to the judgment of his readers.[158]

Schorer also refers, apparently with approval, to the position in seventeenth century Florence, where insurance on a person's life was allowed,[159] a position confirmed by the Florentine court in 1641.[160] The insurance of wagers is also discussed but Schorer seems to be of the opinion that they are not allowed as being contrary to the nature of the contract of insurance.[161]

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149 Scheltinga *Dictata ad Gr* 3 24 4.

150 On the life and works of Schorer, see De Vos 207–208; Van Zyl 408–409.

151 See par 3 2 5 above.

152 *Inleiding tot de Hollandsche rechtsgeleerdheid beschreven by Hugo de Groot met aanmerkinge door Simon van Groenwegen van der Made met Latynsche aantekeningen door Willem Schorer* (1767).

153 Schorer *ad Gr* 3 24 4.

154 See par 3 2 13 above.

155 S 2 of the Costumen van Antwerp is a reference to title LIX of the "Impressae" of 1582 which provided that insurance and wagers were prohibited by the placcaat of 1571 "hoe wel men voor-tijden plochte te useren asseurantie op't leven van personen" (see Gabri *Rechten ende Costumen van Antwerpen* (1639) 75; Van Niekerk *Sources* 51).

156 The Frisian statute provided that "nochtans geen Assurantie zal moogen geschieden . . . noch op het leeven van eenige Persoonen, noch op weddingen van Reizen" (see *Statuten ordonnantie, reglementen, en costumen van rechte van Vriesland* (1770) 1 28 3).

157 Schorer *ad Gr* 3 24 4.

158 This comment does not appear in the 1776 edition but was added in 1784 when Schorer expanded his notes on De Groot and had them translated into Dutch (see Schorer *Aantekeningen van Willem Schorer over de Inleidinge tot de Hollandsche rechtsgeleerdheid van Hugo de Groot* translated by Austen (1784) 3 24 3).

159 Schorer *ad Gr* 3 24 4. Reference is also made to the situation in Naples where insurance on lives was allowed especially if the clause "may God himself grant him (the life insured) a long life", was added to the policy (see also fn 197 below).

160 Schorer *ad Gr* 3 24 4. Schorer refers to the discussion of the decision by Roccus (see par 3 3 *et seq* below).

161 Schorer *ad Gr* 3 24 4.

3 2 16 Franciscus Lievens Kersteman

The prohibition on insurance on lives and wagers is not mentioned by Kersteman[162] in his discussion of insurance in the *Hollandsch rechtsgeleert woordenboek* (1768).[163] This dictionary was so badly written that the subscribers demanded that the publishers add a supplement to it. This was done by publishing the *Aanhangzel tot het Hollandsch rechtsgeleerd woordenboek* in 1772-1773.[164] The prohibition of insurance on lives and wagers is discussed in the *Aanhangzel*[165] by the inclusion of a reprint of certain sections of Van Zurck's *Codex Batavus*[166] and by occasional comments on the latter in parenthesis. The prohibition on insurances of lives and wagers is noted as follows:[167]

> "Op 's menschen leven en weddingen worden anders (te weeten zo ze niet by de Wet zyn verboden als by ons), assurantien van waerden gehouden, en is zulks niet buiten gebruik."

It seems, therefore, that the author of the *Aanhangzel* was of the opinion that insurance on lives was valid elsewhere where it was not prohibited by legislation.

3 2 17 Cornelis Willem Decker

The prohibition on insurance on lives is discussed in greater detail by Decker in his commentary of 1783 on Van Leeuwen's *Het Roomsch Hollandsch recht*.[168] Decker states that the question whether insurance on the life of a person was possible had been discussed by a number of authors.[169] Advocates of Roman law argued against the validity of insurance on the life of a person on the ground that human life is incapable of valuation.[170] By making use of the *utilis actio ex lege Aquilia*,[171] others argued that such a valuation is possible and that insurance on life is not a valuation of life, but merely an undertaking to pay a certain amount in the event of a person's death.[172] Decker then states that while De Groot and Van Bijnkershoek can never be sufficiently praised for stating that insurance on lives is not possible,

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162 Kersteman seems to have been an opportunist who was primarily interested in making money. He served in the army, obtained a doctorate within six weeks, practised as an advocate, worked as a lecturer and professor honorarius and spent time in jail for forgery (see De Vos 208–209; De Wet 169; Van Zyl 411–413).

163 See Kersteman *Holl rechts woordenboek* sv "Assurantie" 28–30.

164 See *Aanhangzel ad Holl rechts woordenboek* vol 1–2. The work appeared under a pseudonym, but apparently the author was Kramp (see De Wet 169).

165 See *Aanhangzel ad Holl rechts woordenboek* sv "Assurantie" 38–40.

166 The reprint is of Van der Schelling *ad van Zurck* par 4–13 (see fn 130 above). Generally the *Aanhangzel* contains very little original material and consists mainly of reproductions of other authors' works (see also De Wet 170).

167 *Aanhangzel ad Holl rechts woordenboek* sv "Assurantie" 38; see also text at fn 129 above.

168 See Decker *ad Van Leeuwen* 4 9 fn 3. On the life and works of Decker, see De Vos 210.

169 According to Decker, Van Bijnkershoek and De Groot argues that the human life may not be insured (see par 3 2 13 and par 3 2 4 above).

170 See Foest *Iets over levensverzekering* (1880) 12 *et seq* where it is stated that this argument is founded upon an incorrect interpretation of Roman law.

171 In terms of the *utilis actio ex lege Aquilia*, Aquilian liability was extended to include also injuries to free men (Kaser *Roman private law* (1968) 214).

172 Decker refers to Huber *Praelectiones* 4 3 6 where this argument originated. Decker also refers to Kuricke who states that insurance on lives was a common occurrence in practice (see par 3 2 9 above).

one must nevertheless take note of the Handvesten of Amsterdam[173] and the case discussed by Roccus.[174] The point which Decker appears to be driving at is that the position changed after De Groot and Van Bijnkershoek had written their treatises. In the first place, section 2 of the keur of 1693 limited the effect of section 24 of the keur of 1598, which prohibited insurance on lives.[175] Secondly, insurance on lives was not prohibited in section 13 of the Amsterdam keur of 1744.[176] Thirdly, from the case discussed by Roccus, it is clear that insurance on lives was permitted at least elsewhere and at an earlier stage than was the case in Roman-Dutch law.[177]

Decker then takes Feitama[178] to task for criticising De Groot for stating, without reason according to Feitama, that the lives of persons cannot be insured. Decker points out that De Groot merely restated the provision of section 32 of the placcaat of 1571 where insurance on lives was prohibited,[179] but he then argues that this provision should not be followed literally. He explains:[180]

> "Maar waarom op den letter gezien en volgens de gezonde reden dezelve woorden niet gelimiteert *ad sponsiones tales, causam inhonestam habentes* . . . op dezelve grond (*Sc. ob honestam causae*) zyn immers de Contracten van overleeving geoorlooft, en wat men hier tegens kan inbringen zie ik voor als nog niet."

Thus Decker argues that sound reason requires that the words of section 32 be limited to such wagers as have a dishonourable cause.[181] Furthermore, contracts of survival[182] are held to be valid on the same ground, that is, by reason of their honourable cause, and there seems to be no reason why they should not be valid. The relevance of the analogy to contracts of survival is that the law already recognises a contract on the subject of a person's life. The mere fact that a contract is concluded on a human life is therefore insufficient reason to conclude that contracts on life are invalid.

Decker consequently seems to argue that wagers with an honourable cause are valid and that insurances on lives which have an honourable cause are also valid. But wagers with a dishonourable cause and consequently insurance on lives with a dishonourable cause will be invalid. The author does not state what he considers to be an honourable cause but it seems clear that wagering on lives in the form of insurance contracts on lives would not be valid.

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173 Decker refers to the *Handvesten van Amsterdam* 660 and 664. This seems to be a reference to s 2 of the 1693 and s 13 of the 1744 Amsterdam keuren which appear on these pages (see Van Niekerk *Sources* 95–96 read with Appendix E (18) and Appendix F and par 3 1 2 and 3 1 3 above).

174 Decker's reference is to Roccus *Uytgesogten gewysdens* 3 (see par 3 3 *et seq* below).

175 See par 3 1 2 above.

176 See par 3 1 3 above.

177 See par 3 3 below.

178 See Roccus *Tractaat over assurantien ofte verzekeringe* no 269 fn (a) where De Groot is criticised by Feitama.

179 See text at fn 38 above.

180 Decker *ad Van Leeuwen* vol 2 4 fn 3.

181 Decker cites Scaccia in support of this argument (see text at fn 85 above).

182 A contract of survival was a type of tontine where a number of participants concluded a mutual contract whereby all the participants made a contribution. The longest surviving participant was entitled to the capital sum as well as the accumulated interest (see Havenga 15 *et seq* where these contracts are discussed).

3 2 18 Dionysius Godefridus van der Keessel

Van der Keessel made voluminous contributions to insurance law in his *Theses selectae iuris Hollandici et Zelandici*, published in 1800,[183] and in the *Praelectiones iuris hodierni ad Hugonis Grotii Introductionem ad iurisprudentiam Hollandicam*.[184] However, the question of insurance on lives is treated sparsely. It is not mentioned in the *Theses selectae*, and in the *Praelectiones* only briefly.[185] Van der Keessel states that insurance on lives is prohibited by section 32 of the placcaat of 1571,[186] and that although it is not even mentioned by the Amsterdam keur of 1744,[187] it does not seem as if this insurance is permitted, the reason being that while ransom insurance is expressly permitted by section 14 of this keur, nothing is said about insurances of lives. On the question of the prohibition of insurances of wagers, Van der Keessel refers to his discussion of wagers and makes it clear that it is not wagers as such which are prohibited, but the insurance of wagers.[188]

3 2 19 Joannes van der Linden

Van der Linden was the last of the Roman-Dutch writers.[189] Insurance is treated in his *Rechtsgeleerd, practicaal en koopmans handboek* of 1806.[190] The author does not treat insurance on lives in any depth but merely affirms that the lives of human beings may not be insured though their civil liberty may be.[191] However, barely two years later, he specifically permitted insurance on lives in his *Ontwerp Burgerlijk Wetboek* of 1807/1808.[192] He states:[193]

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183 See Van der Keessel *Th* 3 24.

184 See Van der Keessel *Praelectiones ad Gr* 3 24. On the life and works of Van der Keessel, see De Vos 211–213; De Wet 172–173; Van Niekerk "Insurance law" 317; Van Zyl 392–394.

185 Van der Keessel *Praelectiones ad Gr* 3 24 4.

186 See text at fn 38 above.

187 See par 3 1 3 above.

188 Van der Keessel *Praelectiones ad Gr* 3 24 4, 3 3 48.

189 On the life and works of Van der Linden, see De Vos 213–215; De Wet 173–176; Van Zyl 395–399.

190 Van der Linden *Koopmans handboek* 4 6 1–11.

191 *Idem* 4 6 2. As authority for this statement, Van der Linden refers to Bijnkershoek 4 1 (see par 3 2 13 above).

192 Van der Linden was instructed by King Louis Napoleon to compile a Code for the Kingdom of Holland (see De Vos 223; De Wet 176–177; Van Nievelt *Bronne van de Nederlandse Codificatie van het Zee- en Assurantierecht 1798–1822* (1978) XXIV; Van Zyl 416). In compiling his draft Code, Van der Linden was influenced by the draft Code of Walraven (1800) which also provided for life insurance in s 36 (see Van Nievelt XXV and 29). The attempt at codification was interrupted on 1809-05-01 when the *Wetboek Napoleon ingerigt voor het Koninkrijk Holland* came into operation (De Vos 223; De Wet 176; Van Nievelt XXV; Van Zyl 416). A further draft Code of 1809 did not make provision for life insurance and neither did the *Code de commerce* which replaced Roman-Dutch law when Holland became a province of France in 1810 (see Foest 26; Lipman *Wetboek van koophandel vergeleken met het Romeinsche en Fransche regt* (1839) 98; Van Nievelt 322 read with 443 *et seq*). The codification process was not resumed until Holland gained her independence from France in 1813 and subsequent draft codes all made provision for life insurance as did the eventual *Wetboek van koophandel* which was adopted in 1838 (see Van Nievelt 322; Voorduin *Geschiedenis en beginselen Nederlandsche wetboeken* (1841) 280 *et seq*).

193 Van der Linden *Ontwerp BW* 3 11 1 34.

> "Assurantie op iemands leven, mag niet anders gedaan worden dan voor eenen bepaalden tijd, gedurende welken hij verpligt is, om zich aan een gevaar bloot te stellen, of voor een bepaalde reize."

3 2 20 Conclusion on treatment of life insurance in treatises

In the first treatises on insurance law written by Santerna in 1552 and Straccha in 1569, a proper distinction was not made between insurance on lives and wagers on lives. But the distinction was soon recognised by later authors such as Scaccia. De Groot was the first Roman-Dutch author of note who considered the insurance contract, but his work only reflects Dutch insurance legislation passed up to 1631, when his *Inleidinge tot de Hollandsche rechtsgeleerdheid* was published. He merely notes the general prohibition on insurance on lives and on wagering insurance. Other Roman-Dutch authors of the seventeenth century, such as Groenewegen, Wassenaer and Van Leeuwen, held the same view as De Groot.

A notable exception was Voet, who pointed out that even though insurance on a life was prohibited by legislation, the custom of insuring lives was observed between honourable persons. Kuricke, a German author, who relied mainly on Roman-Dutch authority, also observed that insurance on lives was frequently encountered in everyday practice.

Roman-Dutch authors of the eighteenth century continued to rely on De Groot and to expound the view that insurance on lives and insurance on wagers were not allowed. This opinion was usually noted without much discussion. However, the prohibition on insurance on lives is discussed in greater detail by Schorer and Decker. Both make the point that there was no reason why a contract of insurance on the life of a person should not be valid. But it is important to note that wagering in the form of insurance was still prohibited, a point emphasised by Scheltinga in particular.

In conclusion, it may be said that the treatment of life insurance in the treatises reflect the divergence which existed between formal law and practice. Some authors merely stated the formal law which prohibited insurance on lives. But a number of them were of the opinion that insurance on lives was legal and valid and noted that such insurances were concluded in practice.

3 3 Decisions and opinions on insurance law

Judgments and legal opinions provide an important indication of how insurance legislation was applied in practice.[194] It is also

> "the only readily available guide to the subsidiary customs and practices applicable to insurance contracts in the absence of any relevant legislative regulation which was, in any case, often abrogated by contrary usage".[195]

The first judgment which is of importance for the Roman-Dutch law of life insurance and which is also referred to by a number of authors, is that discussed by Roccus.[196] In this case, decided in 1641 in Florence, a creditor, Hieronymus Andreini, insured the life of his debtor, Placidus Sangro, for a period of two years.

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194 See Van Niekerk "Insurance law" 318–321 and Van Niekerk *Sources* 72–74 where decisions and opinions on insurance law are discussed as a source of Roman-Dutch insurance law.

195 Van Niekerk *Sources* 73.

196 See Roccus *Uytgesogten gewysdens* 3.

Placidus had to pay a certain sum to Hieronymus within the two years, but he died before he had paid the debt and before the two years had expired. The question before the court was whether the insurance was valid. It considered the arguments for[197] and against[198] insurance on the life of a person, and held such insurance to be valid but only if it did not involve a shameful cause.[199] The insurer in the case was accordingly ordered to pay the sum insured.[200]

The next indication of how insurance legislation was applied in practice, appears from a legal opinion. This opinion, on the interpretation of the legislation which prohibited insurance on a person's life, was given in Amsterdam by Sybert Coeman on 26 March 1678.[201] The issue here was whether or not a ransom insurance policy was valid. Coeman approached the problem on the basis that all contracts were valid unless specifically prohibited by legislation or unless unlawful by reason of the nature of the contract itself.

Coeman stated that ransom insurance was not prohibited by legislation because the legislative prohibition concerned something completely different.[202] He seems to have been of the opinion that insurance by way of wagering was prohibited and not a true insurance contract.[203] The distinction made by Coeman is important because it also makes it clear that it was wagering on lives which was unacceptable and not insurance on lives.[204] He stated this as follows:[205]

> "[W]ant het is geheel iets anders dat in de Ordonnantie van Amsteldam Art. 24. van Middelburg Art. 2 van Rotterdam Art. 10. gesproken werd, van het leven van eenige luiden of Perzonen van weddingen, van Reisen of Voyagien en diergelijke inventien, welke diergelijke weddenschappen in de Statuten van Genua *lib.* 4. *cap.* 17. ook in het brede werd verboden. Zijnde licht te bemerken dat in deze Ordonnantie ter occasie van ware assurantie, waar mede zy eenige overeenkomingen schijnen te hebben, het zelve ter neder is gestelt . . ."[206]

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197 The arguments in favour of enforcing the contract were that insurance on the life of a person was in use amongst merchants and that it was not prohibited by legislation (Roccus *Uytgesogten gewysdens* 3 num 3 and 5). The merchants of Naples also gave evidence that insurance on lives was in use in Naples and that the clause "may God grant him (the life insured) a long life" was usually added to such a policy (*idem* 3 num 6). The Ordinances on Marine Insurance for the Kingdom of Naples of 1622 and 1623 specifically provided that insurance on lives was permitted (Grosse 6).

198 The argument against enforcing the contract was that the consent of the life insured was required (Roccus *Uytgesogten gewysdens* 3 num 1).

199 *Idem* 3 num 9. The Dutch translation uses the term "schandelyke oorsaak". This does not seem to differ from the dishonourable cause required by Decker since both these terms convey the meaning that the contract must be concluded for a proper cause (see par 3 2 17 above).

200 Roccus *Uytgesogten gewysdens* 3 num 1.

201 Van den Berg *Nedl advb* vol 2 170.

202 Coeman refers to s 24 of the Amsterdam keur, s 2 of the Middelburg keur and s 10 of the Rotterdam keur: see par 3 1 2 *et seq* above.

203 In effect, wagering in the form of insurance was prohibited (see par 2 *et seq* above).

204 See also Braun "Die Wettversicherung auf das menschliche Leben" 1922 (2) *Assekuranz-Jahrbuch* 3 *et seq*.

205 Van den Berg *Nedl advb* vol 2 170.

206 The Statutes of Genoa (1588) provided that insurance or wagers on the life of the pope, kings, cardinals, dukes, sovereigns, bishops or other persons of spiritual or royal nature was prohibited (see Grosse 6). In Venice, wagering on the pope's life was already forbidden in 1419 (Stefani vol 1 237).

Coeman was further of the opinion that his interpretation was also supported by the Amsterdam keur of 8 December 1601[207] and by section 32 of the placcaat of 1571.[208]

The next question dealt with by Coeman was whether, like wagers on a person's life, the policy here was unlawful owing to the nature of the contract itself.[209] To determine this, a double distinction is made between wagers and insurance contracts. In the first place, the nature of wagers is such that the parties have no interest in the outcome of the contract other than that they desire to wager. By contrast, lawful acts based on uncertain happenings and risks are characterised by the fact that the parties have an interest in the outcome of the contract.[210] The second distinction flows from the first. In the case of unlawful contracts such as wagers, the one party hopes for a loss to the other, whereas in the case of a lawful contract both parties hope for a good result, that is, that a loss will not occur.[211]

Coeman then applied the above criteria to the ransom insurance policy and came to the conclusion that it was also not unlawful by reason of the nature of the contract itself.

Finally, he commented that the fact that the policy renounced the applicability of the placcaat, did not also mean that it was in conflict with the placcaat which ostensibly provided that lives may not be insured. The ignorance of the compiler or the parties to the contract, thinking that the placcaat had to be renounced since it prohibited insurance on lives and by implication ransom insurance, could not make the placcaat prohibit that which was not prohibited.[212] In other words, the fact that parties concluded a contract on the assumption that the placcaat had a certain (incorrect) meaning, did not mean that the contract had to be interpreted in this way.

The next relevant judgment was a decision of the Hooge Raad of 30 March 1770.[213] In this case the plaintiff had entered into an agreement in his own favour with another party to ensure that the life of a third party would be insured for the amount of seventeen thousand florins every year.[214] The reason for the insurance is not clear. The question that the court had to decide was whether the plaintiff could

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207 See text at fn 58 above.

208 See text at fn 38 above.

209 This is stated as follows: "En om nu ten anderen te onderzoeken, of zoodanige handelingen uyt haar eigen natuur ongeoorlooft zijn, gelijks als van de weddingschappen over iemands leven of dood en diergelijke inventien, met recht kan gezegt werden . . ."

210 Coeman states this as follows: "[D]e weddenshcappen natuur is, dat de partyen aan den uytslag niet is gelegen, om iets dat koopmanschap of andere private contracten raakt, maar alleen dat zy hebeen willen wedden . . . en zijn om wettige reden ongeoorloft, daar de geoorlofde handelingen over onzekere gevallen en perijkelen tot een eigenschap heben, dat de Handelaars aan het indien was gelegen . . ."

211 Coeman states this as follows: "Uyt dat ondersscheid vloit nu het tweede, dat in de ongeoorlofde handelingen en weddenschappen, de een naar des anders verlies en ongeluk haakt, daar zy in de geoorlofde beide op een goede uitslag hopen."

212 Coeman states this as follows: "[E]n of wel in het geschrift hier over gemaakt renuntiatien staan, ook behelzende dat dit contract tegen de Placaten souden strijden, die quansuis dicteren zouden, datmen op geen lyve mag doen verzekeren, zoo dat de onkunde van de Schrywer of van de contrahenten niet maken dat by Placaten verboden soude zijn, het geen niet verboden is."

213 Pauw *Obs Tum Nov* 1116.

214 A florin is a Dutch coin of gold or silver.

claim execution of the contract in the light of the fact that insurance on lives was not allowed.[215] In support of the prohibition, the court cited the relevant Roman-Dutch legislation[216] and also referred to De Groot[217] and Van Bijnkershoek.[218] However, according to the court, the latest insurance legislation passed in Amsterdam in 1744 posed a problem in that it did not contain an express prohibition of insurance on lives. The court was furthermore of the opinion that if section 13 of the new keur of 1744[219] was compared to section 24 of the old keur of 1598,[220] this omission appears to have been deliberate. Therefore it seemed to the court that nothing prevented the conclusion of the contract at hand.

Nevertheless, since the placcaat of 1571 and legal opinion[221] were against insurance on lives, the court was reluctant to conclude that the contract was legal on the strength of this omission alone. The plaintiff was persuaded not to ask for execution of the contract but was allowed at his own request to show why the contract had to be excluded from the prohibition. The judgment stated that this was easily accomplished and the claim was therefore allowed. But the judgment does not provide any indication of the reasons advanced in support of the plaintiff's arguments in this regard.

3 4 Extant policies of the Roman-Dutch period

The earliest insurance contracts yet identified were concluded in Italian mercantile centres[222] and it is therefore logical to try and find examples of policies on lives which originated in these centres.

Bensa discusses a number of these policies contracted in Genoa.[223] The first type of policy concerned the risk of death at the moment of giving birth. Initially this form of insurance was restricted to slave women only,[224] but an example exists of a contract concluded in 1427 where the life of a non-slave was insured.[225] Apart from this contract where a specific cause of death was contemplated, two other policies in which the life of a person was insured for a period of one year against death as a result of general causes are also discussed. These policies date from

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215 The plaintiff made use of the "condemnatie" procedure, in terms of which no summons was necessary. The contract was delivered to the judge to scrutinise, and if he had no objection, execution of the contract was ordered (see Van der Linden *Koopmans handboek* 3 1 3 3).

216 It referred to s 2 of the Middelburg keur, s 10 of the Rotterdam keur, s 24 of the Amsterdam keur and s 2 of the Costumen of Antwerp which affirmed s 32 of the placcaat of 1571 (see in general par 3 1 above).

217 The reference here to De Groot 3 24 5 is incorrect (see par 3 2 4 above).

218 The reference is to Van Bijnkershoek *Quaest jur priv* 4 1 (see par 3 2 13 above).

219 See par 3 1 3 above.

220 See par 3 1 2 above.

221 It seems that this refers to De Groot and Van Bijnkershoek who were cited earlier in the judgment.

222 Van Niekerk *Sources* 5.

223 See Bensa *Il contratto di assicurazione* (1884) 128. Ch 8 of this work was translated into English by Dr GAM Radesich, previously of the Department of Private Law, Unisa.

224 Since slaves were treated as merchandise, this form of insurance was more akin to property insurance than life insurance (see Havenga 23 *et seq*).

225 Bensa 130 and see also 228 where the policy is reproduced.

1427[226] and 1428[227] respectively. In neither case is it apparent what interest the insured had in the life insured.

A number of policies on lives contracted in Venice have been reproduced by Stefani.[228] Most of the policies were concluded by creditors who insured their debtors' lives.[229] The earliest such policy is dated 7 August 1590 and was an instance of a creditor insuring the life of his debtor.[230] The other policies reproduced were concluded in 1592, 1598, 1603 and 1604 respectively and also include a ransom insurance policy.[231]

It seems, therefore, that the practice of concluding insurance contracts on lives was well established in Italy[232] at the beginning of the seventeenth century.[233]

Two Amsterdam insurance policies on lives from the second half of the seventeenth century were investigated.[234] The first is dated 17 December 1676 and is unusual in that the lives of one hundred persons were insured for a period of one year.[235] In the policy the insurer undertook to insure "op het lijff ende leven" of the one hundred persons in question and the sum insured was one hundred guilders on each life. The reason for the insurance does not appear from the policy and the lives insured were mostly middle-aged persons.[236] The premium amounted to four per cent.[237]

The second policy is dated 16 November 1692 and is an example of a ransom insurance policy.[238] The printed policy is for insurance "op het Lijf van Gillis Joosten van den Brande" and provides that if the insured were to be captured the

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226 *Idem* 132 and see also 230 where the policy is reproduced.

227 *Idem* 132 and see also 232 where the policy is reproduced.

228 See Stefani vol 1 258 276 277 281, vol 2 339 609. Although the policies are in Italian, most of them are preceded by a brief English description of the content of each policy.

229 See also Stefani vol 1 277, vol 2 339.

230 *Idem* vol 1 276.

231 *Idem* vol 2 356.

232 For a policy concluded in Florence in 1610, see Scaccia 1 1 142 and see also par 3 2 3 above.

233 This also appears to have been the case in Barcelona. See Madurell "El riesgo del rescate en los antiguous contractos de seguros de vida (1525–1609)" 1972 *Anuario de historia del derecho Español* 610; Madurell "Los antiguos seguros de vida en Barcelona (1427–1764)" 1957/1958 *Anuario de historia del derecho Español* 889 *et seq*. Examples exist of life insurance in Barcelona preceding the beginning of the seventeenth century (see Smith "Life insurance in fifteenth century Barcelona" 1941 *JEH* 57). However, most of the contracts discussed by Smith were contracts on the lives of slaves and are therefore more in the nature of property insurance than life insurance (see Havenga *op cit* 23 *et seq*).

234 The policies issued in Brussels in 1566 and which, according to De Groote and Gallix, were life policies, seem to have been wagers on travels and voyages (see De Groote "Onuitgegewen zestiende-eeuwse Antwerpse polissen" 1974 *Bijdragen tot de geschiedenis* 163; Gallix 89 *et seq*; see also fn 39 above).

235 See Wagenvoort "Een tijdelijke risicoverzekering Å 1676" 1963 *Het verzekerings-archief* 36–37 where the policy is reproduced. See also Roeleveld *Suid-Afrikaanse lewensversekeringsreg* (unpublished LLD thesis UOVS 1977) 477 where the article by Wagenvoort is reproduced.

236 Roeleveld 477; Wagenvoort 36.

237 Wagenvoort 35 37; Roeleveld 476 478.

238 This policy may be found in the Economisch Historisch Archief in Amsterdam, document number 7347. See Havenga Appendix A 314 where this policy is reproduced.

insurer would pay the amount of any ransom necessary to obtain his release. The premium amounted to one and three quarters per cent. It is important to note that this ransom insurance policy was concluded before the 1693 Amsterdam amendment which specifically allowed such insurances.[239] Furthermore, the policy was virtually identical to the ransom policy prescribed by the Amsterdam keur of 1744.[240] Finally, the fact that the policy was printed and could be purchased from a bookshop,[241] may be an indication that ransom insurance was regularly used at this stage, even though it was not yet provided for by legislation.[242] The same may also be said of life insurance contracts. The fact that they were not specifically provided for by legislation does not mean that they were not concluded. On the contrary, evidence that life insurance contracts were in fact concluded by the Dutch is provided by the policy of 1676[243] and the policy around which the decision of the Hooge Raad of 1770 centred.[244]

It has already been mentioned that the Hamburg insurance ordinance of 1731 specifically permitted insurance on a person's life.[245] The ordinance also contained a model policy which provided for such insurance.[246] The policy stated that the life of a person would be insured for the duration of an entire journey against death arising from any cause. The fact that a model policy of insurance on lives was included in the Hamburg insurance ordinance is an indication that the practice of life insurance was well established in this centre.

In conclusion, it may be said that extant policies of the Roman-Dutch period provide ample evidence that the practice of life insurance occurred in all the important mercantile centres of Europe and was well established by the end of the seventeenth century.[247] Furthermore, the fact that Amsterdam was a major insurance market during the seventeenth century militates against the conclusion that a practice which occurred in other mercantile centres was not also customary in Amsterdam.

4 CONCLUSION AND EVALUATION OF ROMAN-DUTCH LAW

The principles of Roman-Dutch insurance law are found in insurance legislation, treatises dealing with insurance and decisions and opinions on insurance disputes. The earliest insurance legislation prohibited wagering in the form of insurance, that is, insurance by way of wagering and, seemingly, insurance on lives. Although the prohibition of insurance by way of wagering was repeated in later legislation, the apparent prohibition of insurance on lives was not repeated. Insurance on lives was therefore not specifically allowed but neither was it expressly prohibited in later legislation.

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239 See par 3 1 2 above.

240 See fn 68 above.

241 Under the signet on the policy it is stated that "[d]ese oprechte Policen zijn te koop by *Marcus Doornick*, Boekverkooper op de Vygendam".

242 The submission that ransom insurance was in use before it was provided for by legislation, is also supported by the fact that a legal opinion was given on the validity of such insurance in 1678 (see par 3 3 above).

243 See text at fn 235 above.

244 See par 3 3 above.

245 See fn 67 above.

246 Knittel 32. See Havenga Appendix B 315 where this model policy is reproduced.

247 For the position in England, see Havenga 63 *et seq*.

The earliest Roman-Dutch treatises on insurance law merely reiterated the prohibition contained in the legislation of the time but later authors did not always support it. De Groot, Groenewegen and Van Leeuwen, for example, merely stated that insurance on lives was prohibited. A notable exception was Voet who held the view that the custom to insure lives was observed between honourable persons. This is reiterated by Voet's contemporary Kuricke who made it clear that insurance on lives was an everyday practice and that the legislation prohibiting it was not observed. This also seems to have been the view of Scaccia, Roccus, Van Zurck, Schorer and Decker. In fact, it seems that the majority of Roman-Dutch authors on insurance were of the opinion that insurance on lives was not prohibited but was legally permissible and valid. This view is also supported by legal opinions, judgments and extant policies of the period.

But it is important to remember that wagering by way of insurance or wagering on lives was and always remained prohibited. If regard is had to the first treatises on insurance by Santerna and Straccha, it seems that initially the difference between wagers and insurance on lives was not clearly recognised. This probably was the reason why insurance on lives was also held in suspicion. At the beginning of the seventeenth century, the difference between wagers and insurance began to emerge more clearly. Scaccia, for example, clearly distinguished between insurance contracts and wagering contracts.

In conclusion, it may be said that early Roman-Dutch law prohibited insurance on lives by analogy to wagering on lives. In fact, wagering on lives in the form of insurance on lives was prohibited, and not proper insurance contracts on lives. In the final stages of Roman-Dutch law, wagering by way of insurance was still prohibited, but the apparent prohibition on insurance on lives was no longer provided for and in practice life insurance contracts were in fact concluded.

The external and immediate result of an advocate's work is but to win or lose a case. But remotely what the lawyer does is to establish, develop, or illuminate rules which are to govern the conduct of men for centuries; to set in motion principles and influences which shape the thought and action of generations which know not by whose command they move (Holmes *Eulogy on S Bartlett. Speaches* (1913) 43).

Stawing en versigtigheidsreëls in die strafreg

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SUMMARY

Corroboration and cautionary rules in criminal law

In this article the nature of cautionary rules is set out and the link between cautionary rules and corroboration explained. It is contended that the general meaning of the term "corroboration" must not be unnecessarily restricted. Various examples of corroboration are given which may satisfy the cautionary rule in suitable circumstances. Finally, the position with regard to statutory requirements of corroboration is canvassed and the difference between statutory requirements of corroboration and the satisfaction of the cautionary rule by means of corroboration, investigated.

INLEIDING

In die bewysreg word dikwels verwys na versigtigheidsreëls en die vereiste dat getuienis gestaaf moet word. Ook artikel 209 van die Strafproseswet 51 van 1977 vereis "stawing" van getuienis in sekere gevalle. Hoewel hierdie begrippe dikwels in strafsake gebruik word, is dit nie altyd duidelik presies wat daarmee bedoel word en hoe die begrip "stawing" met die versigtigheidsreëls verband hou nie. Ook die vorm wat die stawing kan aanneem, is dikwels onduidelik: Is dit byvoorbeeld voldoende dat periferiese aspekte gestaaf word of moet die stawende bewysmateriaal die beskuldigde direk met die misdaad verbind? Kan 'n ontoelaatbare verklaring gebruik word ter stawing van 'n ooggetuie? Moet die stawende getuienis teen spesifiek die beskuldigde toelaatbaar wees of kan 'n verklaring van een beskuldigde gebruik word as stawing van getuienis teen 'n medebeskuldigde hoewel die verklaring op sigself teen die medebeskuldigde ontoelaatbaar is? Kan verskillende verklarings van 'n beskuldigde gebruik word ter voldoening van die stawingsvereiste in artikel 209 van die Strafproseswet?

Hierdie artikel poog om die onderskeie begrippe te verduidelik en aan te toon hoe die begrippe "versigtigheidsreëls" en "stawing" met mekaar verband hou. Daarna word die begrip stawing in groter detail bespreek en gepoog om 'n bydrae te lewer ten einde sommige van die kwelvrae wat hierbo genoem is, te beantwoord. Daar word ook gekyk na die statutêre stawingsvereiste en hoe die begrip aldaar verstaan moet word.

1 VERSIGTIGHEIDSREËLS

1 1 Omskrywing

Versigtigheidsreëls is praktyksreëls wat dien as hulpmiddels vir die evaluering van getuienis wat óf weens die onderwerp óf weens die soort getuie wat betrokke is

deur ervaring in die regspraktyk as potensieel onbetroubaar bestempel word.[1] Daar is nie sprake van enige vasgestelde hoeveelheid getuies wat aan die versigtigheidsreël onderwerp moet word nie. Enige getuie wat weens die een of ander rede potensieel onbetroubaar is, behoort met versigtigheid bejeën te word. Deur die jare het sekere gevalle wat aan die versigtigheidsreël onderwerp moet word, egter uitgekristalliseer. Hier word byvoorbeeld gedink aan enkelgetuienis (veral van die enkelgetuie), die lokvink, die kind, getuienis met betrekking tot die identiteit van 'n misdadiger, klaers in seksuele misdade, medepligtiges en bekentenisse.

1 2 Illustrasie van die redes vir versigtigheidsreëls

Bogenoemde omskrywing kan geïllustreer word met verwysing na die redes vir die bestaan van versigtigheidsreëls by die kind, seksuele misdade en medepligtiges.

Die rede vir die versigtigheidsreël by kinders is dat hulle verbeeldingryk en baie vatbaar vir suggestie is.[2]

Die grondslag van die versigtigheidsreël by seksuele misdade is daarin geleë dat dit dikwels moeilik is om sodanige klagtes te weerlê en dat verskeie oorwegings daartoe kan lei dat dit valslik gemaak word, byvoorbeeld finansiële oorwegings waar die klaagster verwagtend is, die begeerte om 'n vriend te beskerm en die "terugkry" van iemand wat die getuie se toenadering van die hand gewys het.[3]

'n Medepligtige en ander betrokkenes wat 'n motief kan hê om die waarheid te verdraai, se getuienis word met versigtigheid bejeën omdat hulle vanweë hul posisie in staat is om sowel hul eie dade as dié van die beskuldigde te kamoefleer of om die hof van 'n oortuigende hoeveelheid korrekte detail te voorsien wat daartoe kan lei dat die hof hulle as bevredigende getuies beskou. Hulle het dikwels ook 'n motief om vals getuienis af te lê aangesien hulle soms deur "bevredigende" getuienis vrywaring teen vervolging kan bekom.[4]

1 3 Toepassingsveld van die versigtigheidsreël

Die versigtigheidsreël is nie net van toepassing waar getuies deur die staat geroep word nie, maar byvoorbeeld ook waar medebeskuldigdes in hul eie verdediging getuig en hulle getuienis teen 'n medebeskuldigde oorweeg word.[5]

1 4 Korrekte toepassing van die versigtigheidsreël

Die korrekte toepassing van die versigtigheidsreël impliseer die volgende:

(a) 'n Versigtige benaderingswyse as gevolg van die inherente gevare verbonde aan die nie-kritiese aanvaarding van die getuienis van persone onderworpe aan die versigtigheidsreël. 'n Verhoorhof moet dus ingestel wees op die gevare verbonde aan die nie-kritiese beoordeling van 'n getuie wat aan die versigtigheidsreël onderwerp moet word en homself op die hoogte stel van die redes vir die

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1 Schmidt *Bewysreg* 3e uitg 111.

2 *R v Manda* 1951 3 SA 158 (A) 163D; *S v R* 1977 1 SA 9 (T) 15G–H; *Woji v Santam Insurance Co Ltd* 1981 1 SA 1020 (A) 1028A–E.

3 *R v Rautenbach* 1949 1 SA 135 (A) 143–144; *R v W* 1949 3 SA 772 (A) 780; *S v Snyman* 1968 2 SA 582 (A) 585C–D; *S v M* 1992 2 SASV 188 (W).

4 *S v Ismael (2)* 1965 1 SA 452 (N) 455B–G; *S v Hlapezula* 1965 4 SA 439 (A) 440D; *S v Bester* 1990 2 SASV 325 (A) 328c; *S v Francis* 1991 1 SASV 198 (A) 205h.

5 *S v Johannes* 1980 1 SA 531 (A) 533; *S v Dladla* 1980 1 SA 526 (A) 529A–B.

onderwerping van die betrokke getuie aan die versigtigheidsreël.[6] Hierdie benadering geld vir elke versigtigheidsreël waar meerdere versigtigheidsreëls op dieselfde getuie van toepassing is.

(b) Dat die hof die betrokke getuienis inderdaad met omsigtigheid benader en nie bloot lippediens aan die versigtigheidsreël bewys nie.[7] Aan die ander kant moet onthou word dat "the exercise of caution should not be allowed to displace the exercise of common sense".[8]

1 5 Wyses van voldoening aan die versigtigheidsreël

1 5 1 Beoordeling van getuies

Die getuie wat onderworpe is aan die werking van die versigtigheidsreël, se getuienis kan op sigself vanweë aspekte wat eie aan hom is of eie aan sy omstandighede op die betrokke dag was, voldoende wees ter bevrediging van die versigtigheidsreël. Die volgende aspekte kan hier genoem word:

(a) Die getuie se besondere vermoëns. Voorbeelde hiervan is die volgende: besondere waarnemingsvermoë; oplettendheid; en passie vir details.

(b) Die getuie se besondere deugde (in die sin van afwesigheid van kwade bedoelings). Die volgende voorbeelde kan genoem word: waar die getuie iemand as beskuldigde impliseer wat "near and dear" aan hom is – verwantskap en toegeneentheid blyk dus tussen die persone;[9] waar blyk dat die getuie vantevore 'n "terugtrekkingverklaring" gemaak het; en die afwesigheid van bymotiewe om valse getuienis af te lê, byvoorbeeld die verkryging van 'n voordeel in ruil vir die stawende getuienis.[10]

(c) Die getuie se besondere omstandighede. Hier word byvoorbeeld gedink aan: voldoende geleentheid vir betroubare waarneming; teenwoordigheid naby of op die toneel; onbetrokkenheid by die voorval; en nugterheid.

(d) Die getuie se voorkoms ("demeanour"). Die voorkoms, houding en spreekwyse van 'n getuie sal in gedagte gehou word by die beoordeling van sy getuienis maar moet nie oorbeklemtoon word nie as gevolg van die gevaar dat 'n leuenaar 'n gladde tong kan hê terwyl 'n eerlike getuie aarselend en onseker kan voorkom.[11]

Daar kan op hierdie manier voldoen word aan die versigtigheidsreël selfs by ontstentenis van ander faktore ter bevestiging van die geloofwaardigheid van die weergawe van die getuie, byvoorbeeld waar die beskuldigde as 'n leuenagtige getuie ontmasker word. Dit is egter alleen die geval waar die verhoorhof ten volle bewus is van die gevare betrokke by sodanige skuldigbevinding en waar die

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6 *S v Ncanana* 1948 4 SA 399 (A) 405; *R v W supra* 780; *R v Manda supra* 163B–D; *S v Nqamtweni* 1959 1 SA 894 (A) 898A; *S v Snyman supra* 585D; *S v Artman* 1968 3 SA 339 (A) 340H; *S v S* 1990 1 SASV 5 (A) 7b–c.

7 *S v Mgengwana* 1964 2 SA 149 (K) 150C; *S v F* 1989 3 SA 847 (A) 853A; *S v Bester supra* 328a–b.

8 *S v Snyman supra* 585G–H; *S v Artman supra* 341C; *S v Sauls* 1981 3 SA 172 (A) 180E–H.

9 *R v Gumede* 1949 3 SA 749 (A) 758; *R v Nqamtweni supra* 898D; *S v Bester supra* 328g.

10 *R v Gumede supra* 756; *S v S supra* 12a; *S v Bester supra* 330b; *S v Francis supra* 205j–206a.

11 *R v Masemang* 1950 2 SA 488 (A) 495; *S v Civa* 1974 3 SA 844 (T) 846F; *S v Kelly* 1980 3 SA 301 (A).

"merits of the complainant and the demerits of the accused as witnesses are beyond question".[12]

Bogenoemde beteken egter nie dat die getuienis van die getuie wat aan die versigtigheidsreël onderwerp word, sonder foute moet wees nie. Dit gebeur selde dat getuies op wie die versigtigheidsreël van toepassing is, nie vatbaar is vir die een of ander vorm van kritiek nie.[13] Dit is dan wanneer die algemene geloofwaardigheid van die hoofkarakters en die waarskynlikhede van groot belang word.[14]

1 5 2 Betroubaarheidswaarborge vir 'n weergawe

Ter bevrediging van die versigtigheidsreël sal die verhoorhof normaalweg die een of ander vorm van betroubaarheidswaarborg soek wat die weergawe van die getuie staaf.[15] Sodanige betroubaarheidswaarborge kan byvoorbeeld in die volgende aspekte gevind word:

(a) Leuenagtige getuienis deur die beskuldigde met betrekking tot 'n belangrike aspek binne of buite die hof.[16] Ook 'n vals verklaring deur die beskuldigde in 'n stadium toe hy rede gehad het om te dink dat hy 'n verdagte is, kan 'n voldoende betroubaarheidswaarborg wees indien dit van sodanige aard is en in sodanige omstandighede gemaak is dat dit 'n afleiding regverdig wat byvoorbeeld die medepligtige se getuienis bevestig of ondersteun.[17]

Daar moet egter in gedagte gehou word dat 'n onskuldige persoon sekere feite soms valslik ontken omdat hy vrees dat 'n erkenning hom kan benadeel.[18]

(b) Nie-getuienislewering deur die beskuldigde.[19]

(c) Versuim deur die beskuldigde om beskikbare getuies te roep.[20]

(d) Versuim deur die beskuldigde om te kruisondervra en sy weergawe aan die getuies te stel.[21] 'n Onverdedigde beskuldigde se versuim sal egter nie te swaar teen hom tel nie.[22]

(e) Die gedrag van die verdagte na die voorval.[23]

(f) Die gedrag en toestand van die slagoffer (byvoorbeeld in seksuele misdade) direk na die voorval.[24]

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12 *R v W supra* 781; *S v Nqamtweni supra* 897–898D; *S v Van Vreden* 1969 2 SA 524 (N) 532D–E; *S v Sauls supra* 180E–H.

13 *R v Kristusamy* 1945 AD 549 556; *R v Gumede supra* 755 758; *R v Nquamtweni supra* 898H; *S v Artman supra* 341C; *S v Van Vreden supra* 532E; *S v Francis supra* 205e–f.

14 *S v Dladla* 1974 2 SA 689 (N) 690H–691C; *S v Bester supra* 329j–330e.

15 *S v Snyman supra* 585E; *S v Artman supra* 340H.

16 *R v Kristusamy supra* 559; *R v Nqamtweni supra* 898C; *S v Van Vreden supra* 532C; *S v B* 1976 2 SA 54 (K) 59C; *S v Bester supra* 330b.

17 *R v Simon* 1929 TPD 328; *R v Boxer* 1943 AD 243 249.

18 *S v Dladla* 1980 1 SA 526 (A) 530D–F; *S v Steynberg* 1983 3 SA 140 (A); *S v Mtsweni* 1985 1 SA 590 (A).

19 *R v Mokoena* 1956 3 SA 81 (A) 86F; *S v Letsedi* 1963 2 SA 471 (A) 473H; *S v Gokool* 1965 3 SA 461 (N) 474; *S v B supra*.

20 *S v Phiri* 1958 3 SA 161 (A); *S v Mulaudzi* 1982 1 SA 193 (V).

21 *S v P* 1974 1 SA 581 (RA); *S v Gobozi* 1975 3 SA 88 (OK) 88E–89G; *S v Mngogula* 1979 1 SA 525 (T) 526D; *S v Mogquza* 1984 3 SA 377 (K) 385G.

22 *S v Mehlape* 1963 2 SA 29 (A) 34C–F.

23 *S v R* 1990 1 SASV 413 (ZR) 416h; *S v Bester supra* 329i.

24 *R v Mokoena supra*; *S v S supra* 12a; *S v R* 1990 1 SASV 413 (ZSC) 416h.

(g) Vorige ondervinding van die hof met betrekking tot die betroubaarheid van 'n getuie wat hy gereeld waarneem.[25]

(h) Die onmiddellike rapportering van die voorval, byvoorbeeld in seksuele misdade en die konsekwentheid van die getuie.[26]

(i) Stawende getuienis. Stawende getuienis is slegs een van die maniere en moontlik die beste manier waarop voldoen kan word aan die versigtigheidsreël. Dit word *infra* volledig bespreek.

1 6 Gevolge van die bevrediging van die versigtigheidsreël

Die bevrediging van 'n versigtigheidsreël regverdig nie noodwendig 'n skuldigbevinding nie aangesien die uiteindelike vereiste, bewys bo redelike twyfel, op sy beurt bepaal word deur die beoordeling van al die getuienis en die graad van die waarborge vir die getuienis van die persoon wat aan die versigtigheidsreël onderwerp word.[27]

Dit is nie 'n vereiste dat die staatsaak verwerp moet word ten einde die beskuldigde die voordeel van die twyfel te gee en te ontslaan nie. Die kernvraag is of daar by die oorweging van al die getuienis gesê kan word dat die beskuldigde se weergawe redelik moontlik waar is. Indien wel, moet hy die voordeel kry.[28]

2 STAWENDE GETUIENIS

2 1 Inleidend

Die presiese betekenis wat aan die begrip "stawing" geheg moet word, is redelik onduidelik in die regspraktyk. Die begrip word los en vas gebruik en verskillende dinge word daarmee bedoel. Die rede hiervoor is grootliks geleë in verskillende toetse wat aangewend is by medepligtiges en pogings om te verseker dat 'n persoon nie verkeerdelik skuldig bevind word nie.

Ten einde bogenoemde te begryp, is dit nodig om te kyk na die ontwikkeling en interpretasie van die begrip in die bewysreg ten opsigte van getuies wat medepligtiges was of is.

2 2 Die ontwikkeling van die begrip "stawing" met spesifieke verwysing na die posisie met betrekking tot medepligtiges

Artikel 285 Wet 31 van 1917 het statutêr voorgeskryf dat 'n skuldigbevinding op die alleenstaande, ongestaafde getuienis van 'n medepligtige slegs kan volg indien getuienis aangebied word wat bewys dat die misdaad wel gepleeg is. Hierdie bepaling was so geïnterpreteer dat daar stawing vereis is "in some material respect" indien nie bewys kon word dat die misdaad wel gepleeg is nie.[29] Die bepaling is later vervang deur artikel 257 Wet 56 van 1955, wat in wesenlike opsigte dieselfde was.

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25 *S v L* 1955 1 SA 575 (T) 577; *S v P* 1955 2 SA 561 (A) 564; *S v Motsepe* 1971 2 SA 475 (T); *S v Malele* 1975 4 SA 128 (T); *S v Madito* 1987 1 SA 185 (NK).

26 *S v R* 1990 1 SASV 413 (ZSC) 416h.

27 *S v Ismael supra* 456C; *S v Hlapezula supra* 440H; *S v Snyman supra* 585F–G; *S v Van As* 1976 2 PH H205 (A); *S v Shabalala* 1977 2 PH H201 (A); *S v Francis supra* 205f–g.

28 *R v M* 1946 AD 1023 1026.

29 *R v Sethren* 1915 TPD 257; *R v Thielke* 1918 AD 373 377; *R v Gokool supra* 470.

Die regsprekende gesag het dit vroeg reeds duidelik gestel dat die stawende getuienis nie die beskuldigde direk met die misdaad hoef te verbind nie.[30] Daar is beslis dat die getuienis waarop gesteun word as stawende getuienis "must show or tend to show that the accomplice is a reliable witness".[31] Teen die agtergrond dat stawende getuienis oor besonderhede wat deur 'n medepligtige verstrek is met betrekking tot die omstandighede van 'n misdaad, nie aanduidend daarvan is dat die medepligtige die waarheid praat nie, is in *R v Brewis*[32] gesê dat stawende getuienis wat nie die beskuldigde by die misdaad impliseer nie, nie 'n afdoende aanduiding van die betroubaarheid van die medepligtige is nie. Hierdie *dicta* is egter nie geïnterpreteer as sou dit 'n vereiste daarstel dat in 'n geval waar 'n medepligtige getuig, daar stawing moet wees wat die beskuldigde by die misdaad impliseer nie. Daar is wel gesoek na stawende getuienis wat aandui of neig om aan te dui dat die medepligtige in sy weergawe van wat gebeur het – wat andersins in essensiële opsigte die waarheid kan wees – nie die beskuldigde valslik daarby betrek nie.[33] Met verloop van tyd het die howe die vereistes van die statutêre bepaling ten opsigte van medepligtiges geskei van die vereistes ter voldoening aan die versigtigheidsreël by medepligtiges.[34] Hoewel die toets ter bevrediging van stawing vir die statutêre voorskrif, naamlik "stawing in 'n materiële opsig", dus bevredig kon word, het dit nie noodwendig beteken dat aan die vereistes ter bevrediging van die versigtigheidsreël voldoen is nie. So is geredeneer dat die bevestiging van 'n kleurlose of onbetwiste feit voldoende kan wees ter voldoening aan die bepalings van die statutêre voorskrif met betrekking tot medepligtiges, maar nie ten einde die versigtigheidsreël te bevredig nie.[35]

Ter bevestiging van die versigtigheidsreël is gesoek na waarborge wat die risiko dat die beskuldigde valslik deur 'n medepligtige geïnkrimineer word, voldoende verminder. In *R v Ncanana*[36] word gesê dat die risiko ten beste verminder word deur stawende getuienis wat die beskuldigde impliseer. Die hof bevestig voorts dat die risiko ook verminder sal word indien dit sou blyk dat die beskuldigde 'n leuenagtige getuie is, of indien hy geen getuienis lewer ten einde die getuienis van die medepligtige teen te spreek of te verduidelik nie. Indien die medepligtige "someone near and dear to him [as beskuldigde]" impliseer, kan dit ook genoegsame bevestiging verleen.[37]

Sommige later sake, veral met betrekking tot medepligtiges, formuleer die begrip stawing vir doeleindes van die versigtigheidsreël egter uiters eng en beperk dit tot iets wat die beskuldigde by die misdaad impliseer.[38] Hoffmann en Zeffertt[39]

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30 *R v Galperowitz* 1941 AD 485 491; *R v Ncanana supra* 406; *S v Gokool supra* 470G–H 472B–473D; *S v Mhlabathi* 1968 2 SA 48 (A).

31 *R v Lakatula* 1919 AD 262 365; *R v Galperowitz supra* 492; sien ook *R v Owen* 1942 AD 389 394; *R v Kristusamy supra* 560.

32 1944 AD 261 269.

33 *S v Kristusamy supra* 558.

34 *R v Ncanana supra* 405; *R v W supra* 781; *S v Gokool supra* 470H–471E; *S v Hlapezula supra* 440F–H; *S v Van Vreden supra* 531E.

35 Sien die minderheidsuitspraak van Schreiner AR in *R v P* 1957 3 SA 444 (A) 448.

36 *Supra* 405–406.

37 *R v Nqamtweni supra*; *S v Hlapezula supra* 440G.

38 *R v Mpompotshe* 1958 4 SA 471 (A) 476E–G; *S v Hlapezula supra* 440; *S v Mhlabathi supra* 51A; *S v Artman supra* 340H; *S v Van Vreden supra* 532A.

39 *The SA law of evidence* 4e uitg 578.

definieer stawing vir doeleindes van die versigtigheidsreël insgelyks soos volg onder die opskrif medepligtiges: "corroboration means evidence independent of the accomplice himself which confirms his evidence in a material respect implicating the accused". Dit kom voor of hierdie eng standpunt ontstaan het weens die spesifieke probleme wat hulle voordoen by die stawing van die getuienis van 'n medepligtige (soos hierbo bespreek), en wel vanweë sy intieme kennis van die gebeure.[40]

Ek is egter van mening dat dit verkeerd sou wees om die begrip stawing vir doeleindes van die bevrediging van die versigtigheidsreël so 'n unieke en eng interpretasie te gee. So 'n eng definisie hou nie rekening met ander toepassingsvelde van die begrip stawing nie. Daar word byvoorbeeld dikwels in die regspraktyk verwys na stawing van 'n enkelgetuie hoewel daar streng gesproke nie sprake kan wees van enkelgetuienis indien die enkelgetuie (deur ander getuienis) gestaaf word nie. Gewoonlik ontstaan die situasie dat 'n getuie enkelgetuienis oor sekere aspekte lewer – veral met betrekking tot getuienis wat die beskuldigde met die misdaad verbind – maar gestaaf word in ander opsigte. Die stawing dien dan dikwels ter bevestiging van die geloofwaardigheid en betroubaarheid van die enkelgetuie in alle opsigte, veral met betrekking tot sy verbinding van die beskuldigde met die misdaad. So merk appèlregter Holmes in *S v Artman*[41] op dat 'n enkelgetuie "does not require the existence of implicatory corroboration, indeed in that event she would not be a single witness". Die *dicta* van appèlregter Holmes in *S v Artman* is met goedkeuring deur die appèlhof in *S v Khumalo*[42] aangehaal.

Die eng definisie hou verder ook nie rekening met die unieke omstandighede met betrekking tot die ontwikkeling van die begrip (soos hierbo bespreek) nie.

2 3 Omskrywing van die begrip "stawing"

Ek meen dat die volgende vereistes met betrekking tot die begrip "stawing" uit voorgaande afgelei kan word:

(a) Stawing moet afkomstig wees van 'n bron wat selfstandig staan teenoor die getuienis wat gestaaf word, dit wil sê dit moet onafhanklik wees van die getuie wat gestaaf word.[43]

(b) Die stawende bewysmateriaal moet toelaatbaar wees en moet daarom aan die vereiste van relevansie voldoen. Selfs al is die enigste bron van relevansie die feit dat dit kan dien om 'n getuie in 'n wesenlike opsig te staaf, word aan die toelaatbaarheidsvereiste voldoen.[44]

'n Vraag wat hier ontstaan, is of die stawende getuienis teen spesifiek die beskuldigde toelaatbaar moet wees. Soos *infra* in die bespreking van die ongerapporteerde beslissing *S v Lelempe*[45] aangevoer word, is dit nie 'n vereiste nie. Daar moet in gedagte gehou word dat dit die getuie is wat gestaaf moet word en nie die beskuldigde nie. Daarom word aan die hand gedoen dat die beslissing in *R v Kohlinfila Qwabe*[46] verkeerd is.

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40 *S v Mhlabathi supra* 51A.
41 *Supra* 341A–B.
42 1991 4 SA 310 (A) 328A–B.
43 *S v B supra* 59B.
44 Schmidt 109.
45 Sien *infra*.
46 1939 AD 255.

'n Verdere vraag wat na vore kom, is of die feit dat 'n beskuldigde 'n ontoelaatbare bekentenis afgelê het aan byvoorbeeld 'n konstabel, gebruik kan word ter stawing van 'n enkelgetuie – 'n lid van die publiek – wat 'n ooggetuie was. In *S v Duna*[47] was dit gemeensaak dat 'n verklaring wat deur die beskuldigde neergeskryf is na sy arrestasie 'n ontoelaatbare bekentenis was. Die staat het die ontoelaatbare verklaring tot beskikking van 'n handskrifdeskundige gestel wat sekere woorde en letters daaruit gebruik het ten einde bepaalde karaktertrekke en uniekhede in die beskuldigde se skryfstyl aan te toon. Die uiteindelike doel was om te bewys dat die beskuldigde sekere handgeskrewe pamflette geskryf het wat as bewysstukke ingedien was.

Die hof bevind dat die gebruikmaking van die ontoelaatbare bekentenis geoorloof is:[48]

> "The selected words are not used or intended to be used to prove their content, to prove what they say, but the use made of these words is to determine what characteristics and mannerisms are peculiar to the handwriting of the accused and to determine whether these characteristics also manifest themselves in the pamphlets allegedly circulated by the accused.
>
> I repeat the State is not interested in the meaning of individual words but intends making a scientific comparison of the handwriting as effected in these words and the handwriting on the pamphlets. It surely cannot be suggested that the signature of the accused at the foot of an inadmissible confession could not be used to compare it with another signature allegedly that of the accused."

Indien hierdie beginsel konsekwent toegepas word, moet ten minste die feit dat 'n ontoelaatbare bekentenis gemaak is, kan dien as stawing vir 'n getuie.

In die lig van erkende gesag[49] dat ook die inhoud van 'n bekentenis in gepaste gevalle voor 'n hof geplaas kan word ten einde die geloofwaardigheid van 'n beskuldigde tydens 'n binneverhoor te toets, kan ook geredeneer word dat die inhoud van 'n ontoelaatbare bekentenis voor 'n hof geplaas behoort te kan word, nie om die waarheid van die inhoud daarvan te bewys nie, maar ten einde 'n getuie te staaf. Dit gaan immers weer eens hier oor geloofwaardigheid, nie van die beskuldigde nie, maar van die getuie wat gestaaf moet word.[50]

(c) Die stawing moet betrekking hê op nie-kleurlose faktore en dus wesenlik wees. Dit is nie voldoende dat die stawende getuienis heeltemal versoenbaar is met die beskuldigde se onskuld en op geen wyse, anders as om 'n invloed te hê op die klaer se geloofwaardigheid, sy skuld waarskynliker maak nie.[51] Getuienis wat dus bevestig maar nie betwis word nie en bygevolg kleurloos is, het geen krag as stawende getuienis nie. Selfs die ruimste bevestiging van onbetwiste onwesenlike besonderhede is nie voldoende nie.[52]

Dit is wel genoegsaam indien die omringende omstandighede en die geheel van die gebeure stawing bied vir aspekte wat in geskil is en dui op die skuld van die beskuldigde en die waarheid of betroubaarheid van die getuienis van die klaer.[53]

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47 1984 2 SA 591 (C).

48 294F–H.

49 *S v Lebone* 1965 2 SA 837 (A); *S v Motlhabakwe* 1985 3 SA 188 (NK); *S v Khuzwayo* 1990 1 SASV 365 (A).

50 Sien in die algemeen Schmidt 355–356.

51 *R v W* 1949 3 SA 772 (A) 781; *R v D* 1951 4 SA 450 (A) 455–456.

52 *R v P* 1957 3 SA 444 (A) 454F–G.

53 *R v D supra* 455F–456A; *S v W* 1963 3 SA 516 (A) 523C; *S v Snyman supra* 586F–587B.

Wat voldoende stawing daarstel, moet aan die hand van die spesifieke geval oorweeg word. Daarom kan byvoorbeeld in die geval van 'n medepligtige vereis word dat, ten einde werklike stawing daar te stel, die beskuldigde by die misdaad geïmpliseer moet word. Dit is egter nie in alle gevalle 'n vereiste nie. Wat van belang is, is dat die stawende getuienis sodanig moet wees dat dit die risiko dat die beskuldigde verkeerd geïmpliseer word, voldoende verminder.

Uit bogenoemde is dit duidelik dat soos in baie gevalle in die strafreg dit nie moontlik is om algemene reëls vir die geaardheid van stawende bewysmateriaal daar te stel nie. Die omstandighede van elke geval sal in hierdie verband 'n beslissende rol speel. Die vereistes wissel grootliks na gelang van die suspisie wat kleef aan die getuienis wat gestaaf word.

2 4 Voorbeelde van stawende bewysmateriaal

Stawende getuienis soos hierbo beskryf is, is eintlik 'n breë begrip wat getuienis wat reeds gelewer is op een of ander manier *aliunde* bevestig. Voorbeelde van stawende getuienis is die volgende:

(a) Mondelinge getuienis. Bevestigende mondelinge getuienis hoef nie in alle opsigte aanvaar of verwerp te word nie. Appèlregter Reynolds stel dit soos volg in *R v P*:[54]

> "He may accept a portion of it and reject some other portion, and it cannot be said that the portion he rejects as not establishing certain facts can be relied upon as confirmatory evidence. Or he may accept one portion of the evidence and make no finding on another, since he feels he cannot make a finding on the other portion at all, and in that event, he can scarcely rely upon that portion of the evidence upon which he is not prepared to make a finding. This rule is most important . . ."

Die getuienis van 'n bevredigende medepligtige kan tot stawing dien van 'n ander medepligtige.[55]

Toelaatbare opiniegetuienis van veral deskundige medici dien dikwels tot stawing van klaers se getuienis, byvoorbeeld ten opsigte van dronkenskap, emosionele toestand ensovoorts.

(b) Dokumentêre getuienis.[56]

(c) Omstandigheidsgetuienis.[57]

(d) Reële getuienis. Voorbeelde hiervan is die volgende: 'n vingerafdruk; die voorkoms van 'n persoon;[58] die opsporing van 'n gesteelde item wat van die beskuldigde afkomstig was;[59] die plek van 'n wond op die liggaam van die oorledene;[60] die teenwoordigheid van byvoorbeeld arseen in die liggaam van 'n oorledene;[61] die vind van bevestigende foto's by die beskuldigde.[62]

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54 *Supra* 451A–B.

55 *S v Avon Bottle Store (Pty) Ltd* 1963 2 SA 389 (A); *S v Ismail supra* 455H–456A; *S v Hlapezula supra* 440H; *S v Van Vreden supra* 532B.

56 *S v Gokool supra* 473H.

57 *R v Blyth* 1940 AD 355; *S v Motaung* 1949 2 SA 414 (O).

58 *S v Gokool supra* 473–474; *R v Sikosana* 1960 4 SA 723 (A) 729D.

59 *R v Boxer* 1943 AD 243 249; *S v Gokool supra* 474A.

60 *S v Letsedi supra* 474H; *S v Musilo* 1993-09-16 saaknr 18/92 en 281/92 (A).

61 *S v Blyth supra* 364.

62 *R v P* 1942 CPD 103.

(e) 'n Erkenning of toegewing deur woorde of gedrag, formeel of informeel, wat byvoorbeeld die getuienis wat gestaaf moet word in 'n belangrike opsig bevestig.[63] In hierdie verband is die beslissing van appèlregter Steyn in *S v Lelempe*[64] (waarmee appèlregter Joubert en waarnemende appèlregter Grosskopf saamgestem het) om twee redes belangrik.

In dié saak het beskuldigde 1 (Komane) en die eerste appellant (beskuldigde 3 tydens die verhoor) beide verklarings voor 'n kaptein afgelê wat toegelaat is tydens die verhoor. Die verklaring van beskuldigde 1 het in belangrike opsigte met dié van die eerste appellant ooreengekom. Hoewel beskuldigde 1 se verklaring ontoelaatbaar was teen die eerste appellant, bevind die hof nietemin dat dit van kardinale belang is in die beoordeling van die eerste beskuldigde se geloofwaardigheid. Die versigtigheidsreël is immers ook op hom van toepassing. Aangesien sy mondelinge getuienis in materiële opsigte verskil van sy eie verklaring, kon dit die eerste appellant nie van hulp wees nie.

Die hof vind ook stawing vir die getuie Fransina in die ooreenkomste in haar weergawe en dié van die eerste appellant soos onder andere blyk uit sy verklaring aan die kaptein.

Ten opsigte van die getuie Annetjie bevind die verhoorhof soos volg:

> "She does not qualify as a witness who is satisfactory in every material respect. Although we are satisfied that she was not lying deliberately we approach her evidence with some circumspection."

Die appèlhof vind ook in Annetjie se getuienis stawing vir Fransina se weergawe en vervolg:

> "Annetjie, in her turn is remarkably corroborated by first appellant, in his said statement, that accused no 2 brought two containers of methylated spirits to the scene and poured the contents on to the deceased who was set alight by accused no 5. That statement was not admissible against those two accused but is of cardinal importance in judging the reliability of Annetjie's evidence against first appellant. The trial Court did not deal with this aspect and may have missed it. But it unquestionably strengthens Annetjie's evidence against first appellant most materially. It also strengthens her corroboration of Fransina in like measure. She is also corroborated by Komane that there were two containers of spirits."

Daar word aan die hand gedoen dat die appèlhof bevestig dat stawing gevind kan word vir onbevredigende of enkelgetuies in verklarings deur die beskuldigde self. Die hof gaan egter ook verder deur te bevind dat die materiële ooreenkomste tussen eerste appellant se verklaring waarin hy beskuldigdes 3 en 5 impliseer en die getuie Annetjie, Annetjie se geloofwaardigheid as getuie teen die eerste appellant versterk. Annetjie was egter nie net 'n getuie teen die eerste appellant nie. Ek is van mening dat 'n enkelgetuie se geloofwaardigheid, indien dit op een of ander wyse versterk of bevestig word, vasstaan; hierdie beslissing dui dus by implikasie aan dat 'n verklaring van een beskuldigde, hoewel dit ontoelaatbaar is teen 'n medebeskuldigde, indirek gebruik kan word teen die medebeskuldigdes deurdat dit aangewend word om 'n getuie se getuienis te staaf en te versterk.

(f) Die pleging van 'n ander maar soortgelyke misdaad as die een waarvan hy aangekla word. 'n Voorbeeld is *R v Viljoen*.[65] Verskeie klagtes van bedrog is

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63 *R v Kristusamy supra* 559; *S v W* 1963 3 SA 516 (A) 522F 523C–E; *S v B supra* 59B.
64 1989-03-30 saaknr 315/88 (A).
65 1947 2 SA 56 (A).

aanhangig gemaak. Daar word bevind dat stawing met betrekking tot een aanklag gevind kan word in die getuienis met betrekking tot ander aanklagte. Appèlregter Tindall verklaar:

> "In the present case we have to deal with a systematic series of frauds following closely upon each other, peculiar in character and all of them revealing the same essential features. I have no doubt that in such a case it is permissible to have regard to the acts referred to in the other counts of fraud. The commission of those frauds by the accused seems to me to make it probable that he was the author, as Adamo stated he was, of the similar frauds referred to in the counts in which Adamo was concerned. The other frauds are admissible as showing a high degree of probability that Adamo was speaking the truth in testifying that the accused played the leading part in the frauds in which Adamo participated . . . The proof of the other frauds was therefore corroboration of Adamo's evidence as to the part played by the accused."[66]

2 5 Selfstawing – 'n manier waarop stawing nie kan geskied nie

Selfs waar 'n vorige ooreenstemmende verklaring van 'n getuie toelaatbaar is, kan dit nie dien as stawing van sy getuienis vir doeleindes van die versigtigheidsreël nie, hoewel dit dui op sy konsekwentheid en in 'n mate sy geloofwaardigheid versterk.[67]

Dit is egter wel moontlik dat die getuie die verklaring van 'n ander persoon bloot as geleibuis aan die hof voorlê (soos in die geval waar hy 'n geskrewe erkenning van die beskuldigde indien) en dat die verklaring van die ander persoon dan as bekragtiging aanvaar word. In so 'n geval moet die feit van die ander persoon se verklaring vasstaan, dit wil sê die suspisie waaronder die getuie staan, moet nie betrekking hê op sy stelling dat die betrokke verklaring deur die ander persoon gemaak is nie.[68]

Die posisie ten opsigte van selfstawing verskil egter met betrekking tot die statutêre vereistes ten opsigte van stawing soos *infra* aangetoon word.

2 6 Stawing as statutêre vereiste

Stawing word tans slegs in artikel 209 Wet 51 van 1977 statutêr vereis. Artikel 209 bepaal soos volg:

> " 'n Beskuldigde kan aan 'n misdryf skuldig bevind word op die enkele bewys van 'n bekentenis deur daardie beskuldigde dat hy die betrokke misdryf gepleeg het, indien bedoelde bekentenis in 'n wesenlike opsig bevestig word of, waar die bekentenis nie so bevestig word nie indien dit deur ander getuienis as bedoelde bekentenis bewys word dat die misdryf inderdaad gepleeg is."

Die vraag wat hier ontstaan, is wat die posisie tans is met betrekking tot die vereiste dat die bekentenis in 'n "wesenlike opsig bevestig [moet] word". Dit blyk meteens dat die maatstaf wat, soos *supra* uiteengesit is, uit soortgelyke sake ontwikkel het, nou in soveel woorde in die artikel verskyn en dat sake wat ten opsigte van medepligtiges beslis is toe soortgelyke wetsbepalings daarop van toepassing was, ook hier van toepassing gemaak kan word ten einde te bepaal wat stawing in 'n wesenlike opsig beteken. Vir doeleindes van "bevestiging in 'n

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66 63–64; sien ook *S v Gokool supra* 474H–480; *S v B supra* 38G–H; *S v Shabalala supra*.

67 *R v Manyana* 1931 AD 386; *R v Rose* 1937 AD 467 473; *S v Bergh* 1976 4 SA 857 (A) 869D; *De Beer v R* 1933 NPD 30; *R v Bell* 1929 CPD 478; *R v S* 1948 4 SA 419 (G); *S v V* 1961 4 SA 201 (O) 205A; *S v M* 1980 1 SA 586 (BH).

68 Sien Schmidt 109; Hoffmann en Zeffertt 585.

wesenlike opsig" ter bevrediging van artikel 209 kan dus aanvaar word dat die beskuldigde nie direk met die misdaad verbind hoef te word nie.[69]

"Bevestiging in 'n wesenlike opsig" vir doeleindes van artikel 209 kan ook afkomstig wees van die beskuldigde self, hoewel sodanige bevestiging met omsigtigheid bejeën moet word aangesien die gevaar altyd bestaan dat 'n persoon 'n misdaad valslik kan erken, byvoorbeeld om iemand anders te beskerm of omdat hy 'n fout begaan; sodoende kan die hele doel van artikel 209 verydel word.[70] In *S v Mjoli*[71] is beslis dat die bekentenis van die beskuldigde in wesenlike opsigte bevestig kan word in sy verklaring en antwoorde wat ingevolge artikel 115 van die Strafproseswet verstrek is. Wesenlike bevestiging kan selfs gevind word in informele erkennings, dit wil sê erkennings wat nie kragtens artikel 115(2)(b) aangeteken is nie.

Die basis vir die reël teen selfstawing is dat 'n bewering nie betroubaarder word net omdat die persoon dit twee keer gesê het in plaas van een maal nie. Die reël teen selfstawing is in *S v Mjoli*[72] getemper, nie deur 'n herhaling deur die beskuldigde van sy bekentenis *per se* as voldoende bevestiging te beskou nie, maar deur die herhaling in die lig van die omstandighede te evalueer en te beoordeel of dit die gevaar van 'n vals bekentenis verminder. Die bron van die bevestiging is nie die hoofsaak nie maar as die beskuldigde self die bron daarvan is, sal die hof dit noukeuriger beoordeel want dit is nie so betroubaar soos 'n onafhanklike bron nie.[73]

Bogenoemde beginsels word ondersteun deur 'n ongerapporteerde Oos-Kaapse beslissing van regter Nepgen in *S v L Erasmus*.[74] In hierdie saak was daar geen direkte getuienis wat daarop dui dat dit die beskuldigde was wat haar man, ene Nel, geskiet het nie. Die staat het op bekentenisse gesteun wat die beskuldigde gemaak het, in die besonder op 'n bekentenis van die beskuldigde op 21 Februarie 1992 aan 'n landdros. Verder was daar 'n brief gedateer 20 April 1992 wat die beskuldigde aan die ondersoekbeampte, 'n kaptein, geskryf het en verskeie bekentenisse aan haar dogter en skoonseun. Die blote feit dat Nel oorlede is aan 'n skietwond aan sy kop is nie bewys daarvan dat hy vermoor is nie. Gevolglik moes aan die vereiste van bevestiging van die bekentenis in 'n wesenlike opsig voldoen word.

Regter Nepgen begin deur te verwys na die doel van artikel 209 soos blyk uit *R v Sikosana*, naamlik om verkeerde skuldigbevindings te vermy as gevolg van 'n onbetroubare bekentenis. Hy beklemtoon dat die vraag wat gestel moet word, is of hierdie doel verydel sou word indien toegelaat word dat 'n ander buite-geregtelike bekentenis aangewend word om die nodige bevestiging te verleen. Die regter vervolg:

> "Volgens my oordeel kan hierdie vraag nie onomwonde 'ja' of 'nee' beantwoord word nie en sal die antwoord daarop in elke besondere geval afhang van die besondere omstandighede waaronder daardie ander bekentenis gemaak is. In 'n bepaalde geval mag sodanige bekentenis onder omstandighede gemaak word wat daarop dui dat dit waarskynlik net 'n herhaling is van die bekentenis waarvoor bevestiging gesoek word. As voorbeeld hiervan kan verwys word na 'n geval waar bevestiging van 'n bekentenis voor 'n landdros gesoek word in 'n bekentenis wat kort tevore aan die ondersoekbeampte gemaak is (cf. *S v Kumalo*, *supra* te 385D) en

69 *R v Blyth supra* 364; *S v Gokool supra* 470G; *S v Dondashe* 1989 1 PH H30 (A).
70 *R v Sikosana* 1960 4 SA 723 (A) 729C; *S v Mbambo* 1975 2 SA 549 (A) 554C–D.
71 1981 3 SA 1233 (A).
72 *Supra* 1238F–G 1245E–H; vgl *S v Kumalo* 1982 2 SA 379 (A) 385D.
73 1993-08-23 saaknr CC8/93 (OK).
74 *Supra* 729C.

> waar die aanduiding is dat dit wat in die een bekentenis gesê is net 'n weerpratery is van dit wat in die ander bekentenis gesê is. In 'n ander geval mag sodanige bekentenis gemaak word op 'n tydstip en aan 'n persoon wat daarop dui dat dit hoogs onwaarskynlik is dat dit vals is. In so 'n geval kan ek geen rede sien waarom die inhoud van so 'n bekentenis nie in beginsel aangewend kan word om die stawing wat deur artikel 209 vereis word, te verleen nie. Ek stem met eerbied saam met wat in hierdie verband gesê is deur Viljoen AR in *S v Mjoli and Another* supra te 1245F–H."

Die regter beklemtoon met verwysing na *S v Letsedi*[75] en *S v Kearney*[76] dat daar in gedagte gehou moet word dat voldoening aan die vereistes van artikel 209 nie noodwendig 'n skuldigbevinding tot gevolg sal hê nie en dat dit steeds 'n vereiste is dat die hof tevrede moet wees dat die skuld van die beskuldigde bo redelike twyfel deur al die getuienis bewys is.[77] Die regter kom dus tot die gevolgtrekking dat 'n ander buite-geregtelike bekentenis wat deur die beskuldigde gemaak is, as bevestiging vir doeleindes van artikel 209 kan dien.

Ter oorweging van die feitlike vraag of enige buite-geregtelike bekentenisse van die beskuldigde die nodige bevestiging vir doeleindes van artikel 209 daarstel, verwys regter Nepgen na die vereistes gestel deur appèlregter Schreiner in *R v Sephanyane*:[78]

> "The confirmation must relate to a material matter. It may further be assumed that the factor of materiality affects degree as well as kind, and that the confirmation must not be trivial or unsubstantial. But it need not go so far as to establish, independently, the accused's guilt."

Aspekte wat die hof in hierdie verband oorweeg, is onder andere die volgende:

(a) Of die feite in die verklaring wat gestaaf moet word met die objektiewe feite verskil. Die hof verwys in hierdie verband na die waarskuwing in *S v Kumalo*.[79]

(b) Die aan- of afwesigheid van sekerheid oor wat die beskuldigde bedoel in die stawende verklaring.

(c) Die tyd wat verloop het na die aflê van die verklaring wat gestaaf moet word.

(d) Die moontlikheid van beïnvloeding deur polisiebeamptes wat betrokke is by die ondersoek.

(e) Die persoon of persone aan wie dit gemaak is, soos 'n familielid (dogter) in teenstelling met byvoorbeeld iemand in 'n gesagsposisie.

(f) Die plek waar dit gemaak is, byvoorbeeld ver van die plek waar die ondersoek plaasvind.

(g) Of die omstandighede waarin dit gemaak is aanduidend daarvan is dat dit vals kan wees.

(h) Of die bekentenis oor 'n tydperk herhaal is en, indien wel, die waarskynlikheid van valse herhalings van die bekentenis.

(i) Of die getuie wat oor die bekentenis getuig se getuienis in dispuut was.

(j) Of die beskuldigde getuig het dat die stawende bekentenis vals is.

Die logiese en sinvolle benadering in bogenoemde uitspraak word ondersteun.

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75 *Supra* 474I–F.
76 1964 2 SA 495 (A) 501H.
77 *Supra* 554C–D.
78 1955 2 PH H233 (A).
79 1983 2 SA 379 (A) 383H.

AANTEKENINGE

DIE ONVERMOËNDE VRUGGEBRUIKER

Inleiding

Dit is algemeen erkende reg dat 'n vruggebruiker, indien die eienaar dit verlang, sekuriteit moet verskaf dat hy die vruggebruik *civiliter modo* sal uitoefen en die saak in net so 'n goeie toestand by die afloop van die vruggebruik aan die eienaar sal terugbesorg as wat dit ontvang is. Alhoewel 'n bepaling in 'n testament dat 'n vruggebruiker nie sekuriteit hoef te verskaf nie, groot omstredenheid by die Romeins-Hollandse skrywers veroorsaak het, is die aanvaarde standpunt dat 'n vruggebruiker ten spyte van so 'n klousule in die testament (onderworpe aan sekere uitsonderings), nog steeds sekuriteit moet verskaf. Die versuim om sekuriteit te verskaf, het drastiese gevolge: 'n vruggebruiker wat na aanvraag in gebreke bly om sekuriteit te verskaf, is nie op die vrugte van die saak geregtig nie en kan ook deur die hof gelas word om die saak aan die eienaar terug te lewer.

'n Probleem wat kan ontstaan, is dat die vruggebruiker nie in staat mag wees om sekuriteit te verskaf nie. Dit is glad nie uitsonderlik nie dat die vruggebruik wat deur 'n nagelate eggenoot of eggenote geërf word, dikwels sy of haar enigste bate is en dat hy/sy dus nie die fondse het om vir die vruggebruik sekuriteit te stel nie. Ten opsigte van hierdie vraagstuk huldig die gemeenregtelike skrywers uiteenlopende menings, en die kernvraag wat aangespreek moet word, is of die hof 'n bevoegdheid het om 'n vruggebruiker vry te spreek van die verpligting om sekuriteit te verskaf.

Die algemene reël

Die algemene verpligting van 'n vruggebruiker om sekuriteit te verskaf, is in die gemenereg erken en al by herhaling deur ons howe bevestig (sien Grotius 2 39 3; Voet 7 9 1; Van der Keessel *Th* 371; *Furnivall v Cromwell's Executors* (1895) 12 SC 6 10; *Master v African Mines Corporation* 1907 TS 925; *Ex parte Newberry* 1924 OPD 219 223; *Ex parte Estate Wagenaar* 1953 4 SA 435 (K); Hutchison (red) *Wille's principles of South African law* (1991) 330; Meyerowitz *On administration of estates, estate duty and transfer tax* 6e uitg hfst 24.14). Behalwe in sekere uitsonderingsgevalle, is enige bepaling in 'n testament wat die vruggebruiker kwytskeld van sy verpligting om sekuriteit te verskaf, nietig (Grotius 2 39 20; Voet 7 9 9; sien ook Van der Merwe *Sakereg* 2de uitg 518 vn 444). 'n Opsomming van die uitsonderingsgevalle waar 'n vruggebruiker nie verplig is om sekuriteit te stel nie, is te vinde in Van der Merwe 517:

(a) Indien 'n vader as vruggebruiker en sy kinders as eienaars benoem word (Voet 5 9 7).

(b) Indien 'n moeder die vruggebruikster en haar kinders eienaars is en sy deur die testateur vrygestel is van die verpligting om sekuriteit te stel (Voet 7 9 7).

(c) Indien 'n eienaar sy saak aan iemand anders skenk of verkoop en vir homself 'n vruggebruik op die saak voorbehou (Voet 7 9 8).

(d) Indien die vruggebruik *inter vivos* tot stand kom en beding is dat die vruggebruiker onthef word van die verpligting om sekuriteit te stel (Voet 7 9 9).

Verder dien vermeld te word dat daar 'n onderskeid gemaak word tussen 'n vader en 'n moeder. In geval van 'n vruggebruik van 'n moeder oor haar kinders se grond, is die uitsondering slegs van toepassing waar die vruggebruikster in die testament vrygestel is van die verpligting om sekuriteit te stel. In *Van Staden v Van Wyk* 1958 2 SA 686 (O) het die testament nie so 'n bepaling bevat nie, en is die eksepsie teen die respondente se verweer gehandhaaf dat sy nie verplig was om sekuriteit te verskaf nie. Daar is ook tot dieselfde gevolgtrekking gekom in *Ex parte Estate Wagenaar supra*. Dit is ook te begrype dat daar dikwels gevalle sal wees waar die testament wel so 'n bepaling bevat (dat sekuriteit nie nodig is nie), maar dat die geval nie onder een van die uitsonderingsgevalle tuisgebring kan word nie. 'n Tipiese geval is byvoorbeeld waar die langslewende eggenote nie die biologiese moeder van die kinders is nie maar die stiefmoeder.

Die praktiese probleem

Die praktiese probleem wat hier ontstaan, word geïllustreer deur 'n aansoek wat onlangs in die Oranje-Vrystaatse Afdeling van die Hooggeregshof gerig is. In die betrokke aansoek is daar van 'n stiefmoeder geverg om sekuriteit te stel ten aansien van haar vruggebruik ten spyte van 'n bepaling in die testament dat sy nie verplig is om sekuriteit te stel nie. Die algemeen erkende wyse waarop sekuriteit gestel word, is deur middel van 'n waarborgpolis wat deur 'n versekeringsmaatskappy uitgereik word. (Dit kan natuurlik deur 'n verband of ander borgstelling geskied.) Voordat 'n versekeringsmaatskappy egter bereid sal wees om so 'n waarborgpolis uit te reik, word daar teensekuriteit verlang, en wel in een of meer van die volgende vorme:

(a) 'n Vaste deposito vir die volle bedrag van die waarborg;

(b) 'n eerste verband oor die eiendom;

(c) aandelesertifikate met ondertekende oordragvorms;

(d) 'n sessie van 'n lewenspolis waarop die afkoopwaarde voldoende is;

(e) verpanding van obligasieskuldbriewe en bougenootskapaandele; of

(f) 'n teenwaarborg.

Dikwels sal die langslewende eggenote nie substansiële bates van haar eie hê nie. In so 'n geval sal dit juis die bedoeling van die testateur wees dat sy deur middel van die vruggebruik in staat gestel word om in haar daaglikse behoeftes te voorsien. Sy mag selfs nie eers in staat wees om deur middel van lewenspolisse (waarvan die premies 'n aansienlike paaiement per maand kan beloop) die nodige sekuriteit te voorsien nie. Dit is voorts te betwyfel of 'n versekeringsmaatskappy in elk geval enige waarborgpolis sal uitreik waar daar enige bewering is dat die bates wat die onderwerp van die vruggebruik is, verwaarloos word (wat gewoonlik die grondslag van so 'n aansoek sal wees).

Die regsposisie met betrekking tot die onvermoënde vruggebruikster

Soos Van der Merwe 516 vn 432 uitwys, is sekuriteit in die Romeinse reg verskaf deur die aflegging van 'n *cautio usufructuaria* van die *praetor*. Die bevoegdhede

en verpligtinge van die partye is aan die hand van hierdie *cautio* uitgewerk. Die verpligting om sekuriteit te verskaf, het eers in die Romeins-Hollandse reg sy verskyning gemaak. Ten opsigte van hierdie verpligting is die skrywers nie eenstemmig nie.

Met betrekking tot die geval waar 'n vruggebruikster nie sekuriteit kan bekom nie, is Voet 7 9 3 se standpunt die volgende:

> "*Judge's duty when they cannot be found*– But if the usufructuary is unable to find sufficient sureties it seems that it should be left to the discretion of the judge, after consideration of the quality of the person, the amount of the property in usufruct, the greater or less likelihood of loss and the like, to assess whether he ought to allow him to use and enjoy on the security of his oath or the giving of pledges, or on the other hand the properties in usufruct should be attached for safe custody or hired out, or the proprietor himself be given leave to gather the fruits and hand them over to the usufructuary after gathering. Certainly the judge ought not to suffer one who cannot tender sureties to be debarred on that account from the testator's generosity" (Gane se vertaling).

Van der Linden *Supplementum ad* Voet 7 9 3 stel sy standpunt soos volg:

> "Such a view suits legal analogy and court practice, though it seems that in the strictness of the edict it ought to be said that action should be denied under the edict even if his not finding sureties is due to the fact that he does not find a guarantor to promise for him; since the praetor says emphatically in *Dig. 7, 2, 13* "If he will not find sureties I will not grant him action". Nor is it against this view that there can be no obligation to do things which are impossible that alone is said to be impossible which cannot physically be fulfilled or which is prevented by law. But this cannot be said of this finding of security, which, though very difficult, is yet never impossible in the juridical sense. This appears from *Dig. XLV, 1, 137, 4; Dig. XL, 7, 4, 1* ..."

Van der Linden se standpunt word soos volg opgesom deur Gane 2 419:

> "Van der Linden's opinion should also be noted that in strict law a usufructuary who is unable to give security should be denied an action upon his usufruct; though he admits that practice is in favour of a milder course."

'n Teenoorgestelde houding word egter deur Van der Keessel *Praelectiones* 2 39 3 ingeneem:

> "Maar die waarborg in verband met die vruggebruik moet ook stellig verskaf word, en wel deur die verskaffing van borge; want ek meen ook nie dat dit 'n aanneemlike standpunt van die skrywers is nie wat dit aan die vrye oordeel van die Regter oorlaat om te ondersoek of 'n waarborg by wyse van pand, of selfs by wyse van eed voldoende is; hierdie standpunt is soveel te minder aanneemlik as daar 'n maklike uitkoms in die saak gebied word indien die vruggebruiker geen borge kan vind nie, naamlik dat die erfgenaam aan hom die opbrengs van die goed onderhewig aan die vruggebruik verskaf. Dit sou immers in die geval van 'n regsfiguur met sy oorsprong in die Romeinse reg, soos hierdie waarborg is, onbesonne wees om op grond van die blote mening van die skrywers van die vorm van die reg af te wyk, tensy die teenstrydige gebruik behoorlik bewys word."

Dit wil voorkom of die meeste handboekskrywers Voet se standpunt verkies (sien Corbett *et al The law of succession in South Africa* (1980) 393; Van der Merwe 517 waar hy vermeld dat die hof kan "gelas dat die saak verhuur word of enige ander bevel in sy diskresie gee"). Nathan *The common law of South Africa* 1 (1904) 436 druk dit soos volg uit:

> "A usufructuary in order to satisfy the requirements of security, must give sureties. If he cannot find suitable sureties he must apply to the Court for directions in the matter, and the Court may allow him to take the usufruct subject to such conditions for safeguarding the property as the Court may deem fit to impose."

In *Van der Westhuizen v Van Aardt's Estate* 1943 EDL 299 310 word klaarblyklik van die standpunt uitgegaan dat die hof wel die bevoegdheid gehad het om die applikant van sy verpligtinge in dié verband te onthef, terwyl die teenoorgestelde standpunt blyk uit *Ex parte Estate Wagenaar supra* 438, veral 439B. In laasgenoemde geval het die testament nie 'n bepaling bevat wat die vruggebruikster onthef van die verpligting om sekuriteit te stel nie. Die hof verwys nie pertinent na die vraag of die hof op grond van behoeftigheid 'n vruggebruikster van hierdie verpligting kan onthef nie. Daar word trouens net melding gemaak van Voet 7 9 7 wat handel met die vraag of 'n testateur 'n erfgenaam kan kwytskeld van sekerheidstelling, en nie na die bogemelde aangehaalde passasie van Voet nie. Daar kan dus tot die gevolgtrekking gekom word dat die probleem waarmee hier gehandel word, nie pertinent of op deurdringende wyse deur ons howe besleg is nie.

Die skrywer hiervan is van oordeel dat Voet se mening nagevolg behoort te word omdat dit die billikste is en inderdaad effek gee aan die testateur se bedoeling om iemand met 'n vruggebruik te bevoordeel. Van der Keessel se oplossing, naamlik dat die erfgenaam die goedere behou maar slegs aan die vruggebruiker "die opbrengs van die goed" verskaf, kan verskeie praktiese probleme veroorsaak. Dit sal beteken dat waar 'n woning byvoorbeeld in vruggebruik aan iemand bemaak is, die eienaar die huis sal moet verhuur en die huurgeld aan die vruggebruikster moet besorg in plaas daarvan om aan haar die reg te verskaf om die betrokke woonhuis te bewoon.

Dat dit tot 'n onbevredigende resultaat kan lei, blyk uit die reeds vermelde voorbeeld waar die oorledene sy tweede vrou (wat die stiefmoeder van sy kinders is) in die gesamentlike woning wil laat bly tot by haar afsterwe. Ongetwyfeld kan Van der Keessel se standpunt in sekere omstandighede (soos waar die eiendom inderdaad deur 'n vruggebruiker verwaarloos word) billiker gevolge hê, maar daar moet steeds in gedagte gehou word dat Voet se mening die uitoefening van 'n diskresie inhou en dat die regter wel sy diskresie teen die daadwerklike lewering van die bates aan 'n behoeftige vruggebruiker kan uitoefen. Terloops kan ook vermeld word dat die vruggebruiker ook afstand kan doen van 'n deel van sy vruggebruik, dit wil sê ten opsigte van sekere bates wat onderworpe aan die vruggebruik is (Voet 7 2 1). Dit kan veral van belang wees waar die betrokke bates vir die vruggebruiker geen voordeel inhou nie maar hy steeds die las van versekering moet dra.

Die praktiese toepassing van Voet se standpunt

Die standpunt van Voet hou in dat die regter 'n diskresie het wat natuurlik op judisiële wyse uitgeoefen moet word. Dit moet hy uitoefen deur al die tersaaklike feite en omstandighede in aanmerking te neem asook die faktore wat spesifiek deur Voet vermeld word. Eerstens sal die vruggebruiker natuurlik moet aantoon dat hy (of sy) nie in staat is om sekuriteit te stel nie. 'n Volledige uiteensetting van die vruggebruiker se bates en laste sal dus noodsaaklik wees, en hier kan daar selfs feitedispute ontstaan of sy met haar beskikbare fondse 'n waarborgpolis kan bekostig. Die bepaling van die vruggebruiker se onvermoë kan uit die aard van die saak meningsverskil ontlok, maar 'n realistiese en redelike maatstaf sal toegepas moet word asook die praktiese vereistes wat deur versekeringsmaatskappye gestel word vir die toestaan van so 'n polis. (Die blote feit dat die vruggebruikster nie oor ander eiendomme beskik wat met 'n verband belas kan word nie, of dat sy nie 'n borg kan bekom nie, is natuurlik nie deurslaggewend nie.)

Afgesien van die vruggebruiker se onvermoë, word daar aan die hand gedoen dat hoofsaaklik die volgende faktore 'n rol moet speel in die uitoefening van die regter se diskresie:

(a) Indien daar 'n spesifieke bepaling in die testament was dat die betrokke vruggebruiker kwytgeskeld moet word van die verpligting om sekuriteit te verskaf, sal dit ongetwyfeld van groot belang wees om eerder 'n diskresie ten gunste van die behoud van die eiendom uit te oefen. Die hele kwessie van die effek van so 'n bepaling in 'n testament is nietemin uiters omstrede. Dit wil vir my voorkom dat waar 'n testateur in sy testament uitdruklik sodanige bepaling ingesluit het, daar oor die algemeen geen rede bestaan om daarvan af te wyk nie. Moontlik is dit 'n aspek ten opsigte waarvan wetgewing oorweeg moet word.

(b) Die vraag of daar minderjarige blooteienaars is. Die hof sal minder geneë wees om 'n vruggebruiker wat nie in staat is om sekuriteit te verskaf nie, in besit te laat van die eiendom van minderjariges.

(c) Die rede waarom sekuriteit aangevra word, of dit aanvanklik aangevra word of eers in 'n latere stadium. Indien dit eers in 'n latere stadium aangevra word, sal die vraag ontstaan waarom dit nie aanvanklik gedoen is nie en of omstandighede sodanig verander het dat die aanvra van sekuriteit nou noodsaaklik geword het.

(d) Die kwaliteit en karakter van die vruggebruiker of vruggebruikster.

(e) Die verhouding wat daar bestaan tussen die vruggebruikster en die blooteienaar.

(f) Die vraag of dit dienlik sal wees om die eiendom te verhuur.

(g) Die feit dat in die geval van 'n vruggebruik oor onroerende goed, die oordrag daarvan reeds aan die blooteienaar geskied het, en dat daar bygevolg nie sekuriteit nodig is om die betrokke blooteienaar teen vervreemding van die onroerende eiendom te beskerm nie.

(h) Indien daar bewerings is dat die eiendom verwaarloos word, sal daar natuurlik op die meriete van sodanige bewerings ingegaan moet word. Dit sal dan ook 'n faktor wees wat die uitoefening van die hof se diskresie kan beïnvloed. Enige bewering van verwaarlosing sal natuurlik beoordeel moet word aan die hand van die normale versorgingsplig van 'n vruggebruiker wat soos volg deur Meyerowitz 24.17 opgesom word:

> "The usufructuary must use the property in a proper manner and maintain and look after it with the highest degree of care. If land is concerned he must use it in a way that will not deteriorate it, e.g. by over-cultivation or over-stocking. The usufructuary is responsible for the upkeep of the property and must effect such moderate repairs as are needed to keep the property in proper repair; but he is not bound to effect improvement or make such repairs as are necessary because the buildings have become dilapidated with age or because damage has been caused through accident or heavy weather, nor is he bound to replace any property which has *bona fide* worn out."

Waar dit aangetoon word dat die vruggebruiker van die bates van die blooteienaar vervreem het, sal 'n regter uit die aard van die saak nie geneë wees om sekerheidstelling kwyt te skeld nie (*Stain v Hiebner* 1976 2 SA 34 (K)).

Daar kan natuurlik ook ander faktore wees, en bogemelde lys is glad nie bedoel om uitputtend te wees nie.

Gevolgtrekking

Die algemene reël dat 'n vruggebruiker sekuriteit moet stel indien die blooteienaar dit verlang, kan drastiese gevolge hê vir die onvermoënde vruggebruiker. Van die

teenstrydige standpunte van die Romeins-Hollandse skrywers is die standpunt van Voet dat 'n regter 'n diskresie moet hê om 'n vruggebruiker van sekerheidstelling te onthef, te verkies. Hierdie standpunt word ingeneem nie alleen omdat dit oor die algemeen billiker is nie maar ook omdat dit gevolg sal gee aan die testateur se bedoeling om inderdaad die betrokke vruggebruiker te bevoordeel. Verskeie kriteria wat van toepassing is by die uitoefening van die diskresie, behoort tot gevolg te hê dat die kwytskelding van 'n bepaalde vruggebruiker om sekuriteit te stel net geskied in omstandighede waar dit billik is. Hierdie benadering word ondersteun deur die onbevredigende toestand van die reg met betrekking tot klousules in testamente wat vruggebruikers kwytskeld van die verpligting om sekerheid te stel. Veral in die lig van hierdie onbevredigende toestand van sake wat moontlik die aandag van die wetgewer regverdig, is dit uiters belangrik dat daar 'n diskresie aan 'n regter toegeken moet word om in bepaalde omstandighede 'n vruggebruiker wat nie in staat is om sekuriteit te bekom nie, van daardie verpligting te onthef.

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DOES THE SUPREME COURT ENJOY THE INHERENT POWER TO ORDER RELEVANT PARTIES TO SUBMIT TO BLOOD TESTS TO ESTABLISH PATERNITY?

Introduction

In its decision in *S v L* 1992 3 SA 713 (E), a full bench of the Eastern Cape provincial division upheld an appeal against the order of a single judge requiring the appellant (an unmarried female) to submit herself and her ten-year-old daughter to blood tests in order to establish whether or not the respondent was the father of the child. In this note the writers examine the question whether the supreme court may, or should, order the necessary parties (that is, the mother, the alleged father of the child and the child), to submit to blood tests for the purpose of scientific analysis in order to establish whether the alleged father is the biological father of the child.

For the purposes of this contribution it is assumed that present scientific analyses, available in South Africa, are able to prove conclusively whether a particular male is the biological father of a child (see, *inter alia*, Böhm and Taitz "DNA-fingerprinting: a revolutionary forensic identity test" 1986 *SALJ* 662; Taitz "DNA-fingerprinting – a reappraisal 1992 *SALJ* 270).

It will also be assumed that the nature of the actual blood test is fairly painless and is in no way dangerous to the health of the person tested. Clinically speaking, the nature of the (invasive) procedure is the removal by way of a hypodermic needle of a small quantity of blood from the person concerned. This latter assumption is made as it would appear that an issue regarding the medical procedure was raised by Mullins J in *S v L* (*supra* 715B–E; see the text *infra* 99 relating to *Crow v McMynn* with special reference to the painlessness of the procedure).

1 The common law

In regard to proof of paternity generally, Erasmus J in *S v L supra* held that

> "prior to the enactment of ss 1 and 2 of the Children's Status Act 82 of 1987, the common law as propounded in *S v Swart* 1965 (3) SA 454 (A) obtained, i.e. that where a woman claimed maintenance for her illegitimate child, an admission of intercourse, no matter when it had occurred by the man indicated by the mother, created a presumption that the man was the father and it placed an onus on him to prove that he could not be the father. The man was required to rebut this presumption on the balance of probability. The effect was that a man who admitted sexual intercourse with the woman was usually in an untenable position in a disputed paternity suit. Proof of intercourse by the woman with another man or men did not avail him. In practical terms the only defences open to him were proof of sterility or negative blood tests. There existed, however, no legal machinery whereby he could compel the taking of blood samples . . ." (723D–F).

The common law, rooted as it is in ancient times, cannot be expected to be otherwise. Sophisticated scientific analyses such as HLA tissue typing, *a fortiori* DNA-profiling, are very much a product of modern technology, as is the practice of keeping irreversibly unconscious patients alive on ventilators and artificial feeding regimes. The common law has fallen far behind the advance of such technology (*Clarke v Hurst* 1992 4 SA 630 (D)). Accordingly, the common law is of little assistance to any individual who seeks an order requiring the necessary parties to submit to any scientific testing in order to prove or disprove that the alleged father is the biological father (cf *E v E* 1940 TPD 333 336).

2 The Children's Status Act 82 of 1987

The preamble to the above legislation reads:

> "[T]o amend the law relating to paternity, guardianship and the status of certain children; and to provide for matters connected therewith."

The act is largely the result of research done, evidence taken and the views of experts recorded by the South African Law Commission. The argument put forward by the Law Commission for the then proposed legislation, is in our view not admissible in the interpretation of the relevant enactments, namely sections 1 and 2 (below) (cf *S v L supra* 718I 723I).

The two relevant sections of the act provide as follows:

> "1. **Presumption of paternity in respect of extramarital children**
>
> If in any legal proceedings at which it has been placed in issue whether any particular person is the father of an extra-marital child it is proved by way of a judicial admission or otherwise that he had sexual intercourse with the mother of that child at any time when that child could have been conceived, it shall, in the absence of evidence to the contrary, be presumed that he is the father of that child.
>
> 2. **Presumption on refusal to submit to taking of blood samples**
>
> If in any legal proceedings at which the paternity of any child has been placed in issue it is adduced in evidence or otherwise that any party to those proceedings, after he has been requested thereto by the other party to those proceedings, refuses to submit himself or, if he has parental authority over that child, to cause that child to be submitted to the taking of a blood sample in order to carry out scientific tests relating to the paternity of that child, it shall be presumed, until the contrary is proved, that any such refusal is aimed at concealing the truth concerning the paternity of that child."

An examination of the above two enactments will show that the legislature has added little to the certainty of the existing law. In terms of section 1, should the

alleged father admit to having had sexual intercourse with the mother of the child, he is presumed to be the biological father unless he is able to produce evidence that he cannot be the biological father. Usually the only evidence would be of a scientific nature. The presumption raised by section 1 is a difficult one to rebut.

If the mother refuses to submit herself and/or her child to a blood test, a second presumption is raised, more particularly "that such refusal is aimed at concealing the truth concerning the paternity of the child". If, however, the alleged father admits intercourse but denies paternity and the mother refuses to submit herself or the child to the blood test the court will be faced with two conflicting presumptions. On the one hand, the alleged father is presumed to be the biological father, while on the other the mother is presumed to be concealing the truth concerning the paternity. Any presumption against the mother, that may follow in the wake of her refusing to submit herself and the child to blood tests, may be rendered of little value where the alleged father admits intercourse. In the face of the conflicting presumptions it is likely that a court will find that the alleged father is in fact the biological father. To this must be added the fact that, should the mother produce what may appear to be an acceptable reason for her refusal to undergo or submit the child to the blood test, for example, if she is a member of a religious group which prohibits the taking of blood, she may be able to avoid the presumption. Of significance, too, is the fact that section 1 is concerned only with extra-marital children while section 2 applies to all children. (The rebuttable presumption *pater est quem nuptiae demonstrant* would be applicable to children born to a married woman.)

In *S v L supra* 719G 728E the judgments of both Mullins and Erasmus JJ require the alleged father to raise the blood testing issue and the obtaining of blood samples before the maintenance court (an inferior court) and that he should not seek the assistance of the supreme court to order the mother and child to submit to blood testing. Erasmus J held that:

> "In my view, the trial court (i.e. the maintenance court) that is required to adjudicate on the question of paternity is best able to decide, in the full context of the case, whether the woman has good reason to refuse her co-operation. Also her reason for refusal will be better tested in a trial than on paper in an application . . ." (728F).

The judge appears to miss the very point of the respondent's seeking assistance from the supreme court. Whatever the value of the presumption raised by section 2 of the Children's Status Act, 1987, it cannot even vaguely be compared with a properly conducted scientific test, for example, the DNA-fingerprinting test (presently referred to as DNA-profiling) which will prove, beyond any doubt, whether or not the alleged father is the biological father (see Böhm and Taitz 1986 *SALJ* 662; cf *S v L supra* 722E).

Mullins J, in stating that

> "[i]t is implicit from the terms of s 2 that the Legislature recognises that a parent having parental authority over the child may refuse to cause that child to be submitted to blood tests, with the concomitant presumption arising from such refusal. Nor is it suggested that her said refusal is *mala fide*, or motivated for improper purposes, or even that it is unreasonable. Respondent seeks such blood tests solely and specifically for the purpose of obtaining evidence which he hopes will disprove his alleged paternity . . . (*S v L supra* 720E),

would appear to recognise some of the difficulties experienced by the alleged father. He nevertheless does nothing to assist the presumption-disadvantaged father.

A further aspect raised by Mullins J is significant:

> "Section 2 does not (where the mother has herself refused to undergo or to submit her child to a blood test) create a presumption that the man who has placed paternity in issue . . . is not the father of the child" (719E).

3 The inherent jurisdiction of the supreme court

That the supreme court possesses inherent powers is trite. Such inherent jurisdiction has been described as

> "those (unwritten) powers ancillary to its common law and statutory powers without which the Court would be unable to act in accordance with justice and good reason" (Taitz *Inherent jurisdiction of the supreme court* (1985) 9 (hereafter Taitz *Jurisdiction*); *M v R* 1989 1 SA 416 (O) 423F).

The supreme court has used its inherent jurisdiction for a number of purposes including regulating its own procedure, even in the face of existing subordinate legislation (see, *inter alia*, *Federated Trust Ltd v Botha* 1978 3 SA 645 (A) 654D; *Moluelle v De Schatelets* 1950 2 SA 670 (T) 675). The court, too, has used its inherent powers to create or modify remedies (see, *inter alia*, *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 115; *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 1 SA 13 (A) 30E). The real question in regard to the procuring of evidence is to what extent the court may exercise its inherent jurisdiction, if at all. The Appellate Division, in considering this very question, held that the court may not use its inherent powers to create substantive law. However, it appears to have found that it is not possible to set clear parameters or constraints on such powers. Corbett JA (as he then was) stated the view of the court in *Universal City Studios Inc v Video Network (Pty) Ltd* 1986 2 SA 734 (A) 754F–G more particularly:

> "There is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice . . . It is probably true that, as remarked in the *Cerebos Food* case . . . the Court does not have an inherent power to create substantive law, but the dividing line between substantive and adjectival law is not always an easy one to draw . . . Salmond (*Jurisprudence* 11 ed at 504) states that:
>
> > 'Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained.'"

In two reported cases, *Seetal v Pravitha* 1983 3 SA 827 (D) and *M v R* (*supra* 423F; Taitz *Jurisdiction* 9) the respective courts held that they enjoyed the inherent jurisdiction to order blood tests in order to prove (or disprove) paternity. In *M v R*, Kotze J found that the order to force parties to submit to blood tests was within the (inherent) jurisdiction of the court, and, more particularly:

> "'n Bevel wat bloedontledings afdwing val, na my beskeie mening, wel binne die toelaatbare soos beskryf deur Corbett AR [in *Universal City Studios Inc v Network Video (Pty) Ltd*, above]. Dit het nie te doen met die totstandkoming van die skuldoorsaak self nie en opsigself bring dit ook nie enige regsgevolg tot stand nie. Dit is 'n blote getuienisbron wat 'n Hof kan help om die waarheid te laat seëvier en in daardie sin dan 'n prosesregtelike aangeleentheid" (428C–D).

It is interesting that in *Seetal*'s case *supra* 832 *et seq*, which was decided before the *Universal City Studio* case *supra*, Didcott J questioned and rejected the approach that the court's inherent jurisdiction is confined exclusively to procedural law.

Although he did not grant the application for the child of a marriage to undergo a blood test, he held:

> "The court will come to his assistance in that situation, one may safely assume, once it has nothing else that matters to take into account, once it has no real reason to withhold help. It will no doubt feel satisfied then, to quote Botha J [in *Moulded Components and Protomoulding South Africa (Pty) Ltd v Covcourakis* 1979 2 SA 457 (W)]
>
> > '. . . justice cannot properly be done unless relief is granted to the applicant'" (832G–H).

However, more recently, in *Nell v Nell* 1990 3 SA 889 (T) Le Roux AJ found that an application to order blood tests for the purpose of proving paternity was beyond the inherent jurisdiction of the court. He held:

> "Die toetse word volgens die applikant benodig om sekerheid vir homself te verkry en myns insiens nie om 'n bewysregtelike maatstaf te bevredig nie. Eersgenoemde is iets wat selfs buite enige prosesregskeppende bevoegdhede van geregshowe ressorteer" (897B).

This decision is unconvincing for the following reasons:

(a) Although the judge cited the *Universal City Studios* case *supra*, he appears to have missed the essence of the reasoning by Corbett JA in that case (see the quotation from that case *supra*), particularly the reason for the citing of *Salmond on jurisprudence*, namely:

> "Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained."

Further, the judge appears not to have considered that the ordering of a blood test is not the "ends" which the administration of justice seeks but merely the "means" to attain that "end", the end being truth and justice following the result of the blood test.

In any event, it has been shown elsewhere that the distinction between substantive and procedural law is not merely blurred but non-existent (Chamberlayne *Evidence* (1911) 171, cited by Cook *The logical and legal base of the conflict of laws* (1942) 158). Although the terms substantive law and procedural law are sometimes used, for example, in certain private international law situations, the following statement by the eminent American jurist Chamberlayne remains appropriate:

> "The distinction between substantive and procedural law is artificial and illusory. In essence there is none. The remedy and the predetermined machinery so far as the litigant has a recognised claim to use it, are legally speaking, part of the right itself. A right without a remedy for its violation is a command without a sanction, a *brutum fulmen* i.e. no law at all."

It is significant that various supreme courts of foreign legal systems, which enjoy inherent powers similar to that enjoyed by the supreme court of South Africa, have resorted to their inherent jurisdiction to order tests to prove or disprove paternity in contested paternity suits (see the various foreign decisions referred to by Didcott J in *Seetal v Pravitha supra* 833 *et seq*). An example is the American case of *Zavaleta v Zavaleta* 358 NE (2d) 13 (1976), in which the Appellate Court of Illinois found that while

> "[the] plaintiff contends there is no statutory authorisation for the trial court in a divorce action to order her and her minor child to submit to blood tests for purposes of discovery . . . [t]he ordering of the blood test is a procedural matter which falls within the rules of our supreme court. It is a firmly established principle that the Illinois courts possess the (inherent) power to adopt court rules for the regulation of

> practice and procedure ... the blood of a minor child and the mother is a controversial factor to be considered in determining paternity. Since our discovery rules are designed to enhance the truth-finding function of the trial and are a means of providing methods for prompt and just disposition of litigation ... we find the trial court was acting within the scope of its authority in ordering the blood tests ..." (15–16).

Because of its strong persuasive influence, the foreign decision which is perhaps the most important to South African law is that of the House of Lords in *S v McC; W v W* [1972] AC 26. In his judgment, Lord MacDermott considered the inherent power of the English superior courts in ordering a blood test to prove or disprove paternity in the following terms:

> "I think it must be accepted that, save where Parliament has otherwise ordained, the High Court has no power to direct that a person who is *sui juris* is to have a blood test taken against his will ... But this lack of power on the part of the court to enforce its order physically without consent does not mean that the question under discussion must be answered in the negative: for much of the jurisdiction of the High Court can only be made effective by indirect means – such as a stay of proceedings, attachment or the treatment of a refusal to comply as evidence against the disobedient party. This is very much the case in one branch of the jurisdiction of the High Court, namely its inherent jurisdiction to make interlocutory orders for the purpose of promoting a fair and satisfactory trial ... It (the Court's inherent jurisdiction) may be procedural in character, but it is much more than that. It is a jurisdiction which confers power, in the exercise of a judicial discretion to prepare the way by suitable orders or directions for a just and proper trial of the issues between the parties" (46B–F).

In casu, after considering the best interests of the children concerned, the House of Lords ordered the parties and the relevant children to submit to blood tests.

(b) In *Nell v Nell supra*, the judge found himself bound or otherwise persuaded by *E v E* 1940 TPD 333 and *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd* 1984 4 SA 149 (T). In fact, neither of these cases is relevant to the question whether the court enjoys an inherent jurisdiction to order blood tests in order to prove or to disprove paternity. While *E v E* did indeed relate to blood tests, the court in that case found itself bound by *Eynon v Du Toit* 1927 CPD 76 80, which is authority for the contention that the court has no jurisdiction to order a plaintiff (who has sued for damages arising from physical injuries) to undergo a medical examination at the hands of a doctor to be appointed by the defendant.

Finally, in regard to the Court's inherent jurisdiction in *S v L supra*, Mullins J pointed to the result of the order sought in the supreme court, which is that the result of the blood tests should be used in the maintenance court – an inferior court, which enjoys no inherent jurisdiction whatsoever. The judge stated:

> "I know of no authority which entitles the Supreme Court, under the guise of its inherent powers, to regulate the procedure of inferior courts" (720A).

A separate order by the supreme court requiring the necessary parties to submit to blood tests can hardly be regarded as regulating the proceedings of the maintenance court. In any event, there is authority that the supreme court may exercise its inherent jurisdiction in order to avoid injustice in the proceedings of an inferior court. A full bench of the Natal provincial division, per Hefer J (as he then was), in *Santam Insurance Co Ltd v Liebenberg* 1976 4 SA 312 (N) 323H, held that while the magistrate's court did not enjoy inherent jurisdiction (*in casu* to prevent an abuse of its process)

> "it may well be necessary ... to approach the Supreme Court having jurisdiction, even though its order will relate to a matter pending in the Magistrate's Court".

It is relevant, too, that the superior courts in England and Australia, which enjoy similar inherent powers to the Supreme Court of South Africa, have used their inherent powers to come to the assistance of inferior courts (under their territorial jurisdiction), *inter alia*, to issue subpoenas in aid of such inferior courts (*Currie v Chief Constable of Surrey* [1982] 1 All ER 89) or to punish summarily contempts of such courts (see *Ex parte Attorney-General: Re Goodwin* (1969) 70 SR (NSW) 413; see also *Attorney-General v Mirror Newspapers Ltd* (1962) 63 SR (NSW) 421).

4 The "best interest of the child" test

In his erudite judgment in *Seetal v Pravitha supra* Didcott J recognised the discretionary nature of the court's inherent powers, stating that:

> "[while] a South African Court handling a case like the present one can effectively consent on a child's behalf to a blood test on him, I come now to the important question of its touchstone for the decision whether or not to do so in a given instance" (863F).

He then clarified the meaning of the word "touchstone" more particularly, namely "that it must act in the interest of the child and take account of nothing else" (864A; for the many foreign decisions concerning this issue see the judgment of Didcott J 834F *et seq*).

Finding that an order requiring the blood test would not be in the best interests of the child as this might create a "substantial hardship" by establishing the illegitimacy of the child born in wedlock, together with the attendant financial implications, the judge refused to order the blood tests (866A).

The criterion of the "best interest of the child" rule became established as the "touchstone" in the subsequent decisions in which orders for blood tests were sought. Subsequently, in *M v R supra* Kotze J held:

> "[E] kan, met respek, nie saamstem met 'n stelling wat wil sê dat die oppervoog net op die kind se onmiddellike omstandighede en op niks anders in die oorweging van sy beslissing moet let nie" (421B–C).

The judge saw the test in the following terms, namely

> "dat die minderjarige se belang nie die enigste nie maar wel die deurslaggewende of oorheersende rigsnoer, waarteenoor alle ander oorwegings 'n ondergeskikte rol speel, moet wees" (421E–F).

After a consideration of all these factors, he ordered the blood tests to be carried out. The court held that the mother as the child's guardian was compelled to act in the "best interest of the child" even if to do so was contrary to her own wishes. *In casu* the blood tests could not have placed the child's interest in jeopardy, as the child was in fact illegitimate.

In *Nell v Nell supra* 891, while the court had difficulty in accepting that it had jurisdiction to order a blood test, Le Roux AJ held that even if the order applied for had been a purely procedural matter and within his jurisdiction, he would still not have granted it as it was not in the "best interest of the child" in question. The judge based his judgment on the following reasoning:

> "[A]s hy eendag meerderjarig is mag hy op die Hofstukke afkom en dan sal dit 'n traumatiese ervaring vir hom wees om vas te stel dat daar onsekerheid bestaan . . . Indien die toetse egter gedoen word en dit blyk dat applikant nie die vader is nie, sal die kind dalk nooit weet wie sy vader is nie" (896D).

In *S v L supra* 722G Mullins J found that it had not been proved by the respondent that it would be in the "best interest of the child" for blood tests to be ordered. He

held that although the child in this case knew that she was illegitimate, she had always regarded the respondent as her father and had established close familial ties with the respondent's family. The court further stated that even negative blood tests would have left the child with a feeling of insecurity. Following closely upon *S v L*, was the case of *O v O* 1982 4 SA 137 (C) in which Friedman JP clearly indicated that the determination of "best interest of the child" should precede any investigation whether the court enjoys the inherent jurisdiction to order a blood test.

The judge stated:

> "Once the Court comes to the conclusion that it is not in the best interests of the child for a blood sample to be taken, it becomes unnecessary to consider whether the Court has the power to order the mother to give a blood sample, and if so, whether it should make such an order" (143G).

This decision makes an unnecessary distinction between the inherent jurisdiction of the court and its function to apply "the best interest of the child" rule. These issues are complementary. Once the court in *O v O* had found that it was not in the best interest of the child, as it did, the judge should simply have refused to exercise his inherent jurisdiction to order blood tests, as Didcott J had done in *Seetal v Pravitha supra.*

5 Is an order to submit to a blood test an invasion of an individual's privacy?

In *S v L* the court appeared to be of the view that an order requiring a party to submit to a blood test is an invasion of that person's privacy (McQuoid-Mason *The law of privacy in South Africa* (1978) 164; cf Neethling *Persoonlikheidsreg* (1991) 230; Neethling, Potgieter and Visser *Law of delict* (1994) 334; *Seetal*'s case *supra* 832–833; *Nell*'s case *supra* 895). This in turn raises the substantive/procedural law issue and the suggested inability of the court to exercise its inherent jurisdiction (above). Further, the invasion of privacy contention is, with respect, as unsound in law as would be the refusal by a court to permit a medical practitioner (who is sued by a patient for damages arising from alleged medical negligence) to lead evidence as to the patient's condition before and after the alleged negligence, as an invasion of the defendant's privacy.

Of relevance is the Canadian case of *Crow v McMynn* (1989) 49 CRR 290. (The writers wish to express their gratitude to Professor Steph van der Merwe of the University of Stellenbosch who referred the case to them.) In this case the supreme court of British Columbia considered whether an order requiring an alleged father to submit to a blood test was a violation of sections 7, 8 and 12 of the *Canadian Charter of Rights and Freedoms*. These sections provide as follows:

> "7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.
>
> 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

The court, per Campbell J, held:

> "In a strictly technical sense a court-ordered blood test may constitute a violation of the defendant's right to security of the person, a violation saved only if the principles of fundamental justice are adhered to . . ." (300).

After considering "the basic tenets and principles" not only of the Canadian judicial process, but also that of other components of the legal system (301),

the judge concluded that an order compelling the blood tests did no more than ensuring adequate disclosure in the interests of justice and that,

> "(the plaintiff) seeks to establish the paternity of her son and in so doing obtain financial assistance for his support. The information supplied by a blood test would be of great assistance to the Court in resolving this issue. The Court's goal is to do justice to the interests of both parties and this goal cannot help but be advanced by the presentation of all relevant evidence . . . it therefore follows that where this evidence has been obtained in accordance with the principles of fundamental justice, arguments against its inclusion when balanced against those in favour must fail" (302).

In regard to section 8 above, the judge considered that to order blood tests to prove paternity was not a violation of the section. In balancing the various interests Campbell J found that

> "[a] balancing of interests of the defendant in not having to undergo the test against the interests of the plaintiff and the government in obtaining the results of the test would . . . weigh heavily in favour of the plaintiff and the government" (303).

The allegation that a blood test is "a cruel and unusual treatment" was rejected by the judge *en passant*, who found that "blood tests are common and relatively painless" (303–304).

The decision in *Crow v McMynn* may be regarded as strongly supporting "the best interest of the child" rule. *In casu* the court found that the interest of the plaintiff and the government in requiring the test "is tied to the welfare of the child involved" (303). Finally, an analysis of the decision will show, first, that the court balanced the interests of the various parties and found that in general terms a blood test furthered fundamental justice; secondly, that the interest of the state and that of the parties is subject to the welfare or "best interest of the child" (cf *Seetal*'s case *supra* 864A); thirdly, that while an order compelling a blood test may constitute a technical violation of the constitutional rights of the individual, the search for truth and justice is a vital factor in the balancing process (*idem* 863E–F).

Conclusion

Subject at all times to the "best interest of the child" rule as enunciated in *Seetal v Pravitha supra* 865F, and *M v R supra* 421F, the question must be asked why some South African courts are not prepared to exercise their inherent jurisdiction to order blood tests in order to prove or disprove paternity. Certainly, reasons have been profferred, ranging from the substantive/procedural law issue to the invasion of privacy. Surely the search for truth and justice is so fundamental to the credibility of an acceptable judicial system that these objections, as valid as they may appear, are of secondary importance? The argument that an individual's rights to bodily integrity are more or less important than the search for truth and justice has been canvassed in various legal systems (see *Seetal*'s case *supra* 834F *et seq*).

In *S v L supra*, Mullins J expressed a view about justice and truth, which we find difficult to accept: "I am not convinced . . . that the Court's prime objective should be the ascertainment of the truth" (722E).

He sought to justify this statement by adding that

> "the Courts, applying principles such as estoppel or waiver, close their eyes to the truth and grant relief because parties to litigation themselves place a different complexion on the facts to what they truly are. This is a fascinating field of jurisprudence . . ." (722F–G).

Waiver and estoppel are ancient principles of law which relate largely to the proof of factual situations. Such aspects of law are not comparable or even relevant to

the refusal by a court to compel the leading of evidence which will either prove or disprove whether the defendant is the biological father of a child. In this specific situation, the "best interest of the child" rule apart, justice can only be served where the truth is before the court (cf *Seetal*'s case *supra* 832G *et seq*); accordingly, the court would further practice, truth and good reason by exercising its inherent jurisdiction to order the necessary parties to undergo blood tests in cases of disputed paternity.

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CLOSELY HELD CORPORATIONS: PERSPECTIVES ON DEVELOPMENTS IN FOUR JURISDICTIONS

1 Introduction

The expression "closely held corporation" refers *inter alia* to the limited number of members of the corporation and the closeness of their relationship. The term "close corporation" is derived from this expression.

The advent of the Close Corporations Act 69 of 1984 has been described as an event of significant historical importance in the development of South African entrepreneurial law (Cilliers *et al Entrepreneurial law* (1993) 288). The Close Corporations Act was assented to on 19 June 1984 and became operative on 1 January 1985. It introduced an entirely new legal form of business enterprise with several unique and innovative features to provide a simple, inexpensive and flexible form of incorporation for the single entrepreneur or small number of participants designed with a view to his or their needs and without burdening him or them with legal requirements that are not meaningful in his or their circumstances (Naudé "The South African close corporation" 1984 *Journal for Juridical Science* 119; see also Cilliers *et al Corporate law* (1992) 568; Van Dorsten *South African business entities* (1993) 21; Katz and Barker "Companies" 3 *Butterworths Forms and Precedents* (1991) 18; Ribbens *In quest for the appropriate code for the ideal legal form for the proprietary business enterprise* (1986) 228; Henning and Bleimschein "Die neue Unternehmensform der Close Corporation in Südafrika" 1990 *Recht der Internationalen Wirtschaft* 627; Beuthin *Basic company law* (1992) 325; Allan *et al A basic introduction to the Close Corporations Act* (1984) 1; Ping-fat "Not too close for comfort" 1992 *International Corporate Law* 17; Sealy "Company law and the small business" *Reforming Company Law* (1994) 14).

Even though the influence of the Close Corporations Act of 1984 is not always clearly identified or even acknowledged (see eg Ffrench *Guide to company law* (1990) 384 who refers only to "overseas countries, eg the United States of America" as to origin), to date this progressive South African initiative has been followed by legislative developments aimed at the introduction of new legal forms for small business in various guises and with divergent results, *inter alia* in Australia, Zimbabwe and Namibia.

First, a few perspectives on the South African initiative will be given. Attention will then be paid briefly to the vicissitudes of the close corporation in Australia, and thereafter to recent developments in Zimbabwe and Namibia.

2 South Africa

Of all countries with company law systems chiefly modelled on the British example, South Africa was the first to take a large step forward with the introduction of the close corporation to provide for the reasonable legal needs and expectations of the typical small businessman in a separate act (as to preceding developments in the United States and Continental Europe, see Naudé 1984 *Journal for Juridical Science* 122–123). Although Professor Gower's Incorporated Private Partnerships Bill was enacted in Ghana with minor amendments in 1962, it lacks certain vital corporate attributes. For example, it does not accommodate a one-man enterprise and it does not provide for limited liability (see Khan-Freud "Comment on the final report on company law in Ghana" 1962 *MLR* 78; Hadden *Company law and capitalism* (1972) 214; Achampong *The use of company and partnership forms in Ghana for small businesses* (1983) 214). In England a Green Paper *A new form of incorporation for small firms* was published in 1981 (Cmnd 8171) containing a memorandum by Professor Gower entitled *A code for incorporated firms?* It provided for an incorporated firm on the partnership model. It was not embraced with any enthusiasm at all and little, if anything, came of it (see eg Woolridge "A new form of incorporation – responding to the Gower proposals" 1982 *The Company Lawyer* 58; Scamell and Banks *Lindley on the law of partnership* (1984) vi).

Compared to recent legislative initiatives in certain jurisdictions such as New-Zealand, the reform of South African company law has not been as comprehensive as some commentators may have wished. Nevertheless, it should be appreciated that various innovative concepts of the act that have survived the proving grounds of competitive corporate practice during the past decade, constitute a convenient and readily available blueprint for the imaginative and speedy reform of important areas of South African company law. A case in point is the effective abolition of the archaic *ultra vires* doctrine and the doctrine of constructive notice (see eg Fourie "Abolition of the *ultra vires* and related doctrines" 1994 *Obiter* 46).

The acceptance of the concept of the close corporation is borne out by the large number that have been formed in the nine years since the act became operative, almost three hundred thousand close corporations compared to approximately sixty thousand companies of all types and forms. Incorporation of close corporations has increased markedly in the second quarter of 1994. This points to a growth of optimism in the small business sector in particular as well as that part of the economy not directly represented on the Johannesburg Stock Exchange in general. Registration of new close corporations rose from two thousand five hundred in April, to three thousand two hundred in May and four thousand one hundred in June (*Sunday Times, Business Times* (1994-07-10) 2).

In the main, international reaction has also been favourable. Thus the Close Corporations Act was considered by Professor Uriel Procaccia of the Hebrew University of Jerusalem as "[a] recent impressive close corporation statute" ("Designing a new corporate code for Israel" 1987 *American Journal of Comparative Law* 589). Professor Len Sealy of the University of Cambridge described the act as "a model worth very serious consideration" and considered it to be a much bigger success than the unanimous written resolution and elective regime amendments introduced for private companies by the Companies Act of 1989

("Legislating for the small business" *Reforming Company Law* (1994) 11). In marked contradistinction to the negative reaction to Professor Gower's proposals in the early eighties, wide-ranging reform of company law in Britain aimed at helping the growth of small businesses was since signalled in April 1994 by the Corporate Affairs Minister. Simplification of the 1985 Companies Act and the creation of a new corporate form of business enterprise "more like an incorporated partnership" are to be considered by the Law Commission (*Financial Times* 1994-04-07 and *DTI press release* 1994-04-06).

In terms of section 11(2) of the Close Corporations Act, the Standing Advisory Committee on Company Law maintains the Standing Sub-Committee on Close Corporations (the SSCC). In its press release of 28 October 1992 on the review of the law of close corporations, the SSCC identified various projects for further research. One of the projects is a comparison between the South African and Australian Close Corporations Acts. Another project on which special emphasis was placed during the international conference on the Future Development of South African Corporate Law in 1993, is the evaluation of the close corporation as the conceptual model for a Southern African form of business enterprise.

3 Australia

In August 1984, that is, two months after the South African Close Corporations Act was assented to, a discussion paper was circulated in Australia by the Companies and Securities Law Review Committee (the CSLRC) entitled *Forms of organisation for small business enterprises* (August 1984). In canvassing the possibility of the introduction of a new category of an "incorporated partnership company" (later the "close corporation") the CSLRC noted that the main advantages of the new form for entrepreneurs may be corporate personality, limited liability, absence of any legal duty to have accounts audited or lodged for public inspection, removal of the distinction between proprietors and directors, flexible regulation of internal relations by rules appropriate to a partnership rather than those traditionally associated with a company, and a minimum of administrative detail.

This discussion paper was followed by the *Report to the Ministerial Council on forms of legal organisation for small business enterprises* of the CSLRC in 1985. The CSLRC set itself the objective of recommending a simpler and cheaper form of corporate structure for entrepreneurs, with due regard to their particular needs and without burdening them with statutory requirements which are not significant under the circumstances. The CSLRC did its level best to place the emphasis throughout the report on simplifying the legal obligations involved in the establishment and operation of a close corporation (par 9) but not with unqualified success (see Tomasic *et al Corporation law* (1992) 203; Ffrench *Guide to company law* 384–385; Ford *Principles of company law* (1990) 131). It further recommended that in the event of the introduction of the close corporation legislation, the category of exempt private company be dispensed with for future incorporations (par 5).

Based on the recommendations of the report of the CSLRC, a Close Corporations Act with more than 170 sections and bearing some resemblance to the South African predecessor, was introduced in Australia in 1989 as part of a comprehensive Commonwealth package for company law reform. Ford (*Principles of company law* 131) describes the close corporation provided for by the act rather vaguely as a legal form of business organisation which is in many ways like a partnership but is also available to the sole trader.

Owing to constitutional difficulties and the resulting decision in *NSW v Commonwealth* ((1990) 169 CLR 484; 1 ACSR 137; 90 ALR 355) which confirmed its unconstitutionality, the act was never promulgated (Hill "Close corporations in Australia" 1989 *Canadian Business LJ* 43; Callaghan "Close corporations" 1990 *Charter* 50; Henning and Wandrag "'n Oorsig van die herkoms van die private maatskappy en die huidige posisie in enkele regstelsels" 1993 *De Jure* 40; Tomasic *et al* 202).

Professor Sealy (*Reforming company law* 11) aptly summarises these developments in Australia as follows:

> "The (South African) legislation shows that it is possible to do without shares, capital, directors, meetings, articles of association, annual returns and audit . . . Australia endeavoured to go down the same road in the mid 1980s and did, in fact, enact a Close Corporations Act in 1989. It was modelled initially on the South African precedent, but they (the Australians) kept wanting to build more and more of the traditional company into it, so it became a fairly lengthy piece of legislation. If that were not enough, it then incorporated by reference, huge chunks of the main Corporations Act. So it was not a totally successful venture."

On 19 June 1992 the Joint Parliamentary Committee on Corporations and Securities announced its intention to investigate the regulation of small businesses in Australia. This might have led to the rewriting of the Close Corporations Act with a view to simplification. This initiative was based on the finding that more than 765 000 of the 800 000 registered companies in effect are small businesses which may benefit materially from the introduction of this new form of incorporation (Frew "Inquiry into small business and the Close Corporations Act" 1992 *Butterworths Corporation Law Bulletin* 158). The terms of reference of the committee were to inquire into the creation of a new corporate form tailored to meet the needs of small business. It had to examine the unproclaimed Close Corporations Act, 1989 which

> "had as its object the simplification of the corporate rules for small business by reducing financial and other reporting requirements and abandoning the company law distinction between directors and shareholders in favour of simple principles based on partnership laws".

The committee also had to examine suggested amendments to the Close Corporations Act and other corporate structures having the same broad objectives.

The committee brought out its report (Joint Statutory Committee on Corporations and Securities *Close Corporations Act 1989*) in December 1992. The committee noted that though the term "close corporation" is widely used *inter alia* in South Africa and the United States, the terminology has been criticised in Australia because its meaning is not readily understood. It pointed out that criticism of the "proposed" close corporation included that the restrictions on its powers would render it unsuitable for small business, that limited liability could be lost relatively easily, that the structure and reporting requirements of the close corporation remain complex, and that there is no simple process for converting a close corporation into a proprietary company. The committee favoured the introduction of a new corporate form of business enterprise within the existing corporations law in place of the proclamation of the Close Corporations Act. It would adopt the best features of the Australian close corporation and eliminate those that were subject to criticism. This new corporate form, the private company with a minimum membership of two and a maximum of ten, would be a category of exempt private company and would enjoy the privileges of the exempt proprietary company. In view

of the scope of these changes the committee recommended that the Close Corporations Act be repealed (par 4.1–4.27). Professor Sealy remarks that this report builds on the earlier close corporations legislation by adding on even more of the traditional features associated with companies, such as bringing back directors. He concludes that the committee has "gone the full circle and reinvented the private company under another name" (*Reforming company law* 14–15).

The Corporate Law Simplification Bill was released for public comment in July 1994. It proposes radical reforms to the structure and operation of proprietary companies. *Inter alia* it foresees the allowance of single director and single member companies, the scrapping of required annual general meetings, the reduction of accounting and financial reporting and the provision of a comprehensive guide to the day-to-day rules that matter for small business. The bill proposes the abolition of the exempt private company and, instead, adopts a distinction between a "small proprietary company" and a "large proprietary company". It also proposes to repeal the Close Corporations Act, 1989. Following a three-month public exposure period, the bill was to have been refined and introduced in Parliament before the end of 1994 (Wormer "Release of draft Corporate Law Simplification Bill" 1994 (15) *Butterworths Corporation Law Bulletin* 294; Watson "Proprietary companies" 1994 (16) *Butterworths Corporation Law Bulletin* 302–304).

4 Zimbabwe

The present Companies Act of Zimbabwe (Chapter 190, previously Chapter 223) dates from 1951 and came into operation on 1 April 1952. It is based on the British Companies Act of 1948 and the South African Companies Act of 1926. It followed the recommendation of the Millin Commission in South Africa (1947–1948 UG 69/1948) by not introducing the concept "exempt private company" which was introduced in Britain by the Company Act, 1947 and abolished by the Companies Act, 1967.

After the introduction and apparent success of the close corporation in South Africa, a privately commissioned and prepared report on a new legal form for small businesses in Zimbabwe was widely circulated for comment. This report, which became known as the Christie/Fairburn Report, recommended the reorganisation and removal of private companies from the Companies Act. Thus a two-tier system was envisaged: public companies under the Companies Act and private companies under a new separate law.

The Law Development Commission consequently appointed a subcommittee in January 1989 to report on proposed changes to the company law. Two interim reports were brought out: *The interim report on proposed new Private Business Corporations Bill* (Report no 5 January 1990) and *Proposed amendments to the Companies Act [Chapter 190]* (Report no 8 September 1990). These were followed by the *Final Report: Private Business Corporations Bill* (Report no 10 July 1991) and *Final Report: Amendments to the Companies Act* [*Chapter 190*] (Report no 11 July 1991).

The Companies Amendment Bill, 1993 was promulgated as the Companies Amendment Act 6 of 1993. The principal objects of the amending legislation are *inter alia* to enable a company to be formed with one member (two directors are, however, still required), to modify the *ultra vires* rule and to make fuller and better provision for the judicial management of companies.

The *Interim report on proposed new private Business Corporations Bill* rejected the two-tier approach of the Christie/Fairburn Report and recommended a three-tier system. Public and private companies would continue to be governed by the Companies Act and entirely new legislation would provide for the introduction of a new form of business enterprise called the private business corporation (PBC). This recommendation was formally adopted in the *Final Report: Private Business Corporations Bill*. The full Law Development Commission recommended on 30 June 1991 that its draft Private Business Corporations Bill, 1991 be passed into law.

The Law Development Commission stressed the possibility that not only the very small businessman but also large enterprises may form a private business corporation. The commission did not regard this as a matter for concern except from a revenue viewpoint in the case of a conversion of a company (*Final Report* 6).

The salient features of the private business corporation are, very briefly: a minimum membership of one and a maximum of twenty; formation by way of an incorporation statement filed with the Registrar of Companies; complexity and formality reduced to a minimum, as there is no need to specify the objects of the private business corporation in a formal memorandum, no need to appoint directors to hold formal meetings, no shares or share capital but members' interests, no need to publish or submit annual accounts to the Registrar, no need to appoint a chartered accountant as auditor but merely a suitably qualified person as accounting officer; a simpler form of accounts; each member is an agent of the private business corporation; in the event of reckless dealing, members may be declared personally liable by the court; no complicated provisions dealing with judicial management and winding-up; decriminalisation is the central policy – only six criminal offences are provided for. Non-compliance with the law gives rise to personal liability of members for debts.

The Private Business Corporations Bill was presented to Parliament by the Minister of Justice, Legal and Parliamentary Affairs in 1993. The Private Business Corporations Act 15 of 1993 was promulgated on 18 February 1994. Pending the establishment of the necessary infrastructure, namely regulations, prescribed forms and lists of professions qualifying for appointment as accounting officers, the Private Business Corporations Act was expected to become operative before the end of 1994.

The Private Business Corporations Act contains 63 sections and one schedule.

5 Namibia

Namibian company law is based largely on the South African Companies Act of 1973, without the South African amendments introduced after 1978 (Registration of Companies Proclamation 234 of 1978 amended by Proclamation 23 of 1979: see Cilliers and Benade *Company law* (1982) 708). However, the Law Reform and Development Commission has quite recently invited proposals on company law reform and related matters for the Republic of Namibia.

The Close Corporations Act 26 of 1988, in effect the South African Act as amended, was promulgated on 31 December 1988. It became operative on 1 March 1994 (Proc 9 of 1994 given on 1994-02-22 and published in *GG* 820 of 1994-03-14) in consequence of the transfer of Walvis Bay from South Africa to Namibia on 28 February 1994. The administrative regulations made under section 10 of the act

were published on 30 March 1994 (Regulations under the Close Corporations Act, 1988. GN no 43, published in *GG* 829 of 1994-03-30).

A proclamation under the South African Transfer of Walvis Bay to Namibia Act 203 of 1993 made provision for the registration in Namibia of close corporations registered in South Africa and which had their registered office or place of business in Walvis Bay (The Registration and Incorporation of Certain Companies and Close Corporations in Namibia Proclamation, 1994. Proc R 57 1994, published in *GG* 15616 of 1994-03-31).

The Close Corporations Amendment Act 8 of 1994 incorporated most of the South African amendments up to 1992.

Roughly a hundred close corporations previously registered in South Africa were reregistered and up to October 1994 more than three hundred new close corporations have been registered in Namibia.

6 In conclusion

In contradistinction to the developments in Australia, it seems that the South African experience of the close corporation during the past nine years may be described as mainly a positive one. Owing to various factors the concept was recently introduced in different guises by two other Southern African states. There may be some reason to expect that this example may in the not too distant future be followed by at least one other as part of a comprehensive reform of its company law. If so, the close corporation will be well on its way truly to become the conceptual model for a Southern African form of business enterprise.

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DISCHARGE OF THE ACCUSED AT THE END OF THE PROSECUTION'S CASE – A QUESTION OF LAW WHICH MAY BE CHALLENGED BY THE PROSECUTION ON APPEAL?

The ancient common law right of the criminal accused not to be tried more than once for the same offence recently acquired constitutional status in South Africa. Section 25(g) in chapter 3 of the Constitution of the Republic of South Africa Act 200 of 1993 provides:

> "Every accused person shall have the right not to be tried again for any offence of which he or she has previously been convicted or acquitted."

Like most of the other provisions contained in chapter 3 of the Constitution, the double jeopardy principle is expressed in simple terms. However, the complexity of the rule becomes apparent in a number of procedural contexts. These are, *inter alia,* the splitting of charges in a single proceeding and the danger of multiple punishment for the same conduct; the definition of the concept "same offence" for the purpose of determining whether a successive prosecution for a related offence or materially the same conduct is prohibited; and also, in my view the most controversial, the admissibility of a prosecution appeal to a higher tribunal against a

termination of proceedings in a competent court of law which is favourable to the accused. By focusing upon three recent decisions of the supreme court, namely, *Attorney-General, Venda v Molepo* 1992 2 SACR 534 (V); *Magmoed v Janse van Rensburg* 1993 1 SACR 67 (A) and *S v Phuravhatha* 1992 2 SACR 544 (V), this note will touch only upon the last-mentioned of these problematic issues which arise in the field of double jeopardy jurisprudence.

The present Criminal Procedure Act 55 of 1977 makes provision for an appeal by the prosecution from a decision handed down in favour of the accused in a lower as well as a superior court on any question of law (s 310 and 319). However, provided that the law of the land was applied correctly to the facts, our courts have, in the past, always accorded finality to a verdict of acquittal on the factual merits of a case (see *R v Brasch* 1911 AD 525; *R v Gasa* 1916 AD 241 and recently, *Magmoed v Janse van Rensburg supra* 67). The reluctance of our courts to grant the prosecution the proverbial "second bite at the apple" on the factual merits of a case (even in appellate proceedings on the same issue), had also never been interfered with by the legislature.

Whether the constitutional court will interpret the double jeopardy provision as also prohibiting an appeal by the prosecution on a point of law, will not be speculated upon in this note. The issue addressed will be whether a section 174 discharge constitutes a termination of proceedings on the factual merits of a case, or amounts to a question of law which, in terms of current legislation as set out above, may be appealed against by the prosecution.

The relevant section provides:

> "If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty."

The words "no evidence" have been interpreted by our courts to mean no evidence upon which a reasonable man, acting carefully, may convict (see *R v Shein* 1925 AD 6; *R v Herholdt* 1956 2 SA 722 (W); *S v Heller* 1964 1 SA 524 (W); *S v Bouwer* 1964 3 SA 800 (O); *S v Cooper* 1976 2 SA 875 (T)).

In *Attorney-General, Venda v Molepo supra,* the court held that a decision by a court to grant an application for the discharge of an accused in terms of this section, amounts to a question of law which may be appealed by the prosecution in terms of section 310 of the same act. Shortly thereafter, the Appellate Division, in *Magmoed v Janse van Rensburg supra,* elucidated the inherent nature and scope of a question of law in the field of criminal appeals. Although the appealability of a section 174 discharge was not specifically considered in this decision, there can be no doubt that the principles applied in this decision should likewise be applied in determining whether such a discharge amounts to a question of law which may be appealed by the prosecution. On the basis of these principles, it is submitted that the validity of the court's approach in *Molepo*'s case may indeed now be questioned. However, before commenting on the decision in *Molepo*, it is apposite to briefly consider the decision of the Appellate Division in *Magmoed*'s case.

In *Magmoed*, counsel acting on behalf of the appellant (*in casu*, it was a private prosecutor), posed, *inter alia*, the following question as one of law in terms of section 319 of the act:

> "Whether any reasonable court could have found on the basis of the factual findings . . . that none of the accused was guilty of the offence of culpable homicide or murder" (97d).

In effect, the question amounted to whether any reasonable court could have acquitted the accused. The argument advanced by counsel in favour of this submission was that in the days before a full right of appeal existed, the convicted accused could request the reservation of a question as one of law whether there was *legal evidence* upon which the jury or other fact-finder could properly or reasonably have convicted. It was submitted, therefore, that just as it was competent for the accused in those days to pose a question of law of this nature, so also was it competent for the prosecution to request the reservation, as one of law, of the question whether, having regard to the weight of the evidence adduced, the trier of fact could properly or reasonably have acquitted the accused (100c–d).

Although counsel were unable to refer to any case where such a question of law had been reserved *at the instance of the prosecution*, reliance was placed on an early decision of the court, *R v Lakatula* 1919 AD 362. In that case, the trial court reserved a point of law under section 372 of the Criminal Procedure and Evidence Act 31 of 1917 (which has been re-enacted in section 319 of Act 51 of 1977), which was formulated as follows:

> "Whether the Judge at the trial should not have withdrawn the case from the jury on the ground that there was no corroboration of the evidence of Notje who was an accomplice in the crime" (363).

What in fact occurred in the court *a quo* in that case, was that at the close of the prosecution's case, counsel for the accused applied for their discharge for lack of sufficient evidence. This application was refused and the accused did not testify. The jury convicted the accused of murder and the above-mentioned question was then reserved for decision by the Appellate Division. During the appeal, the Attorney-General raised the point whether this was strictly a question of law which may be reserved in terms of section 372, and whether the point reserved should not have been that at the close of the trial there was no legal evidence on which the jury were entitled to convict (363).

Solomon ACJ made the following important comment on this particular aspect:

> "I agree with [the Attorney-General] that if at the close of the case for the prosecution the Judge refuses to withdraw the case from the jury because in his opinion there is evidence which would justify them in convicting, the exercise of his discretion cannot be called in question under sec. 372 . . . That, in my opinion, is not a point of law within the meaning of sec. 372, seeing that it is left by sec. 221(3) to the discretion of the Judge whether or not he should withdraw the case. If, however, at the close of the trial, there is no legal evidence upon which the jury were entitled to convict, that is a point of law which may be raised under sec. 372, and the question should be reserved in that form" (363–364).

Corbett CJ, who delivered the judgment in *Magmoed*, did not agree with the line of reasoning advanced by counsel for the appellant. Having discussed the historical development of a right of appeal in South African law in detail, the Chief Justice concluded that a question whether a jury could properly or reasonably have inferred the guilt of the accused from the evidence adduced, does not *inherently* amount to a question of law but came to be treated as such by reason of separation of functions, earlier in our law, between judges and juries – questions of law decided by the judge and questions of fact by the jury. (100f. Corbett CJ relied on *R v Slabbert and Prinsloo* 1945 AD 137 144–145 where the court pointed out that the rules relating to the burden of producing evidence, first to satisfy the judge and then to satisfy the jury, had their source in the bipartite constitution of the common law tribunal. The court in *Slabbert*'s case referred to *Wigmore on evidence* vol 5

(2ed par 2487) where the author remarks: "Apart from the distinction between Judge and jury these rules need have no existence.")

Corbett CJ explained that in terms of Act 31 of 1917 (the old Criminal Procedure Act), it had been the function of the judge to decide, at the end of the prosecution's case, as matter of law, whether there was legal evidence upon which the jury could convict. If the judge was of the opinion that there was sufficient evidence to go to the jury, then, at the end of the trial, the accused, if convicted, could apply for reservation as a question of law of the issue whether there was no legal evidence upon which the jury *was entitled* to convict (99b). In such a case the test to be applied by the court was not whether the court of appeal would have drawn the inference which the jury drew, but whether "no reasonable man would have drawn that inference" (99c).

However, in the court's view, there is no historical or legal basis for equating the position of an accused who complains that no legal evidence exists upon which a jury could convict, with that of the prosecutor who complains that the evidence submitted to the jury was so strong that the jury could not reasonably have acquitted (100g). Historically speaking, there is no case on record in which such a question of law was reserved at the instance of the prosecutor and the court held that, legally speaking, it was not *inherently* a question of law but had come to be treated as such for the above-mentioned reasons. Moreover, Corbett CJ expressed the view that the principle in *Lakatula supra* was adopted because of concern that the absence of a right of appeal on the facts would amount to injustice to the accused (100h). (He also referred to Hiemstra's statement in *Suid-Afrikaanse strafprosesreg* (4ed 775) that before an appeal purely on fact was recognised, the provision in s 372 was used by way of a "kunsgreep" to appeal on the facts by clothing a factual question as a question of law, by asking whether there was any legal evidence to support a conviction.)

In considering (earlier in the decision) the inherent nature of a question of law, Corbett CJ pointed out that in the field of income tax appeals on a question of law, facts may be classified as primary facts, namely those facts that are directly established by the evidence, and secondary facts, namely those facts that are established by way of inference from the primary facts (96g). According to the court, an inference drawn from primary facts that an accused had formed a common purpose to kill, amounts to a factual inference and not one of law (96h). Therefore, although such an inference would amount to a so-called secondary fact, it would still be a factual issue because it deals with the question whether a *factual foundation* exists for the application of a legal rule. To put it differently: Where the elements of the crime or a rule of law itself (eg a rule of evidence dealing with the admissibility of evidence) or its scope is not at issue, but merely the factual foundation for the application of the rule, it would amount to a question of fact and not, inherently, to a question of law (96i). It follows, therefore, that the question whether the trial court made the correct evaluation or drew the correct inference from the primary facts, amounts to a question of fact.

In *Molepo supra*, the court, in holding that a section 174 discharge of the accused at the closing of the prosecution's case constitutes a question of law which may be appealed by the prosecution, seems to have based its conclusion on the following considerations:

(a) The fact that *R v Thielke* 1918 AD 373 379 and *R v Louw* 1918 AD 344 352 are authority for the proposition that if there is some evidence upon which a reasonable man may convict, the court has no discretion in the matter but a duty to

refer the case to the jury. According to the court in *Molepo* (per Le Roux J), the decision that there is no evidence upon which a reasonable man could convict at that stage,

> "is therefore one of law because the presiding officer has the duty to consider every bit of evidence presented by the State, to evaluate it and to test it against the essential elements of the crime which the State has to prove" (538b).

(b) The fact that this process of evaluation, comparison and inference of evidence constitutes a legal exercise (538b). To substantiate this statement, the court referred to the following *dictum* in *R v Lakatula supra*:

> "If, however, at the close of the trial there is no legal evidence upon which the jury were entitled to convict, that is a point of law which may be raised under section 372, and the question should be reserved in that form" (583c).

Le Roux J then made the following comment:

> "Why otherwise would this process be categorised as a question of law which can be reserved under s 319 (the former s 372) at the end of the trial? I can see no difference in principle between the mechanics of the two exercises although the rules governing the evaluation of the evidence differ radically and credibility plays a much more important role at the later stage" (538c).

It is submitted that the court's view that there is no difference in principle between the mechanics of the two exercises, cannot be questioned. No material difference exists between the question, determined *ex post facto*, whether any evidence existed upon which a reasonable court *could* convict, and the question, posed at the close of the prosecution's case, whether any evidence existed, at that stage, upon which a reasonable court *may* convict. (See *R v Shein supra* 8 where the court stated that "a verdict which reasonable men 'might' find means one which reasonable men 'could properly' find".)

However, the purpose of this note is to point out that, in view of the decision in *Magmoed*, these similar exercises deal with factual issues and not questions of law as decided in *Molepo*'s case. It is not a rule of law itself or the scope of such a rule which is at issue, but rather the factual foundation for the application of the rule. Furthermore, the argument advanced by the court in *Molepo* that the court does not, in terms of section 174, have a discretion but has a duty to refer the case to the jury if there is some evidence upon which a reasonable man may convict, has also, recently, been shown by the same division to be ill-founded.

In *S v Phuravhatha* 1992 2 SACR 544 (V), the court (per Du Toit AJ) considered the nature of the power afforded a presiding officer in terms of section 174. The court held that it is clear from the section itself that it affords a discretion and that, although the discretion should be exercised judicially (in a balanced way by weighing all relevant factors, including the interests of justice, the community and the accused person), there is no room for an approach on the basis of a duty to discharge or a duty to refuse a discharge (547i–j). As authority for this point of view the court relied *inter alia* upon a similar interpretation of the section in *R v Kritzinger* 1952 2 SA 401 (W) which had subsequently been followed in various decisions in South Africa (eg *R v Herholdt supra*; *S v Ostilly* 1977 2 SA 104 (D)).

It is submitted that since, in terms of section 174, a court is afforded a wide discretion to decide upon the discharge of an accused at the close of the prosecution's case, the prosecution is not at liberty to question the validity of a decision to discharge by means of an appeal on a question of law. Inherently, the decision of a court to discharge, amounts to a factual determination of the guilt or innocence of the accused. The fact that such a determination takes place at an early stage in the

trial, does not alter the *nature* of the determination in any material sense. Moreover, this is in full accord with the principle or legal tenet that in a criminal case, all elements of the offence must be proved by the prosecution beyond reasonable doubt. If the prosecution fails to do this, the defence does not have to present its own evidence in order to gain an acquittal.

In *Magmoed*, the Appeal Court expressed considerable concern for the interest of the accused not to be placed in jeopardy by being tried again once he has been acquitted (101a–j). The above discussion clearly shows that a section 174 discharge amounts to an acquittal in the sense of an adjudication upon the factual merits of a case. It is therefore concluded that such a determination by a competent court of law may not be questioned by the prosecution by way of an appeal on a question of law in terms of sections 310 and 319 of the present Criminal Procedure Act.

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SAFE DEPOSIT SECURITIES

Collective securities depositories have existed since the end of the nineteenth century. They developed out of clearing arrangements between market participants and have since grown into independent institutions aimed at immobilising and eventually eliminating securities certificates. Not all collective depositories have the same legal basis, nor do they function within the same, or even similar legal systems. Furthermore, the status of the security certificate deposited differs in the different legal systems. It is the nature of the security certificate that determines that investor's right to securities held for him (see generally Malan *Collective securities depositories and the transfer of securities* (1984)).

Until recently South Africa did not have a central securities depository, although considerable progress had been made towards the immobilisation of shares through the use of nominees and global share certificates. Frequently a system of nominee registration and global share certificates are combined and a bank, through its nominee company, holds shares evidenced by a single certificate for several investors. The bank also collects dividends and interest on securities held on behalf of its customers. Furthermore, share and other certificates are held in safe custody by stockbrokers and banks. The shares are, of course, in terms of these arrangements still "movable", and are registered as such for convenience.

The concept "scrip bank" was first outlined in 1971 by the President of the Johannesburg Stock Exchange who stated that a central electronic registry of share ownership without the issue of share certificates could be expected to solve the problems of coping with backlogs in delivery of scrip (Johannesburg Stock Exchange *Annual Report* 1971, cited in ISSA 2 *Country Reports : South Africa* 399).

For several years the project to introduce an electronic share register was not carried further. The Safe Deposit Securities Act 85 of 1992 brings that project to fruition. (The act came into operation on 1993-05-14: Proc 43 *GG* 14820 of 1993-05-14. S 9, 12 and 14 were amended by the Financial Institutions Second

Amendment Act 104 of 1993.) The depository system provided for in the act is based on a blend of the North American and continental models in that it provides for two levels of collective deposit: the deposit for safe custody of securities by the public with a depository institution authorised by the Registrar of Financial Markets (s 2(1)), and the re-deposit of these securities by the depository institution with a central securities depository, which must be a public company registered as such by the Registrar (s 2(2) and 9). Depository institutions are central to the operation of the act. There is a defect in the act, however, in that it does not specify *how* a depository institution is to be authorised. Neither does it state whether a person or institution has the right to appeal against a refusal to authorise the application to act as a depository institution. However, since the act falls under the aegis of the Financial Services Board, the person or institution concerned may have a right to appeal to the Board of Appeal constituted by the Financial Services Board Act 97 of 1990.

As Malan (219) correctly points out, the term "safe custody" in respect of securities is not entirely satisfactory. A security is an incorporeal and thus cannot be deposited. Only securities certificates can be held in safe custody. Furthermore, the relationship between the customer and the depository institution in respect of the securities held by them in "safe custody" is governed primarily by a mandate given to the depository institution to "hold" the securities and to administer and manage them. For practical reasons, however, the terms "safe custody" and deposit are used.

Where securities are deposited for safe custody with a depository institution, such an institution will, unless the depositor expressly directs otherwise, be entitled to re-deposit them with a central securities depository or with another depository institution which is a member of the central securities depository. Only a depository institution which is a member of a central securities depository will be entitled to deposit securities with a central securities depository and to have an account with it (s 10(1)).

The holdings of a person who deposits securities for safe deposit with a depository institution are reflected in securities accounts with the depository institution and the holdings of the depository institution on its accounts with the central securities depository. All securities held by a central securities depository will, unless they are bearer securities, be registered in the name of the central securities depository or its wholly-owned subsidiary, as defined in section 1(1) of the Companies Act 61 of 1973 (s 10(3)).

A central securities depository will reduce the cumbersome procedure of daily physical delivery of securities by sellers to buyers of securities, as transactions will be recorded on the centralised register of the depository. This system will therefore enhance security from an investor's point of view, since the risk of introducing tainted (mainly stolen or forged) scrip into the pool of traded securities, as well as the loss of securities by theft, misplacement or incorrect delivery, will be reduced. It will also lead to a great saving in costs as a result of the many administrative functions that will be eliminated or curtailed by the use of computer technology. It should be pointed out, however, that transactions may still take place through physical delivery of scrip.

The four major clearing banks and the Reserve Bank have established a company called the Central Depository Ltd (CD) to immobilise scrip (see GN 670 *GG* 14967 of 1993-07-16). Initially the CD will receive the bonds of seven major issuers: Eskom, the Land Bank, RSA, Telkom, Transnet, the Development Bank of

Southern Africa and the SA Housing Trust. The facility is soon to provide for the immobilisation of all bond issues. Once the bond market is formalised, all transactions will have to be reported to the Bond Market Association. Though transactions through physical delivery of scrip will still be possible by agreement, JSE Executive President Roy Andersen believes – based on European experience – that the big holders of gilts will all use the electronic transfer system (see *Financial Mail* (1992-06-12 33)). Securities will be registered in the name of the Central Depository's nominee company (CD Nominees (Pty) Ltd) which is a wholly owned subsidiary of the CD. (As regards the role of a nominee company, see *Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Company (Pty) Ltd* 1976 1 SA 441 (A) 448.)

To protect the interest of depositors, section 9 lays down stringent requirements for registration as a central securities depository (see GN 670 *supra*). The Registrar may not grant an application for registration unless he is satisfied, *inter alia*, that the establishment of the proposed central securities depository will be in the public interest, that it will be able to establish itself successfully as a central securities depository, and that its business will be conducted in a prudent manner and with due regard to the rights of depositors, members and the issuers of securities. Furthermore, the Registrar is empowered to cancel the registration if the initial registration was acquired on the strength of misleading information or if he is of the opinion that it is not in the public interest to allow the central securities depository to continue its activities.

In terms of section 12, a central securities depository must frame rules to ensure proper management and administration. The rules should, *inter alia*, ensure that the business of a central securities depository is carried out with due regard to the public interest and the interest of depositors, members and issuers of securities (*ibid*).

To ensure that a depository institution or central securities depository will not suffer loss as a result of any claims brought against it for stolen or forged security certificates deposited with the institution concerned, section 2(3) of the act provides that every depositor will be deemed to warrant to the depository institution or the central securities depository, as the case may be, that he is entitled to deposit such securities and that any documents relating to such securities is genuine and correct in all respects. Furthermore, he will be deemed to have agreed to indemnify such institution against any claim made upon it and against any loss suffered by it arising out of such deposits. (See the Stock Exchange Rules which provide that a broking firm will be responsible for the "genuineness and regularity of every document, including a document of title, delivered by it in respect of a stock exchange transaction" (Rule 5 70 1). The client to whom "faulty or tainted" scrip is delivered, has recourse to his own broker and a broker who receives faulty or tainted scrip has recourse against the broker who delivered it to him (Rules 5 70 1, 5 70 2 1 and 5 70 8 1).)

In terms of section 3 of the act, a depository institution may hold all securities of the same kind deposited with it for safe custody collectively in a separate securities repository. (A similar provision applies to a central securities depository (s 11(1) and (2)).)

Where a global certificate is used and the holdings of several investors are consolidated into and evidenced by it, the appropriation of each individual security to a specified customer becomes impossible. The interest of an investor, his collective depository share, cannot be described in terms of ownership or co-ownership of

the tangible certificate; ownership of the certificate does not decide the question who is entitled to the incorporeal rights (Malan 235).

Section 4 therefore sets out the rights of the investor to the body of securities of the kind held by the depository institution or the central depository on his behalf. It provides, *inter alia*, that the person who was the owner of the securities at the time of the deposit will be entitled to an interest as co-owner of all the securities of the same kind comprised in the securities repository or central securities repository proportional to his holding. The total of the rights of the investor is his collective deposit share. This he cedes or transfers when deliveries are made and pledges when he applies his holdings as security.

A certificate signed by or on behalf of a depository institution or a central securities depository and specifying the interest of the title of the depositor, will be *prima facie* proof of the title of the depositor to such interest (s 4(4)). The certificate can obviously be nothing more than *prima facie* proof, since shareholdings change continuously.

Section 5 provides for the transfer of securities. The transfer of an interest in securities held by a depository institution will be effected by agreement (cession), completed by entry in the securities accounts of the transferor and the transferee with the depository institution or institutions concerned. (The provisions of this section apply *mutatis mutandis* to the transfer by one depository institution to another of an interest in securities held by a central securities depository in safe custody (s 11(3).)

Where a transfer is made on the instructions of a *non-dominus*, the bank entry crediting the account of the transferee should have creative force provided he acquired in good faith and for value. The transferee should be placed in the same position, as far as possible, as if he had received a securities certificate with a transfer instrument signed in blank (Malan 236). If the *bona fide* purchaser were not protected, securities transactions would be impossible.

Section 6 deals with the pledge of securities. A pledge in respect of an interest in securities held by a depository institution will be effected by agreement completed by entry in the securities account of the pledgor in favour of the pledgee, specifying the name of the pledgee, the interest pledged and the date. Such an interest may not be transferred except with the written consent of the pledgee. Although the debtor is deprived of his power of disposition he remains owner of the security. By precluding the debtor from transferring, the creditor can attach the holder's share on his failure to perform the secured debt. Furthermore, the pledgee of such an interest will be entitled to all the rights of a pledgee of movable corporeal property in possession of that property. (The provisions of this section apply *mutatis mutandis* to the pledge by one depository institution to another of an interest in securities held by a central securities depository.)

However, since possession of a corporeal pledged publicises the existence of the security interest, another problem remains. Because physical possession of the collective depository share certificate is not possible, some form of public access to holdings of individual depositors held in collective deposit should have been expressly provided for. The act does not entitle the public to this information. (This, however, involves no real change from the present system as the public is not entitled to this information when the shares are held by nominee companies.) But, as Malan (238) cautions, unlimited access would constitute a grave infringement of an individual's rights, and it is for this reason that he suggests that access to an investor's securities account should be made dependent on his consent.

Section 8 obliges the depository institution or the central securities depository to deliver, within a reasonable time, the same number of securities, or securities of the same nominal value and of the same kind, to the owner of the securities held in a securities repository or central securities repository. An area of concern is the determination of a reasonable period of time. One would have hoped that the term "a reasonable period of time" would have been more carefully defined when the rules and regulations were published.

Section 10(2) provides that if an owner of securities deposited by a depository institution with a central securities depository wishes to exercise his rights, he must do so through the depository institution, and the depository institution will exercise these rights on behalf of the owner. Likewise, dividends and other benefits are only acquired indirectly.

Section 13 provides for the attachment of securities deposited for safe custody with a depository institution – a necessary part of the new system if the pledge of scrip to secure borrowings is to continue. The attachment will be complete only when: (a) a notice has been given in writing by the sheriff to the depository institution; (b) the sheriff has taken possession of any securities account as evidenced by a certificate issued by a central securities depository or member of such depository, as the case may be, or has certified that he has been unable to obtain possession of such certificate; and (c) the sheriff has made an entry of the attachment on such securities account or caused it to be made by such depository institution.

The Minister of Finance is empowered by section 14 to make regulations ensuring the efficiency of depository institutions and central securities depositories.

As a further safeguard, section 15 empowers the Registrar personally, or through a person nominated by him, to attend any meeting of a controlling body of a central securities depository or a subcommittee of such a body and to take part in all the proceedings at such meeting.

The immobilisation of securities in a central securities depository must not be confused with the related concept of dematerialisation, which invokes the statutory abolition of bond or share certificates and their replacement by compulsory electronic entries. While the establishment of scrip banks made possible by the act is an advance on the present arrangements, "dematerialisation" of scrip should be seen as the final phase in the development of financial markets in South Africa. In France securities have been dematerialised since November 1986 and now exist only in the form of book entries in accounts.

As the integration of the financial markets allow a larger and more efficient crossborder flow of capital, the resulting complexities demand soundness and certainty of the underlying trade and post-trade services. In view of South Africa's re-entry into the international financial arena, cognisance must be taken of evolving global structures. South Africa's central securities depositories must be able to link efficiently into international systems. All clearing systems, both domestic and international, must strive to operate on a delivery versus payment basis and provide the requisite ancillary services to ensure an efficient system of transfer with minimum risk. (The international association of banks, the group of thirty, in its efforts to minimise risk, recommends, *inter alia*, delivery versus payment (DvP).) In terms of this system, a securities transaction will be executed only against countervalue charged at the same time, backed by the guarantee of a depository or clearing institution.

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PUTATIEWE NOODWEER: OPMERKINGE OOR 'N DADERSUBJEKTIEWE BENADERING TOT MISDAADOMSKRYWING

1 Inleiding

In 'n onlangse saak, *S v De Oliveira* 1993 2 SASV 59 (A), het die volgende feitestel na vore gekom: D en sy vrou het in 'n huis in 'n gevaarlike omgewing gewoon waar roof en huisbraak dikwels voorgekom het. Hulle huis was beveilig en inbrekerbestand. Een Sondagmiddag was hulle besig om te rus toe drie persone daar opgedaag het. Een was 'n werknemer van D wat na sy kamer aan die agterkant van die huis wou gaan. Die staaldeur aan die einde van die motorinrit was egter gesluit. Genoemde werknemer het aan die deur geklop met die doel dat sy vroulike metgesel dit vir hulle sou oopmaak. Met dié het D se vrou wakker geword en hom meegedeel dat daar onbekende persone buite was. D het haar gerus gestel, sy pistool geneem, na die venster gegaan wat uitsig oor die motorinrit bied en ses skote afgevuur. Een van die persone word gedood en 'n ander gewond. Op klagtes van moord en poging tot moord was D se verweer dat hy in putatiewe noodweer opgetree het. Dit is deur die verhoorhof verwerp en die saak het vir beslissing voor die appèlhof gedien waar die appèl afgewys is. In die onderhawige kort aantekening word putatiewe noodweer onder die loep geneem en word gewys op die behoefte aan 'n nuwe benadering tot die omskrywing van misdade.

Cicero het reeds daarop gewys dat die reg op noodweer 'n aangebore reg is. (*Oratio pro Milone* Cap 4). In dieselfde trant verwys Berlichius daarna as 'n natuurreg (*Conclusiones practicabiles* 4 12 7; sien ook Van Warmelo "Noodweer" 1967 *Acta Juridica* 12; Labuschagne "Noodweer teen 'n regmatige aanval?" 1974 *De Jure* 109; Labuschagne "Noodweeroordadigheid" in Coetzee (red) *Gedenkbundel HL Swanepoel* (1976) 153). Nieteenstaande hierdie siening was optrede in noodweer in rudimentêre regstelsels, soos in 'n onlangse publikasie aangetoon word, ook strafbaar (Labuschagne "Van instink tot norm. Noodweer en noodtoestand in strafregtelik-evolusionêre perspektief" 1993 *TRW* 133).

2 Die sogenaamde objektiewe dimensie van noodweer

In die *De Oliveira*-saak verduidelik appèlregter Smalberger die verskil tussen noodweer en putatiewe noodweer soos volg (63–64):

> "A person who acts in private defence acts lawfully, provided his conduct satisfies the requirements laid down for such a defence and does not exceed its limits. The test for private defence is objective – would a reasonable man in the position of the accused have acted in the same way? In putative private defence it is not lawfulness that is in issue but culpability ('skuld'). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude *dolus* in which case liability for the person's death based on intention will also be excluded."

Objektiwiteit word gevolglik bepaal aan die hand van die redelike man, dit wil sê die hof volg die *mensobjektiewe* benadering tot dié probleem. Daar bestaan 'n veelheid van gewysderegtelike gesag in die verband (sien bv *R v Koning* 1953 3 SA 220 (T) 225; *S v Botes* 1966 3 SA 606 (O) 612; *R v Bhaya* 1953 3 SA 143 (N)

149; *R v Hele* 1947 1 SA 272 (OK) 276; *R v Britz* 1949 3 SA 293 (A) 297–298; *R v Pope* 1953 3 SA 890 (K) 894–895; *S v Mnguni* 1966 3 SA 776 (T) 778; *S v Mtetwa* 1967 2 PH H 273 (N); Labuschagne "Noodweeroordadigheid" 163). Die aanwending van hierdie toets by noodweer is al gekritiseer omdat die gangbare toets vir nalatigheid hier aangewend word om "wederregtelikheid" te bepaal (sien bv Van Oosten se bespreking van *S v Van Antwerpen* 1976 3 SA 399 (T) in 1977 *De Jure* 180–181). Volgens Snyman gebruik die howe die redelike man-toets hier om te bepaal of die beskuldigde se optrede redelik was in die sin dat dit met die gemeenskapsopvattinge strook (*Strafreg* (1992) 118–119). Burchell, Hunt *et al* wys daarop dat indien die beskuldigde private kennis het wat die redelike man nie het nie, hy hom nie op die mensobjektiewe toets kan beroep nie (*South African criminal law and procedure* vol 1 (1983) 331). In so 'n geval sal derhalwe 'n suiwer subjektiewe toets geld (vir verdere kritiek teen die mensobjektiewe benadering sien Labuschagne "Noodweeroordadigheid" 164).

Artikel 34 van die Kanadese Strafkode is ter sake en lui soos volg:

> "(1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.
>
> (2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
>
> (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and
>
> (b) he believes, on reasonable and probable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm" (vgl ook a 37).

Die verwysing na "reasonable" in artikel 34(2) is insiggewend. 'n Saskatchewanse hof het egter beslis dat dit nie hier om 'n objektiewe toets gaan nie:

> "But if one believes he is in danger of life or limb he is entitled to use such force as would effectually put his assailant out of action. Where the means of defence used is not disproportionate to the severity of the assault, the plea is valid although the defender fails to measure with nicety the degree of force necessary to ward off the attack and inflicts serious injury. The test as to the extent of justification is whether the accused used more force *than he on reasonable grounds believed necessary*. It is not an objective test; the determination must be made according to the accused's state of mind at the time. The question is: Did he use more force than he on reasonable grounds believed to be necessary?" (*R v Cadwallader* (1966) 1 CCC 380 (Saskatchewan QB) 387–388).

Volgens LaFave en Scott word in die jurisdiksies van die VSA oorwegend vereis dat die beskuldigde hom slegs in geval van 'n *redelike* geloof mag verweer:

> "[T]he case law and statutory law on self defense generally require that the defendant's belief in the necessity of using force to prevent harm to himself be a reasonable one, so that one who honestly though unreasonably believes in the necessity of using force in self-protection loses the defense. When his belief is reasonable, however, he may be mistaken in his belief and still have the defense. Thus one may be justified in shooting to death an adversary who, having threatened to kill him, reaches for his pocket as if for a gun, though it later appears that he had no gun and that he was only reaching for his handkerchief" (*Substantive criminal law* vol 1 (1986) 653–654).

In Nederland daarenteen word die feitlik-objektiewe benadering blykbaar gevolg, hoewel daar meningsverskil oor die interpretasie van 'n Hoge Raad-beslissing van 20 November 1949 (1950 *NJ* 179) bestaan (Remmelink *Het wetboek van strafrecht*

Boek 1 (1992) 271). Ek het by 'n ander geleentheid aan die hand gedoen dat binne bestaande denk- en insigpatrone die feitlik-objektiewe benadering by bepaling van die noodweersituasie, asook by bepaling van proporsionaliteit, die aanvaarbaarste is. Die argumente daar geopper, word nie hier herhaal nie ("Noodweeroordadigheid" 162–167).

3 Dadersubjektiewe begrensing van optrede in noodweer

In hierdie verband kan op die volgende gewys word:

(a) Voorafgaande provokasie

Uit onlangse uitsprake van die Duitse Bundesgerichtshof blyk dat iemand wat 'n aanval op hom ligsinnig provokeer, eers moet probeer om te ontvlug voordat hy ter selfbeskerming 'n lewensgevaarlike wapen aanwend (BGH (1988) *NStZ* 269; BGH (1992) *NStZ* 327). Matt kritiseer hierdie benadering tereg omdat die reg op noodweer nie 'n voorreg is waarvoor jy jou eers waardig moet bewys en moet verdien nie, maar 'n natuurlike reg is wat jou toekom ("Eigenverantwortlichkeit und subjektives Recht im Notwehrrecht" 1993 *NStZ* 273).

Artikel 35 van die Kanadese Strafkode skep insgelyks 'n dadersubjektiewe begrensing van noodweer in daardie gevalle waar die dader die aanval op homself teweeggebring het. Hierdie artikel lui soos volg:

> "Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault upon himself by another, may justify the use of force subsequent to the assault if
>
> (a) he uses the force
>
> (i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and
>
> (ii) in the belief, on reasonable and probable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;
>
> (b) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and
>
> (c) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose."

(b) Voorafgaande kennis

Uit die feitestel van 'n onlangse saak uit Ontario (*R v Melaragni* (1992) 76 CCC (3d) 78 (Ontario Court, GD) 82) blyk dat indien die beskuldigde (gesubstansieerde) persoonlike of private kennis van die aanvaller het, soos dat hy buitengewoon aggressief is, hy homself tot die omvang van daardie kennis mag verweer (sien ook Labuschagne "Noodweeroordadigheid" 168). Die Bundesgerichtshof in Duitsland huldig 'n soortgelyke standpunt (BGH, 1989 *NJW* 3027). Dit is klaarblyklik ook die benadering van die Suid-Afrikaanse howe (*S v T* 1986 2 SA 112 (O) 131–132).

(c) Afweringsgerigtheid

'n Verdere dadersubjektiewe aspek by noodweer is dat die dader (beskuldigde) se optrede op die afwering van die aanval gerig moet wees. Hiervolgens moet hy bewus wees daarvan dat hy aangeval word (sien Labuschagne 1979 *SASK* 273; "Noodweeroordadigheid" 163–164; "Die uitskakeling van toeval by strafregtelike

aanspreeklikheid" 1985 *De Jure* 155–158; Morkel en Verschoor "Oor die 'bedoeling om te verdedig' by noodweer" 1981 *TRW* 73; Snyman 117–118; Burchell en Milton *Principles of criminal law* (1991) 115 vn 46).

(d) Gemoedstoestand van die dader ten tyde van die afweershandeling

Artikel 33 van die Duitse Strafwetboek bepaal dat 'n noodweerdader strafregtelik verskoon word indien hy die grense van noodweer oorskry het as gevolg van verwarring, vrees of verskriktheid. Volgens Jescheck stel dit 'n skulduitsluitingsgrond daar (*Lehrbuch des Strafrechts* (1988) 443). Sover my kennis strek, bestaan daar nie 'n soortgelyke reëling in die Suid-Afrikaanse strafreg nie. Die Duitse benadering is egter navolgenswaardig aangesien dit, in die lig van die strafteorieë, geen sin maak om 'n persoon in sodanige omstandighede te straf nie.

4 Putatiewe noodweer

Dit wil voorkom of noodweer in die Romeinse reg saamgehang het met wat hedendaags die skuldbegrip genoem word (*D* 9 2 52 1; Van Warmelo 1967 *Acta Juridica* 16; Labuschagne "Noodweeroordadigheid" 153). In vroeëre sake het ons howe beslis dat 'n feitedwaling slegs verskoon word as dit redelik is. So verklaar appèlregter De Villiers in *R v Mbombela* 1933 AD 269 273:

> "A reasonable belief, in my opinion, is such as would be formed by a reasonable man in the circumstances in which the accused was placed in a given case. The 'reasonable man' is in this connection the man of ordinary intelligence, knowledge and prudence. It follows that mistake of fact is not reasonable if it is due to lack of such knowledge and intelligence as is possessed by an ordinary person, or if it is due to such carelessness, inattention and so forth, as an ordinary person would not have exhibited. The particular point, however, which is raised by the question reserved, is whether there is only one type of 'reasonable man' who is to be taken as the legal standard, or whether in a case like the present, another type of reasonable man is to be conceived of, viz, 'an ordinary native aged 18 years and living at home in his kraal'. I have no doubt that by the law of this country there is only one standard of 'reasonable man'."

Ons howe het mettertyd weggedoen met die redelikheidsvereiste (sien bv *R v Z* 1960 1 SA 739 (A) 743). In *S v Sam* 1980 4 SA 289 (T) 294 verduidelik regter Myburgh die huidige stand van die reg soos volg:

> "Op gesag van die genoemde gewysdes is dit na my oordeel so dat by 'n misdaad waar opset (*dolus*) 'n vereiste is moet die Staat bo redelike twyfel wederregtelikheidsbewussyn bewys. Of die feitedwaling redelik of onredelik is, is nie ter sake nie omdat die toets subjektief is. Die begrip van redelikheid of onredelikheid, en die graad daarvan in die omstandighede en feite van elke saak, kom alleen ter sprake by die bewyslewering of die beskuldigde wel *bona fide* gedwaal het al dan nie. Dit raak nie die regsbeginsel as sodanig nie. Dit geld in beide gemeenregtelike en statutêre misdrywe waar *dolus* 'n vereiste is."

In Kanada geld die redelikheidsvereiste, blykens artikel 34 van hulle Strafwetboek, ten aansien van 'n beroep op noodweer. Volgens appèlregter Martin word 'n suiwer objektiewe toets egter nie aangewend nie:

> "I think I should add that, contrary to the view expressed by the trial Judge, s 34(1) does not import a purely objective test. The doctrine of mistake of fact is applicable to s 34(1) as well as s 34(2). An accused's belief that he was in imminent danger from an attack may be reasonable, although he may be mistaken in his belief. Moreover, in deciding whether the force used by the accused was more than was necessary in self-defence under both s 34(1) and (2) the jury must bear in mind that a

> person defending himself against an attack, reasonably apprehended, cannot be expected to weigh to a nicety, the exact measure of necessary defensive action" (*R v Baxter* (1975) 27 CCC (2d) 96 (Ontario CA) 111. Sien ook *R v Bolyanta* (1975) 29 CCC (2d) 174 (Ontario CA) 175–176).

In *R v Ndaru* 1955 4 SA 182 (A) het die volgende feitestel na vore gekom: 'n groep van ongeveer vyf tot ses persone, ingeslote die oorledene, het hulleself in lang gras versteek om buite die sig van polisiemanne te bly wat met 'n ondersoek besig was. Een van genoemde persone is deur 'n vreemdeling N (die beskuldigde) versoek om sodomie te pleeg. Die versoek is geweier, maar weer herhaal. N is gevra om te loop waarop hy 'n mes te voorskyn gebring het en een van die groep in die wang gesteek het. N het toe weggehardloop maar is agtervolg en ingehaal. Hy het hierna die oorledene noodlottig gewond. Die argument is geopper dat N in putatiewe noodweer opgetree het. Waarnemende hoofregter Schreiner sê hieroor die volgende:

> "Now if full effect is given to these findings there is a good deal to be said for the view that they amount to holding that the appellant believed that the conditions required for self-defence existed in his favour; if so it would be arguable that even though he was mistaken he should be treated as if those conditions did in fact exist. It should, however, be observed that there is no finding by the trial Court that the belief, assuming it to have existed, was reasonable and it is difficult to see how the appellant could reasonably have entertained more than a fear, perhaps a strong fear, that his pursuers would not only hand him over to the police but would also themselves assault him. For a mistaken belief to operate in favour of an accused person it is commonly said that the belief must be reasonable ... and the circumstances of this case provide a strong argument in favour of this view" (185; vgl *R v Sile* 1945 WLD 134 135; *R v De Ruiter* 1957 3 SA 361 (A) 364).

In die lig van die hedendaagse benadering van ons howe, soos hierbo genoem is, dat redelikheid by *error facti* nie 'n vereiste is nie, is regter Schreiner se opmerkinge nie meer geldig nie. Dit blyk ook duidelik uit *De Oliveira supra* 63–64.

In die Kanadese saak *R v Vlcko* 10 CCC (2d) 189 (Ontario CA) is die beskuldigde van aanranding aangekla deurdat hy 'n vredesbeampte in die uitvoering van sy pligte weerstaan het. Beskuldigde was onder verdowing as gevolg van die inname van LSD-dwelms. Sy verweer was dat hy onder die indruk verkeer het dat hy aangeval word. Die hof bevind dat beskuldigde *ignorantia facti* opgetree het (sien ook Labuschagne "Noodweeroordadigheid" 162). Hier het 'n mens duidelik met putatiewe noodweer te make.

In geval van putatiewe noodweer word die vereistes van noodweer tot die dadersbewussyn herlei (sien die Duitse saak BGH, 1968 *NJW* 1885; Jescheck 442). In die Amerikaanse saak *State v Cope* 78 Ohio App 429, 67 NE 2d 912 (1946) (vgl LaFave en Scott 656 vn 29) beslis die hof dat 'n mens nie net in noodweer mag optree indien 'n redelike man dit sou doen nie, maar ook as iemand met die besondere eienskappe van die beskuldigde dit sou doen; 'n senuweeagtige of vreesbevange persoon word nie aan dieselfde standaarde as 'n dapper en sterker persoon gemeet nie. Artikel 3.04(1) van die *Model Penal Code* vereis bloot dat die noodweerdader moet glo dat die gebruik van geweld nodig is. Enkele state van die VSA het wetgewing met 'n soortgelyke strekking aangeneem (LaFave en Scott 655 vn 31). Hierdie benadering is myns insiens sinvol en onderskryfbaar. Waarom moet 'n mens eers vra wat die (feitelik- of mens-) objektiewe posisie was, as die finale vraag in ieder geval is wat in die dader se bewussynswêreld aangegaan het? (Sien ook Labuschagne 1993 *TRW* 33.)

5 Konklusie

In vroeëre regstelsels is 'n persoon bloot vir 'n sintuiglik-waarneembare of objektiewe veroorsaking van 'n gevolg gestraf. Die dekonkretiserings- of subjektiveringsproses wat soos 'n goue draad dwarsdeur die geskiedenis van die strafreg loop, het hierdie objektiewe basis geleidelik geërodeer en sal dit ook in die toekoms doen. Trouens, die bestaan van noodweer as verweer is reeds 'n bewys daarvan (sien Labuschagne "Die eindbestemming van die dekonkretiseringsproses in die strafreg" 1990 *THRHR* 99; "Die voorrasionele evolusiebasis van die strafreg" 1992 *TRW* 38–40). Hierbo is daarop gewys dat daar hedendaags reeds verskeie dadersubjektiewe aspekte by noodweer aangetref word. In party Amerikaanse state is die ontwikkelingslyn reeds volledig deurgetrek en wòrd putatiewe noodweer in effek aan noodweer gelykgestel. In die lig van bogenoemde dekonkretiseringsproses, wat 'n natuurbasis het, is die uiteindelike gelykstelling van putatiewe noodweer en noodweer myns insiens onvermydelik. Trouens, putatiewe noodweer stel, vir doeleindes van strafsinvolheid, inderdaad noodweer daar. Soos by 'n ander geleentheid aangetoon is, het die hedendaagse standaardmisdaadelement "wederregtelikheid" in die toekomstige strafreg nie bestaansreg nie (Labuschagne "Misdaadelementologie en indoktrinasie: 'n teelaarde vir stagnasie?" 1993 *SAS* 82). Misdade sal in 'n toenemende mate met verwysing na dadersubjektiewe faktore, gekoppel aan 'n uitvoeringshandeling, omskryf word (sien Labuschagne "Ondeugdelike poging: opmerkinge oor strafsinvolheid" 1980 *De Jure* 122–125). Daardeur word 'n hoër vlak van geregtigheid gedien.

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IS THERE AN OBLIGATION TO DISCLOSE EPILEPSY WHEN ENTERING INTO A (INSURANCE) CONTRACT?*

1 Introduction

Must a person with epilepsy disclose his epilepsy to the other contracting party when entering into a contract?

During 1901–1902 a French archaeological expedition found three blocks of black diorite stone in the ancient city of Susa (Iran), which contained the Babylonian laws of Hammurabi (dating from approximately the 18th century BC) (Troch *Van "vallende" ziekte tot epilepzieen* (1975) 17–18; De Villiers "A few thoughts on the history of epilepsy" 1993 (83) *SAMJ* 212). Section 278 of the text stipulates that when someone bought a slave who contracted the "bennoe-illness" before the end of the month, he had to give the slave back to the seller, and receive back the silver that he had paid. A German master of medicine, Karl Sudhoff, made a study of what was meant by "bennoe-illness". He pointed out that the sold slave had to be in apparent good health at the time of the contract of sale, but must actually already have been suffering from the illness. The lawgiver therefore

* This note is based on certain aspects of the author's LLD-thesis *Epilepsy – legal problems* (Unisa 1994).

mentioned the existence of an illness that could not be noticed at a certain time, but would come to the fore later and would considerably reduce the commercial value of the slave. Sudhoff accepted that in all probability "bennoe-illness" referred to epilepsy, because epilepsy usually occurred at varying intervals.

The devil "bennoe" was referred to together with the fever devils, and epilepsy was associated with it as it was regarded as possession by a devil. Furthermore, a synonym for "bennoe" is the word "miqtoe", which means "to fall" or "the inclination to fall" (Troch 18–19).

The deeds of sale at the time of kings Abi-Esoech, Ammiditana and Ammisadoega, who lived in the same period as Hammurabi, show that section 278 was used quite often. These deeds of sale stipulated that the sale could be annulled in the month in which the "bennoe-illness" originated (Troch 19–20).

Plato (429–347 BC) also referred to the sales of slaves with epilepsy in a chapter named "Honesty in purchasing and selling". He had the following to say (Troch 20–21 (translation by Troch)):

> "Wie bij een verkoop een som van minstens vijftig drachmen heeft ontvangen, zal tien dagen lang in die stad moeten verblijven en de koper zal het adres van de verkoper moeten kennen, wegens de betwistingen die bij zulke aangelegenheden plegen te rijzen en met het oog op de wettelijke teruggave van de gekochte. Ziehier in welke gevallen deze teruggave wettelijk al dan niet moet worden toegestaan. a) Wie een slaaf verkoopt die lijdt aan tering of stenen of strangurie of aan die zogenaamde 'heilige ziekte' (epilepsie) of aan enige ander kwaal – zowel lichamelijke als geestelijke – die voor het oog van de gewone man verborgen blijft en die ernstige en ongeneeslijk is, moet hij deze terugneme; als hij die verkocht heeft aan een geneesheer of een gymnastiekmeester, kan er van teruggave in dat geval geen sprake zijn, evenmin als in het geval waarin de verkoop voorafgegaan werd door een verklaring betreffende de werkelijke toestand. b) Zou echter een vakman een dergelijke verkoop afsluiten met een onbevoegde (koper), dan mag de koper binnen de zes maanden het gekochte teruggeven; uitzondering wordt gemaakt voor de 'heilige ziekte', waarvan de toegestane termijn van teruggave een jaar is. De uitspraak hierover komt toe aan drie geneesheren, gezamenlijk gekozen uit de door beide partijen voorgedragen kandidaten. De verliezer van het proces zal het dubbele van de verkoopprijs betalen. c) Verkoopt een onbevoegde aan een onbevoegde, dan zal de teruggave gebeuren precies zoals boven aangegeven; ook hier zal de zaak gerechtelik beslecht worden, maar de veroordeelde zal slechts de enkelvoudige prijs betalen."

The physician had to be able to distinguish between a healthy slave and a slave suffering from epilepsy. The procedure therefor was that an epileptic attack was provoked by letting the slave stare at a turning potter's wheel, or by burning jet, asphalt, horn, and so on, close to the nose of the patient (Troch 21; Temkin *The falling sickness: a history of epilepsy from the Greeks to the beginnings of modern neurology* (1979) 48–49).

If an ignorant person sold a slave with epilepsy to another ignorant person, the seller had to pay back the purchase price. If a professional person sold the slave with epilepsy to an ignorant person, the sanction was twice the selling price (Temkin 48).

In the Nile valley (at about the time of Christ's birth) a slave contract existed which stated that if a slave contracted the "Iera Nousos" (epilepsy) within six months after entering into the contract, the sale would be annulled (Troch 21; Raubenheimer *Die ontwikkeling van onderwys aan kinders met epilepsie in die Republiek van Suid-Afrika, binne die raamwerk van onderwysvoorsiening vir kinders met spesiale onderwysbehoeftes* (LLD thesis US 1981) 8).

The question whether a person with epilepsy should disclose his epilepsy to the other contracting party when entering into a contract, is investigated in American, English and South African law with specific reference to the insurance contract.

2 The USA

A premium is an essential part of the insurance contract. The rate of the premium must be agreed upon expressly or tacitly (Anderson *Couch cyclopedia of insurance law* (1959) 107–108). The essence of an insurance contract is the risk factor, which should be clearly specified or be easily identifiable. In general, it could be any uncertain event that in any way could be to the detriment of the insured person (*idem* 109). If incorrect information is provided in an insurance application, the insurer may decide to reject the claim (Widiss *Insurance. Materials on fundamental principles, legal doctrines and regulatory acts* (1989) 521). Should there be an intentional concealment of a material fact, for instance that the applicant has epilepsy, courts in the USA generally conclude either that the insurer has a valid defence to a claim, or that he has a ground for rescinding the insurance contract (*idem* 537). The contract is voidable in terms of the common law (Meyer *Life and health insurance law* (1972) 155).

3 England

Where an insured person is guilty of fraudulent non-disclosure or misrepresentation of certain facts, the contract is voidable (Birds *Modern insurance law* (1988) 74; Colinvaux *The law of insurance* (1984) 92). Fraud is present if a false declaration has been made knowingly, without belief in its truth, or has been made with reckless disregard for its truth or falseness. A person with epilepsy can falsely, knowingly, without belief in the truth of his statement, declare that he does not suffer from epilepsy, in which case the insurer may declare the contract null and void, claim damages in terms of the tort of deceit, and keep all premiums that have been paid (*idem* 78).

An insurance contract belongs to the class of contracts which require *uberrimae fides*. A person with epilepsy is expected to disclose all material information, within his knowledge, that the insurer does not know about or is presumed not to know about, before signing the contract. If he neglects to do this, the contract is void *ab initio* (*idem* 81; Colinvaux 92; O'Dowd and Birds *Encyclopedia of insurance law* (1985) 1004). Especially with regard to his health, the declaration must be factual and not merely an opinion. It is therefore essential to consult a medical practitioner. The opinion of the person with epilepsy with regard to the essentiality of the non-disclosed facts is irrelevant (Birds 83–84). Certain facts, for example, facts increasing the risk, must be disclosed to the insurers (*idem* 85; Colinvaux 95). The latter aspect can be of significance if a person with epilepsy leaves a blank space with reference to his state of health and the insurer accepts this contract. The person with epilepsy would then have failed to disclose a fact that could influence the risk. A material fact is regarded as any fact which can affect the judgment of a reasonable or prudent insurer in deciding whether or not to accept a certain risk or what premium to charge (Birds 87; *Lambert v Co-Operative Insurance Co Society* (1975) 2 Lloyd's Reports 485, as referred to in Birds 87–88). It seems reasonable to view epilepsy as a material fact, as it is a fact that will influence the decision of an insurer. Material facts can be related to either a physical or a moral hazard. Facts relating to a physical hazard are those which, generally speaking, are obviously material. Examples are, in life insurance, a high-risk occupation or

hobby, and in liability insurance a bad accident record (Birds 90). Moral-hazard cases may be divided into three categories: those relating to the insurance history of the applicant, those relating to his nationality or origin, and those relating to criminal convictions. The insurance history of the proposer includes previous refusals by other insurers to insure as well as his claims history (*ibid* 90). Whether a previous refusal to insure is material in respect of a type of insurance other than that for which the applicant is applying, is not clear. It would appear that such a previous refusal may be material when it relates in a general way to the integrity of the applicant. A mere refusal would, therefore, not be material, but a refusal based on the insurance history of the applicant, for example as to his claims experience, may well be. As far as the criminal history of the applicant is concerned, any conviction relevant to the insurance sought will be regarded as material unless it is trivial and old (*idem* 92–93).

The rejection of claims by insurers was investigated by the Law Commission and it made certain recommendations in 1986. One of the recommendations (par 3(a) of the *Long Term Statement* as referred to in Birds 98) was that an insurer may not unreasonably reject a claim, especially on grounds of non-disclosure or misrepresentation of a fact, unless it is a material fact falling within the knowledge of the proposer and which the proposer could reasonably be expected to disclose.

A factual misrepresentation which is materially false, whether innocently or negligently made, renders a contract voidable. "Material" has the same meaning here as with the non-disclosure of a fact (Birds 79; Colinvaux 97 99–100). According to section 2(2) of the Misrepresentation Act of 1967 (Birds 80; Colinvaux 97 fn 56), the court has a discretion, in relation to the setting aside or annulment of the contract, to award damages to the insurer.

An insurance contract may also contain warranties and/or conditions. A warranty is a term of an insurance contract whereby the insured person warrants the correctness of the information provided by him at the time of the conclusion of the contract, or whereby he undertakes to maintain a specific state of affairs for the duration of the contract. The insurer may, in a case of a breach of warranty, repudiate the contract (Birds 99; O'Dowd and Birds 1005). There are three types of warranties, namely warranties with regard to past facts, future facts and opinions. A warranty can thus also refer to the future, for instance a warranty that an individual will in future take medication to control his epilepsy, which is known as a "promissory warranty" (Birds 101).

4 South Africa

To conclude an insurance contract the parties must at least have *consensus* with regard to the interest, the risk, the premium, the coverage and the period of insurance. The interest must be of a patrimonial nature, but may consist in personal rights and even an expectation (Van Jaarsveld (red) *Suid-Afrikaanse handelsreg* (1) (1988) 692; *contra* Davis *Gordon and Getz on the South African law of insurance* (1993) 99). The risk may include different things, for instance the insured interest or the danger that the interest can be exposed to (Van Jaarsveld 692–693). A responsibility rests on all parties to reveal all facts that may affect the risk and of which they have actual or constructive knowledge (*Mutual & Federal Insurance Co v Oudtshoorn Municipality* 1985 1 SA 419 (A) 432E-F; Van Jaarsveld 693). Because epilepsy is a fact that may affect the risk and of which the person with epilepsy has knowledge, it should be revealed. The risk may then be contractually limited.

In any insurance contract it is good faith, and not the utmost good faith, which is generally required (*Mutual & Federal Insurance Co v Oudtshoorn Municipality supra* 433A–F; Van Jaarsveld 712; Christie *The law of contract in South Africa* (1991) 333). The duty of good faith must be distinguished from the duty of disclosure, which was formerly regarded as flowing from the duty of good faith. The duty of disclosure operates *ex lege* (*Mutual & Federal Insurance Co v Oudtshoorn Municipality supra* 433C; Christie 333; Van Jaarsveld 713) and requires all questions on the application form to be answered honestly and correctly. There may be no omission of the disclosure of any essential or material facts (Van Jaarsveld 713; Van der Merwe, Van Huyssteen, Reynecke, Lubbe and Lotz *Contract. General principles* (1993) 77). "Material facts" (Van Jaarsveld 713–714) include all facts which, according to the judgment of the reasonable man, will influence the extent of the risk and thus the extent of the premium too. The non-disclosure of any material fact causes the contract to be void, as the risk is different from the risk understood and intended for the contract (*Iscor Pension Fund v Marine and Trade Insurance Company Ltd* 1961 1 SA 178 (T); Christie 333). Epilepsy may be seen as a material fact because it affects the risk and the extent of the premium. The insurer must decide whether to accept the risk, and if so, at what premium (*Mutual & Federal Insurance Co v Oudtshoorn Municipality supra* 442; Van der Merwe, Van Huyssteen, Reynecke, Lubbe and Lotz 95; Van Jaarsveld 714). Material facts may extend to facts beyond the actual knowledge of the insured person, because constructive knowledge is sufficient. A duty rests upon the insurer and the insured person to disclose all material facts before conclusion of the contract (*Mutual & Federal Insurance Co v Oudtshoorn Municipality supra* 432E; Wille and Millin *Wille and Millin's Mercantile law of South Africa* (1975) 455; Oelofse *Die* uberrima fides *leerstuk in die versekeringsreg* (1988) 142; Van der Merwe, Van Huyssteen, Reynecke, Lubbe and Lotz 95). In life insurance this disclosure occurs once only, but in other forms of insurance, renewal of the policy and disclosure need to be done periodically (Van Jaarsveld 714).

Facts about which no specific questions are asked, do not have to be revealed (Van Jaarsveld 714–715; Davis 126). This includes, *inter alia*, facts that the insurer is aware of or should have been aware of, instances where the insurer has waived his rights to information or disclosure, facts that reduce the risk, and so on.

Non-compliance with the duty of disclosure is regarded as a misrepresentation and the contract may be annulled at the choice of the aggrieved person (Van Jaarsveld 715 fn 43; *contra* Van der Merwe "*Uberrima fides* en die beraming van die risiko voor sluiting van 'n versekeringskontrak" 1977 *THRHR* 1, "Insurance and good faith: exit *uberrima fides* – enter what? 1985 *THRHR* 456; Oelofse 142 145; Wille and Millin 455 547).

Before an insurer may annul a contract or refuse to pay out specific claims on the ground of misrepresentation, it should be established that the misrepresentation substantially affected the risk. The answers of insured persons are therefore expressed as warranties. It may render the insured person's right to recover dependent either on the existence of a state of affairs, or on the insured person's conduct. These answers of insured persons to questions asked in the insurance contract must be given in detail (Van Jaarsveld 715). There are different types of warranties (*idem* 716), such as an affirmative warranty that relates to the averment of the actual existence of a fact, for instance that the insured person is in good health or possesses a driver's licence, or a promissory warranty that relates to the insured person's conduct during the existence of the contract. A breach of a warranty is

regarded as a breach of contract giving rise to various remedies, for instance the right to resile from the contract by means of the *lex commissoria*, cancellation, and if this was stipulated in the contract, the retention of all the premiums that have been paid, as well as annulment of the contract (Davis 215; Van Jaarsveld 717).

Statutory protection of an insured person against misrepresentation is found in section 63(3) of the Insurance Act 27 of 1943 (as amended): a policy is not invalidated and the obligation of an insurer thereunder not excluded or limited, or the obligations of the owner thereof are not increased, on account of any representation made to the insurer which is not true, whether or not such representation has been warranted to be true, unless the incorrectness of the representation is of such a nature as to be likely to have materially affected the assessment of the risk under the said policy at the time of issue or any reinstatement or renewal thereof.

In terms of this section, a warranted misrepresentation by the insured person will invalidate the contract only if the incorrectness has materially influenced the calculation of the risk at the time of issue, reinstatement or renewal of the policy (Van Jaarsveld 718). The misrepresentation of a health condition, for instance, a statement that one does not suffer from epilepsy, is of such a nature as is likely to affect the assessment of the risk of the policy materially.

5 Conclusion

In this note the question whether a person with epilepsy should reveal his or her condition to the other contracting party was investigated.

The Babylonian laws of Hammurabi stipulated the procedure if a slave with epilepsy was sold to another person. Plato also referred to the consequences of a sale of a slave with epilepsy.

In the legal systems of all three countries investigated (USA, England and South Africa), it is a requirement for the valid conclusion of an insurance contract that the parties must have reached *consensus* about the interest that will be insured, the risk, the premium, the coverage, and the period of insurance. All parties to the contract must reveal all facts that may affect the risk and of which they have actual or constructive knowledge. Epilepsy is therefore a condition that must be revealed. If it is not disclosed, the contract is voidable in all three countries. The duty of disclosure is therefore applicable with regard to insurance contracts. This means that all questions on the proposal must be answered honestly and correctly, and there may be no omission of disclosure of material facts. "Material" refers to all facts which, according to the judgment of the reasonable man, will affect the extent of the risk and also the extent of the premium. Epilepsy may be regarded as a material fact. Non-compliance with this requirement is regarded as a misrepresentation and the contract may be annulled at the request of the aggrieved party (the insurer).

In all three countries, a breach of warranty constitutes a breach of contract, and the aggrieved party (the insurer) may resile from the contract, cancel the contract and, if it was thus stipulated, retain all paid premiums, and annul the contract. Should a person with epilepsy answer questions asked in the proposal, he must be truthful because his answers also constitute warranties. Breach of a warranty will amount to breach of his contract, which may result in its cancellation.

Because a person suffering from epilepsy will either be refused insurance or required to pay exorbitant premiums due to the risk attached to epilepsy in the USA, England and South Africa, s/he may feel tempted not to disclose her/his

condition when entering into the contract. S/he must, however, disclose her/his epilepsy to the insurer prior to contracting, as the fraudulent non-disclosure would in most instances result in the contract being null and void.

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University of South Africa

LIDMAATSKAP: VERENIGING HUGO DE GROOT

Ingevolge artikel 3.1 van die Reglement van die Vereniging Hugo de Groot kan enige persoon wat 'n intekenaar op die THRHR *is, op aansoek na die bestuur van die Vereniging, as lid van die Vereniging toegelaat word. Op grond hiervan rig die bestuur 'n uitnodiging aan alle belangstellende persone om aansoek tot lidmaatskap van die Vereniging te doen. Aansoeke moet gerig word aan:*

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THE APPLICATION OF THE REASONABLE FORESEEABILITY TEST FOR NEGLIGENCE

Stratton v Spoornet 1994 1 SA 803 (T)

1 Introduction

The conceptual aspects of negligence seem to have become established in our law to a large extent. The classic formulation of the so-called "reasonable man" ("reasonable person", *bonus paterfamilias*) test by Holmes JA in *Kruger v Coetzee* 1966 2 SA 428 (A) is without exception accepted by the courts as a true exposition, in cases dealing with the determination of negligence for purposes of the law of delict. Holmes JA expressed himself as follows (430E–F):

> "For the purposes of liability, *culpa* arises if–
>
> (a) a *diligens paterfamilias* in the position of the defendant–
>
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
>
> (ii) would take reasonable steps to guard against such occurrence; and
>
> (b) the defendant failed to take such steps."

It is impossible to lay down strict guidelines for the applicability of the test of reasonable foreseeability (the first tier of the reasonable man test for negligence). However, having regard to judicial decisions on this aspect, one can evidently accept as a rule of thumb that reasonable foreseeability of harm will depend upon the degree of probability that such harm will materialise. The greater thus the possibility that harm will ensue from a specific wrongful act, the easier it will be to decide that such harm was reasonably foreseeable or foreseeable to the *bonus paterfamilias*. Logically the converse also holds true. (There are many examples to be found in reported judgments, of which the following more recent ones merit mention: *Ablort-Morgan v Whyte Bank Farms (Pty) Ltd* 1988 3 SA 531 (E); *Johannesburg Consolidated Investment Co Ltd v Langleigh Construction (Pty) Ltd* 1991 1 SA 576 (A); *Willmers v Cape Provincial Administration* 1992 1 SA 310 (E); *General Accident Insurance Co of South Africa Ltd v Xhego* 1992 1 SA 580 (A); *Daniels v General Accident Insurance Co Ltd* 1992 1 SA 757 (C); *Butters v Cape Town Municipality* 1993 3 SA 521 (C); see further Van der Walt *Delict: principles and cases* (1979) 78; Boberg *The law of delict: vol I Aquilian liability* (1984) 275; Neethling, Potgieter & Visser *Law of delict* (1994) 132–133.)

2 Facts and the decision of the court

The facts of the *Stratton* case are as follows: The plaintiff's eight-year-old son sustained severe burns when he climbed up an electric pylon abutting a railway

line running through a busy Pretoria suburb and touched a high-voltage cable. The accident occurred while the child was in the process of crossing a double railway line from the pylon which he had scaled, by means of a perpendicular girder which abutted from the pylon right to the other side of the tracks. The plaintiff, in his personal capacity, claimed an amount from the defendant for the recovery of past and future medical expenses with regard to his son's injuries and, in his representative capacity, for so-called general damages. He based the claims on the allegation that the defendant or its predecessor (the South African Transport Services) had negligently created the situation involving a potential risk of harm, *inter alia* by not keeping the fence along the railway tracks in a state of good repair and by failing to take steps to prevent persons from climbing the pylons. The court held that the possibility of a child's being injured in the specific way as in the case under consideration was not reasonably foreseeable and that no negligence on the part of the defendant or its predecessor had been proved.

3 Observations regarding the *ratio decidendi*

3 1 Emphasis on "reasonable" possibility

This case illustrates the first tier of the *bonus paterfamilias* test for negligence, as authoritatively stated in *Kruger v Coetzee supra* extremely effectively. In the first instance, the court emphasised the correct method of application of the test for reasonable foreseeability as follows (809H):

> "[I]nsufficient emphasis has been placed upon the words 'reasonable possibility' as they occur in the judgment of Holmes JA [in *Kruger v Coetzee*] *supra*. I comprehend this to mean that it is a possibility which would not be too remote or fanciful."

It is submitted that Price J's exposition in this respect is in accord with the correct application of the test and that he in fact issued a timely caution: one is apt to lose sight of the fact that there is a not negligible difference between the concepts of '*reasonable' possibility* on the one hand, and simply *possibility* on the other, even if it is merely a difference of *degree*.

3 2 Concrete (relative) approach to reasonable foreseeability

The court drew attention to the fact that, although it was reasonably foreseeable in the instant case that the child could have been injured on the railway tracks as a result, for example, of a collision with a passing train, this does not imply that the injury sustained as a result of the scaling of a pylon abutting the line is automatically to be viewed as reasonably foreseeable. Although the court did not employ the terminology in so many words, the judgment nevertheless furnishes a good example of the so-called concrete approach to foreseeability, according to which a person's conduct may be said to be negligent only with regard to a specific consequence or consequences. Thus it is a prerequisite for negligence in a specific instance that the occurrence of the particular wrongful consequence must be (reasonably) foreseeable to the *bonus paterfamilias* (see *Ablort-Morgan v Whyte Bank Farms (Pty) Ltd supra* 536; Boberg 278–279; Neethling, Potgieter & Visser 131).

3 3 Relevance of specific facts of particular case

This judgment illustrates how the determination of reasonable foreseeability cannot be divorced from the facts of a particular case (see 809H–I). This cautious approach is evident from the following observation of Price J (810G–H):

> "The issue of foreseeability can be charted with almost mathematical accuracy. That young children, especially young boys at an adventurous or exploratory stage, would

> stray onto railway premises is virtually certain. There is no difficulty in ranging such conduct within the realm of reasonable foreseeability. Far less likely almost to the point of extreme remoteness, is the possibility that the child would venture to climb a pylon right to the very top and pass the horizontal barrier. To go on to contemplate the possibility that such a child would then climb along the latticework takes one, in my view, to the stage of such unlikelihood as to free a *diligens paterfamilias* from delictual liability. The further possibility of an electric shock or a fall from the latticework is even more unlikely and involves the piling of one unlikelihood upon another."

3 4 Lack of record of previous similar occurrence as consideration

The court relied heavily upon the fact that there was no record of even one similar occurrence on railway premises (811B):

> "The very fact that an accident of this general kind has never occurred is, in my view, a cogent and compelling pointer to the conclusion that this kind of harm does not fall within the realm of reasonable foreseeability."

Emphasis is thus placed on the absence of any record of a similar occurrence as an important, if not the most important, consideration in the process of ascertaining the reasonable foreseeability of any specific occurrence. Thus this judgment illustrates the application of a relatively uncomplicated consideration as a most useful determinant of reasonable foreseeability.

3 5 Obiter dictum *concerning breach of statutory duty*

One of the well-established considerations pointing to the existence of a legal duty to act positively, is a statutory measure imposing a duty to perform a specific act or acts, or to refrain from conducting oneself in a specific manner (see Neethling, Potgieter & Visser 58–59). It was submitted on the plaintiff's behalf that the defendant failed to perform the duties imposed upon it by regulation 16 of the Electrical Machinery Regulations promulgated under the Machinery and Occupational Safety Act 6 of 1983, which reads as follows:

> "The user shall ensure that all supports of the lattice-type which are used to carry overhead conductors are adequately protected in order to prevent any unauthorised person from coming into dangerous proximity of the conductors by climbing such supporters . . ."

For reasons not relevant to this discussion, the court held that regulation 16 was not binding upon the defendant, thus rendering its comments concerning the lack of relevance of that regulation, even if it were binding (see 812H), mere *obiter dicta*. The court's attention was in this respect drawn to the fact that Eskom, acting in accordance with the provisions of regulation 16, fits anti-climbing devices to all its lattice-type pylons (the type scaled by the plaintiff's son), which pylons number in the thousands (811F). Preiss J rejected the plaintiff's invitation to draw an analogy between the legal duties resting upon Eskom and the defendant in the instant case. In the first place, the judge pointed out (811G) that Eskom instals anti-climbing devices on its pylons primarily to prevent the theft of copper cable, which is a serious and ever-present problem, but one which does not exist with regard to the electric cable affixed to the pylons on railway premises. A further reason for Eskom's measures is to prevent suicides, as to which the court simply stated that "it [suicide] was never suggested in argument nor is it a reasonable possibility *in the defendant's situation*" (811G; my emphasis). It is suggested that the emphasised phrase should read "in the plaintiff's son's situation" in order to make sense. (Surely, looking at the situation from the defendant's angle does not differ materially from looking at it from Eskom's side: someone who is on the

verge of committing suicide would definitely not be concerned about the ownership of the electric pylon from which he is about to leap!) In their suggested sense these words illustrate further the court's adherence to the concrete approach (see 3 2 *supra*) to reasonable foreseeability.

One may conclude the discussion of this aspect by pointing out that the court's approach to the existence or lack of a statutory duty, is fully in accord with the warning furnished by Rumpff CJ in the well-known case of *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 596, that the breach of a statutory provision should not under all circumstances be regarded as an indication of the breach of a private law duty, but that the existence of a statutory measure should merely be regarded as "'n faktor wat in die feitekompleks van hierdie saak wel in aanmerking geneem behoort te word . . ." (see also *Simon's Town Municipality v Dews* 1993 1 SA 191 (A)).

4 Conclusion

Although the doctrine of *stare decisis* is not overtly helpful in the sphere of application of the legal rules pertaining to negligence (see *Kruger v Coetzee supra* 430G–H; *Ngubane v South African Transport Services* 1991 1 SA 756 (A)), the *Stratton* case provides a most useful example of the correct application of the first tier of the *bonus paterfamilias* test for negligence. Preiss J's treatment of this aspect of the test will be difficult to surpass in even the best of academic writing. It is therefore recommended that this judgment should, in future, be included in the case references forming part of the syllabus of every fundamental course in the law of delict at all South African universities.

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ONREGMATIGE MEDEDINGING: ASPEKTE VAN PRESTASIEAANKLAMPING

The Concept Factory v Heyl 1994 2 SA 105 (T); Payen Components SA Ltd v Bovic Gaskets CC 1994 2 SA 464 (W)

Daar word algemeen aanvaar dat in die afwesigheid van statutêre beskerming (soos in die geval van outeursreg, patente, modelle, planttelersregte en handelsmerke), en uitgesonderd die gemeenregtelike beskerming van onderskeidings- en reklametekens, 'n ondernemer se gepubliseerde bedryfsidees waarop sy prestasie of produk gegrond is, vryelik en selfs slaafs deur mededingers nagevolg mag word (sien in die algemeen Van Heerden en Neethling *Die reg aangaande onregmatige mededinging* (1983) 132 141–143; Neethling "Die reg aangaande onregmatige mededinging sedert 1983" 1991 *THRHR* 562–563; Neethling "Misappropriation or copying of a rival's performance as a form of unlawful competition (prestasieaanklamping)" 1993 *SALJ* 711–713). Hierdie standpunt is deur die appèlhof in *Taylor and Horne (Pty) Ltd v Dentall (Pty) Ltd* 1991 1 SA 412 (A) 422 aanvaar en word in die onderhawige twee sake bevestig (sien *Payen Components* 477B–C). In *Concept Factory* 116B word dit soos volg gestel:

> "In the absence of statutory protection it is . . . not unlawful to copy and make use of the published ideas and concepts used by a trade rival."

(Sien ook *Easyfind International (SA) (Pty) Ltd v Instaplan Holdings* 1983 3 SA 917 (W) 925; *Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd, Lorimar Productions Inc v OK Hyperama Ltd, Lorimar Productions Inc v Dallas Restaurant* 1981 3 SA 1129 (T) 1140; *Bress Designs (Pty) Ltd v GY Lounge Suite Manufacturers (Pty) Ltd* 1991 2 SA 455 (W) 474; *Schultz v Butt* 1986 3 SA 667 (A) 681; *Agriplas (Pty) Ltd v Andrag and Sons (Pty) Ltd* 1981 4 SA 873 (K) 878–879; *Sea Harvest Corporation (Pty) Ltd v Irvin and Johnson Ltd* 1985 2 SA 355 (K) 359–360; *Adcock-Ingram Products Ltd v Beecham SA (Pty) Ltd* 1977 4 SA 434 (W) 437–438; *John Waddington Ltd v Arthur E Harris (Pty) Ltd* 1968 3 SA 405 (T) 407–408; *Victoria's Secret Inc v Edgars Stores Ltd* 1994 3 SA 739 (A) 746.)

Nou is dit van wesenlike belang om in gedagte te hou dat dit hier gaan om die kopiëring van die *idee* waarop die prestasie van die mededinger berus en nie navolging van die prestasie self nie. Die idee van die mededinger word weliswaar gebruik, maar steeds word 'n eie prestasie op grond daarvan geskep. Die idee van die mededinger dien sodoende net as die *voorbeeld* waarvolgens die eie prestasie dan selfstandig daargestel word (sien Van Heerden en Neethling 143).

Hierteenoor is die posisie gans anders waar nie net die idee nie maar ook die prestasie van die mededinger tot basis van die eie prestasie gemaak word. Sodanige *prestasieaanklamping* (sien hieroor *idem* 143 ev; Neethling 1991 *THRHR* 563–566; Neethling 1993 *SALJ* 713–725) of dan wel die "piracy", parasitering of slaafse navolging van 'n mededinger se prestasie behoort in beginsel weer onregmatig te wees. Dit behoef naamlik weinig betoog dat prestasieaanklamping in stryd is met die wese van die *mededingingsprinsiep* as onregmatigheidskriterium – wat 'n konkretisering van die algemene *boni mores*-maatstaf vergestalt (Van Heerden en Neethling 69–71; Neethling "Unlawful competition and schools" 1993 *SALJ* 10; Neethling, Potgieter en Visser *Law of delict* (1994) 299–300 en in die algemeen 31 ev) – waarvolgens juis die *meriete* van die *eie prestasie* die deurslag in die mededingingstryd moet gee. (Sien oor die mededingingsprinsiep Van Heerden en Neethling 72 ev; Neethling 1991 *THRHR* 220; Van Heerden "Die mededingingsprinsiep en die *boni mores* as onregmatigheidsnorme by onregmatige mededinging" 1990 *THRHR* 154 ev; Neethling 1993 *SALJ* 717–718. Hierdie prinsiep is onlangs vir die eerste keer uitdruklik in die regspraak erken en toegepas (*Van der Westhuizen v Scholtz* 1992 4 SA 866 (O) 873–874; sien ook *Aetiology Today CC t/a Somerset Schools v Van Aswegen* 1992 1 SA 807 (W) 819, waar Cloete R beklemtoon dat hy nie bereid is "to interdict *free competition on merit*" – ons kursivering).) Omdat die prestasieaanklamper geen *egte, eie* prestasie daarstel nie maar bloot op sy mededinger se prestasie teer, is daar van suiwer *prestasiemededinging* wat op die meriete van die "eie" prestasie berus, geen sprake nie. Gevolglik maai hy waar hy nie gesaai het nie en moet sy optrede as onregmatige mededinging geag word. In die *Taylor and Horne*-saak *supra* 421 stel appèlregter Van Heerden – met verwysing na *Schultz v Butt supra* 678–679 en die Amerikaanse *locus classicus* op die gebied van prestasieaanklamping, *International News Service v Associated Press* (1918) 248 US 215 – die algemene beginsel soos volg:

> "It will be observed that in both the above cases B competed with A by, in a very real sense, selling A's product *as if it were its own product*. Because this amounted to the filching of the fruits of another's skill, labour, etc, it was held to be unlawful competition" (ons kursivering).

(Vgl ook die *Taylor and Horne*-saak 423 waar prestasieaanklamping beskryf word as "*any form of adoption of his* [die mededinger se] *product or performance*".)

In die *Payen Components*-saak 474D–E onderstreep regter Van Zyl ook die waarde van die mededingingsprinsiep, maar met die voorbehoud dat dit as 'n beleidsoorweging (sien Van Aswegen "Policy considerations in the law of delict" 1993 *THRHR* 171 na wie Van Zyl R 474I–476G met instemming uitvoerig verwys) en nie as 'n maatstaf vir die bepaling van onregmatigheid dien nie. Hy verklaar:

> "*Neethling* (in (1993) 110 *SALJ* 9 at 10) suggests that the *boni mores* criterion is 'so vague *and* wide' that it does not in itself provide 'a rational yardstick for the delimitation of the conflicting interests of competitors'. A yardstick which has found favour with *Van Heerden and Neethling* [*Onregmatige mededinging* 71–77] is the so-called 'competition principle' ('mededingingsprinsiep') which is described as follows (*op cit* at 74): 'Die wesentlike mededingingsprinsiep is dus dat die mededinger wat die beste en/of billikste prestasie lewer, die oorwinning moet behaal; die een wat die swakste prestasie bied, die neerlaag moet ly.' The emphasis is placed, in this principle, on competitive performance: the most meritorious performance should meet with success and the least meritorious with failure. The authors see this (*op cit* at 77) as a concretising of reasonableness or *boni mores* as general criteria for establishing wrongfulness. This does not mean, however, that the *boni mores* standard no longer has any role to play in determining the line of demarcation between lawful and unlawful competition. On the contrary, they submit, it may supplement the competition principle in appropriate cases . . . There is undoubted merit in this approach, although it may not always be easy to draw the line between sufficiently good and unacceptable poor performances. I am inclined to the view, however, that the competition principle should be regarded as a policy consideration *per se* rather than as a yardstick for establishing wrongfulness in the sphere of competition."

Laasgenoemde twee opmerkings is egter vatbaar vir kritiek. Eerstens sal die beskouing dat die mededingingsprinsiep bloot as 'n beleidsoorweging moet funksioneer, die reële gevaar skep dat hierdie beginsel gerelegeer word tot maar net nog een van vele ander oorwegings of faktore wat 'n rol by die vasstelling van die onregmatigheid van mededinging kan speel, en dit langs hierdie weg ontneem van die primêre en selfs deurslaggewende funksie wat dit in hierdie verband behoort te vervul. Tweedens sal dit nooit nodig wees om 'n skeidslyn te trek tussen "good " of "poor" prestasies wanneer die mededingingsprinsiep toegepas word nie; die enigste vraag is of die gewraakte gedrag op die *meriete* van die mededinger se prestasie gebaseer is; indien wel, is sy mededingingshandeling regmatig. (Sien verder Neethling 1993 *SALJ* 10–11 13 15; Neethling 1993 *SALJ* 717–718; Naudé "Competition" 2 (1993) *LAWSA* 268 vn 22.)

Prestasieaanklamping kan bestaan in die *onmiddellike of direkte oorname* (soos in die *Schultz*-saak *supra*), of in die *(feitlik) identiese navolging* (soos in die sake onder bespreking) van die mededinger se prestasie (Van Heerden en Neethling 143–145; Neethling 1991 *THRHR* 565–566; Neethling 1993 *SALJ* 713 ev). Dit kom egter voor of die howe (bv *Bress Designs supra*; sien Neethling "Onregmatige mededinging: prestasieaanklamping en die rol van motief " 1992 *THRHR* 134 ev) ongeneë is om die identiese navolging-gevalle as onregmatig te brandmerk (sien Neethling 1991 *THRHR* 565; Neethling 1993 *SALJ* 720–722; Dean "Reproduction of three-dimensional utilitarian objects – copyright infringement and unlawful competition" 1990 *Stell LR* 63). Hierdie standpunt kan egter nie goedgepraat word nie. Daar is wesenlik geen verskil tussen die direkte oorname en identiese navolging van 'n mededinger se prestasie nie (prakties gesproke is dit trouens soms moeilik om te besluit of 'n mens met die een dan wel die ander te make het: sien Neethling 1993 *SALJ* 718). In albei gevalle maak die dader sy mededinger se

prestasie tot grondslag van sy eie prestasie – optrede wat klaarblyklik in stryd met die mededingingsprinsiep is. Daarom behoort ook die identiese of feitlik identiese kopiëring in beginsel as onregmatig aangesien te word (sien ook Dean 1990 *Stell LR* 65).

Voorgaande beteken egter nie dat iedere identiese prestasieaanklamping wat op die werfkrag van 'n mededinger inwerk in die afwesigheid van regverdiging onregmatig is nie. Inteendeel. Daar is naamlik vele prestasies van sodanige aard dat die betrokke ondernemer nie 'n *geregverdigde belang* daarby het om teen identiese prestasieaanklamping beskerm te word nie. En dit is die geval – om die knoop deur te hak – waar die prestasie, wat voorkoms en inhoudelike samestelling betref, geensins of ten minste nie beduidend van mededingende prestasies verskil nie (soos gewone spykers, boute en moere, om 'n paar eenvoudige voorbeelde te noem). Daarom behoort geverg te word dat 'n prestasie 'n *mededingende eie-aard of eie identiteit* moet besit alvorens regsbeskerming in die onderhawige omstandighede verleen word. Die prestasie moet dus – en dit kan in die reël net met inisiatief, koste en moeite bereik word – weens sy tegniese of estetiese voorkoms, inhoudelike samestelling of 'n ander eienskap as iets besonders of buitengewoons in die handelsverkeer geld. Slegs met betrekking tot sodanige prestasies is dit tog billik om te verwag dat die betrokke ondernemer sover moontlik in staat gestel moet word om self die vrugte van sy inisiatief te pluk. Die vraag of 'n prestasie wel 'n mededingende eie-aard het, moet objektief aan die hand van al die omringende omstandighede beoordeel word (sien in die algemeen Van Heerden en Neethling 147–148; Neethling 1993 *SALJ* 718–720).

In hierdie verband is die *Concept Factory*-saak van belang. Die applikant het onder andere 'n interdik aangevra om die respondent, 'n voormalige werknemer van die applikant, te verbied om onregmatig met hom mee te ding deur die advertering, bevordering, oprigting of bedryf van 'n onderneming waardeur goedere en dienste geadverteer word deur gebruikmaking van die formaat en styl (of 'n wesenlik soortgelyke formaat en styl) wat deur die applikant ontwikkel en beliggaam is in *The Look Guide*, 'n plaaslike telefoon- en noodgids vir die publiek en besighede. Ten aanvang aanvaar regter Southwood tereg dat dit enigiemand vrystaan om die gepubliseerde idees van 'n mededinger oor te neem; en volgens die regter het die respondent bloot so 'n idee van die applikant aangewend – naamlik dié van gelokaliseerde advertering vir klein en mediumgrootte besighede – om haar eie onderneming op die been te bring (dit wil sê 'n eie prestasie selfstandig daar te stel) (117F–G):

> "An important distinction between the present case and that of *Schultz v Butt* [waar, soos bekend, onregmatige prestasieaanklamping ter sprake was] is that the time and effort of the applicant went into the development of a concept, ie that of localised advertising for small and medium sized businesses. It is this idea which generates income for the applicant and which will generate income for the respondent – not the format for *The Look Guide*."

Gevolglik kon die respondent se optrede (ten minste op die oog af) nie as onregmatig beoordeel word nie. Die regter vervolg nietemin dat "[e]ven if she adopted the *identical* [wat nie die geval *in casu* was nie: vgl 113C–D met 117D–E] format and layout of *The Look Guide*, she would not be acting unlawfully provided she did not pass her own guide off as the *The Look Guide*" (117D). (Vir kritiek op die beskouing as sou net gevalle van prestasieaanklamping wat op aanklamping ("passing off") neerkom, onregmatige mededinging daarstel, sien Neethling 1993 *SALJ* 721 vn 53.) Regter Southwood maak nietemin die volgende interessante stelling (117G–H):

> "Whatever time and effort went into the development of *The Look Guide* I am not satisfied that this was the result of research or some kind of scientific process . . . I conclude that the applicant was attempting to present this as something much more sophisticated and complicated than it really is."

Hierdie aspek van die beslissing in *Concept Factory* verdien instemming. By nadere ondersoek blyk naamlik dat regter Southwood in der waarheid bevind het dat selfs al was *The Look Guide* identies gekopieer, die kopiëring steeds regmatig sou wees omdat die gids nie 'n *mededingende eie-aard of eie identiteit* gehad het nie: dit het inligting bevat wat geredelik beskikbaar was van ander gepubliseerde bronne, dit was ongekompliseerd, ongesofistikeerd en daar was nie sprake van navorsing of 'n wetenskaplike proses nie; gevolglik het dit nie as iets besonders of buitengewoons in die handelsverkeer gekwalifiseer nie.

Hoe dit ook al sy, in ten minste een geval behoort selfs die identiese navolging van prestasies met 'n mededingende eie identiteit nie onregmatig te wees nie. Dit is waar 'n ondernemer – wat doeltreffendheid, effektiwiteit en koste betref – *op geen ander wyse funksioneel* 'n mededingende prestasie kan lewer as om die prestasie van sy mededinger identies na te volg nie. Met ander woorde, *funksionele noodsaaklikheid* dwing hom om sy mededinger se prestasie te reproduseer. Die *prima facie* onregmatigheid van die reproduksie behoort dus uitgesluit te word deur die aanwesigheid van noodtoestand as regverdigingsgrond (sien in die algemeen oor noodtoestand Neethling, Potgieter en Visser 77). Aanvaarding van die teenoorgestelde standpunt sal tot die onaanvaarbare situasie aanleiding gee dat 'n mededinger 'n monopolie vir 'n onbeperkte duur op 'n besondere prestasie kan vestig (sien in die algemeen Van Heerden en Neethling 145–146; Neethling 1993 *SALJ* 720–721).

Die beslissing in *Payen Components* blyk in hierdie verband relevant te wees. Die applikant, vervaardiger en verskaffer van pakstukke ("gaskets"), het 'n interdik aangevra om die respondent, ook 'n verskaffer van pakstukke, te verbied om onregmatig met hom mee te ding deur onder andere die applikant se kodeerstelsel (die kodes wat sy pakstukke en pakstukstelle identifiseer) te gebruik. Regter Van Zyl bevestig die beginsel dat 'n ondernemer geregtig is om dit wat in die "public domain" val, te kopieer, of om die gepubliseerde idees van 'n mededinger oor te neem (477B–C). Hy bevind dat die applikant se kodeerstelsel inderdaad in die openbare sfeer val omdat dit die standaardmetode geword het om pakstukke in die handel te identifiseer (477D–E; sien ook 469–470). Die regter vervolg (477E–F):

> "It must be accepted that much time, effort and expenditure were required to devise the system, but it would be absurd to expect that the first respondent, or anyone else in the gasket industry, should devise its own system when that of the applicant is used widely, if not exclusively, in such trade."

Gevolglik besluit regter Van Zyl dat daar nie sprake van onregmatige mededinging was nie. In die lig van wat hierbo oor funksionele noodsaaklikheid gesê is, kan die beslissing gesteun word. Selfs al was die applikant se kodeerstelsel *onveranderd* gebruik, was sodanige aanwending geregverdig deur die feit dat dit onmoontlik was om dit nie in die pakstukbedryf te gebruik nie (vgl 469I: "It is in fact impossible not to work with it"), en dat die applikant nie op enige ander wyse funksioneel 'n soortgelyke kodeerstelsel kon skep nie. Regter Van Zyl verklaar soos volg (469I–470A):

> "It would appear that, if the first respondent could have avoided using the applicant's system, it would have done so. Its attempt to devise its own numbering system . . . however, was unsuccessful and it was compelled to resort once again to the applicant's established code . . ."

Soos reeds gestel is, is ons howe in die algemeen egter huiwerig om die identiese navolging van 'n mededinger se prestasie as onregmatig te brandmerk. Desnietemin, die uitdruklike erkenning van die mededingingsprinsiep – veral in *Payen Components* met betrekking tot die onderhawige terrein van die mededingingstryd – kan die taak van die howe vergemaklik om die toepassing van die beginsel uit te brei ten einde die identiese navolging van 'n mededinger se prestasie in beginsel te verbied. Dit blyk dat die deur vir sodanige verbod inderdaad deur die appèlhof oopgelaat is in die *Taylor and Horne*-saak *supra* 421–422. Die beslissing van appèlregter Van Heerden skep naamlik die indruk dat dit slegs regmatig is om die gepubliseerde idee van die mededinger waarop sy prestasie gebaseer is, oor te neem (422; sien ook *supra*), maar dat "*any form of adoption* of his product or performance" (421; ons kursivering) – dus ook die identiese reproduksie of kopiëring daarvan – onregmatige mededinging daarstel. Dieselfde benadering blyk ook uit die uitspraak van die hof *a quo* in *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd* 1990 2 SA 718 (T) 729 (ook 735) waar regter Stegmann verklaar:

> "The point of the decision in *Schultz v Butt* is that the use of a particular method of copying (*viz* using a rival's article as a mould from which to make copies) may result in the delict of unfair competition ... Nevertheless, *precise copying by more laborious methods is not necessarily unlawful* and need not result in the delict of unfair competition" (ons kursivering).

Die regter laat dus ook die deur oop om die identiese navolging van 'n mededinger se prestasie as onregmatig in bepaalde omstandighede te beoordeel. Insgelyks bevind die hof in *Concept Factory* en *Payen Components* (sien die bespreking hierbo) nie sonder meer dat die identiese duplikasie van 'n mededinger se prestasie *altyd* regmatig is nie, maar doen moeite om te verduidelik waarom sodanige optrede in die besondere omstandighede regtens toelaatbaar was. Hierdie beslissings is moontlik aanduidend van wat die howe se benadering in die toekoms kan wees.

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ARTIKEL 31-EIS VAN DIE AFHANKLIKE EN DIE SERTIFIKAATVEREISTE: DIE SAGE DUUR VOORT ...

Finlay v Kutoane 1993 4 SA 675 (W)

1 Inleiding

Verskeie hofsake is al beslis oor die vraag wanneer die sertifikaat dat 'n gewoonteregtelike huwelik bestaan by 'n eis vir die nalatige doodsveroorsaking van die broodwinner ingedien moet word (vgl 5 hieronder). Die sertifikaat word vereis kragtens artikel 31 van die Wysigingswet op Swart Wetgewing 76 van 1963. Artikel 31 is op die wetboek geplaas omdat die howe nie bereid was om in gevalle waarby Swartes betrokke is 'n eis aan die deelgenote in 'n gewoonteregtelike huwelik te verleen nie omdat die erkenning van die gewoonteregtelike huwelike

probleme sou geskep het vanweë die poligame aard daarvan (vgl oa *Mokwena v Laub* 1943 WLD 63; *Myeza v Ngwenya* 1951 NAC (N–E) 279; *Santam Bpk v Fondo* 1960 2 SA 467 (A)). Afhanklikes se eise het gesneuwel op grond van die feit dat die tersaaklike gemeenregtelike bepalings geïnterpreteer is as sou dit nie 'n onderhoudsverpligting voortvloeiend uit 'n gewoonteregtelike huwelik erken nie (vgl in die verband Olivier ea *Die privaatreg van die Suid-Afrikaanse bantoetaalsprekendes* (1989) 402–407; "Indigenous law" 32 (1994) *LAWSA* 135–138; Davel *Skadevergoeding aan afhanklikes* (1987) 59–63).

Artikel 31 het ten doel om die posisie van vroue in 'n gewoonteregtelike huwelik te verbeter. Die artikel was egter nie duidelik bewoord nie en dit het tot heelwat litigasie aanleiding gegee. Selfs na die wysiging van artikel 31 deur die invoeging van subartikel 2A (mbt die sertifikaatvereiste) in 1985 is daar steeds nie duidelikheid nie (Wysigingswet op Wetgewing op Samewerking en Ontwikkeling 83 van 1984). Verskeie verweerders het die geleentheid aangegryp om van aanspreeklikheid te ontkom. *Finlay v Kutoane* is die jongste in 'n lang reeks hofsake waar dié onduidelike bewoording van artikel 31 weer eens litigasie meegebring het.

2 Feite

Die oorledene, Molatudi Lebeta, het gesterf as gevolg van aanranding deur 'n groep persone (verweerders – in dié geval eksipiënte (F en andere)). Hy het 'n vrou met wie hy tot sy dood in 'n gewoonteregtelike huwelik verbind was en vyf kinders nagelaat. Die eiseres (K) het in haar persoonlike hoedanigheid en namens haar vyf kinders 'n eis kragtens artikel 31 ingestel (677I–J). Sy eis (a) verlies aan inkomste (huidige en toekomstige); (b) begrafniskoste; (c) hospitaaluitgawes; en (d) op grond van emosionele skok (678F–G).

Verskeie eksepsies is deur F teen K se dagvaarding opgewerp waarvan die hof twee behandel. Die eerste is dat die reg om begrafniskoste te eis net 'n weduwee of kind (of soortgelyke persoon) toekom en dat K slegs beweer het dat sy ooreenkomstig Afrikagewoontereg getroud is (678I–J). Die hof interpreteer die eksepsie asof die vraag sou wees of K wel 'n eis vir begrafniskoste het. Daar is verder eksepsie opgewerp omdat artikel 31(2) die indiening van die sertifikaat as 'n voorvereiste sou stel wat nagekom moet word – nie-indiening sou die eis laat misluk al is aan al die ander vereistes voldoen (679B).

Die hof verwerp die eerste eksepsie (683F) maar handhaaf die tweede (687E). K is 15 dae grasie verleen om haar dagvaarding reg te stel (687G–H).

3 Erkenning van gewoonteregtelike huwelik

Die hof is van mening dat beide eksepsies die vraag oor die erkenning van die gewoonteregtelike huwelik aanspreek (679B). 'n Gewoonteregtelike huwelik se geldigheid hang volgens die hof af of 'n ooreenkoms tussen die twee familiegroepe en die twee partye bestaan. Hierdie ooreenkoms en daaruitvoortspruitende verhouding is nie *contra bonos mores* nie en die howe het verskeie kere gevolg daaraan gegee. Waar beperkinge deur die reg opgelê is (bv *Santam Bpk v Fondo* 1960 2 SA 467 (A)), is dit deur wetgewing reggestel. By implikasie lyk dit of die hof van mening is dat die geldigheid van gewoonteregtelike huwelike nie meer 'n geskilpunt behoort te wees nie. Adjunk regter-president Flemming stel dit soos volg (679E – vgl ook Flemming "Regsnavorsing in verbondenheid met ander dissiplines – voorvereistes vir 'n geordende gemeenskap" 1992 *TSAR* 532–536):

> "All Courts have been enabled to take judicial knowledge of indigenous law. The pattern towards protection is among the factors which should incline a Court in the South Africa of 1992, in appropriate cases and if there are no constraints in terms of eg inability of a Court to legislate, to interpret and to apply the prevailing law towards assimilation or reception ... That is so also when a consequence of a customary union brushes against an outsider to whom the indigenous laws and customs are unknown."

4 Begrafniskoste

Begrafniskoste word gewoonlik deur die eksekuteur van die boedel betaal. In die onderhawige saak is begrafniskoste as een van die skadeposte aangemerk. Die hof stel na aanleiding van Romeins-Hollandse bronne 'n ondersoek in na die reg en plig om begrawe te word en aan wie hierdie reg of plig toekom (679F–683F).

Daar word onderskei tussen (a) 'n "reg" om te begrawe wat die regte en wense van alle ander ontken (679G–H); (b) die "reg" om te begrawe in die sin dat iemand regmatig gemagtig is om die begrafnis te onderneem, byvoorbeeld 'n vriend, die plaaslike owerheid of self 'n vreemdeling (Voet *Com ad Pand* 11 7 7 – 679H)); en (c) die "plig" om die oorledene te begrawe. Hierdie plig kan soms met die "reg" om begrawe ooreenkom of op iemand totaal anders rus (bv 'n militêre bevelvoerder of plaaslike owerheid – 679I). Waar die reg of plig verskillende persone kan toekom, moet die reg bepaal wat die gemeenskap as reg en billik ag. Faktore wat hier in ag geneem moet word, is sosiale strukture, familieverhoudinge, huwelike, gesagstrukture, die finaliteit van besluitneming, die onbehoorlikheid van die wense van die oorledene of die nie-nakoming van sy wense, asook godsdienstige opvattings, kulturele waardes en tradisies (679I–680A).

Die howe het in die verlede met verwysing na Voet 11 7 7 ("plig" om te begrawe (680D–E)) die volgende reëls neergelê (680B–D): (a) die oorledene se eie keuse word aan gevolg gegee – die keuse hoef nie in 'n geldige testament vervat te wees nie; (b) as hy geen keuse uitgeoefen het nie, sy testamentêre erfgename; (c) as daar nie testamentêre erfgename is nie, die intestate erfgename of (d) die *magistratus* (waarskynlik vandag die plaaslike owerheid). Voet se verwysings moet so beskou word dat die erfgenaam nie net geldelike voordeel nie maar ook verantwoordelikhede teenoor die gesin en die boedel verkry het. Die naaste familielid moes meestal 'n erfgenaam wees (totale onterwing kon nie gemaklik plaasvind nie – 680I–681B). As beheerder van die boedel moet die erfgenaam ook die begrafniskoste daaruit betaal.

Die onderliggende billikheidsidee van Voet kan nie so maklik in die Suid-Afrikaanse samelewing van vandag toegepas word nie. 'n Man wat sy nuwe vrou as erfgenaam instel, ontneem sy kinders uit 'n vorige huwelik die reg op 'n sê in hulle vader se begrafnis. Die hof stel dit soos volg:

> "[U]nderlying that Voet was dealing with the duty to bury serves to underscore that that duty was related to a specific need and that the justification of the legal rules which care for that need is not be found in the specific need itself and views in society about what is proper" (681I).

In bepaalde gevalle kan dit gebeur dat die erfgename nie betyds gekontak kan word nie. Ten einde die persoon wat die begrafnis onderneem, te verseker van 'n eis, is die *actio funeraria* (as losstaande van die *actio legis Aquiliae*) teen die erfgenaam van die boedel verleen (vgl De Groot *Inleydinge* 2 11 16; Van der Keessel *Th* 254; Voet 11 7 8 – 682E–F). Dié aksie is nie net tot die beskikking van familielede of die persoon met die sterkste "reg" nie, en kan ook teen die eksekuteur ingestel word (682H). *In casu* beweer F dat K nie 'n "eggenote" of "familielid" is nie en gevolglik nie op sodanige eis geregtig is nie. *Rondalia*

Assurance Corporation of SA v Britz 1976 3 SA 243 (T) beperk egter nie "spouse" tot iemand wat getroud is nie en K sou dus volgens laasgenoemde beslissing (wat die hof in *Finlay* volg) wel so 'n eis kon hê. In die moderne reg word die eis teen die eksekuteur van die boedel ingestel of die eksekuteur van die boedel self sou sodanige eis teen F kon hê (682H–J – vgl De Groot *Inleydinge* 3 32 2; *Lockhat's Estate v North British Insurance Co Ltd* 1959 3 SA 295 (A) 304C). Die verweerders (weens hulle opsetlike of nalatige doodsveroorsaking) is kragtens die uitbreiding van die *actio legis Aquiliae* verplig om begrafniskoste aan die eksekuteur te betaal. K eis egter in haar persoonlike hoedanigheid en toon nie aan of sy erfgenaam of eksekuteur is nie. (Die hof verwys na die vraagstuk of sy wel sal erf as die boedel intestaat volgens die gewoontereg sou vererf, maar laat hom nie verder daaroor uit nie – 683A.) Die hof kan nie die korrektheid van die *Britz*-beslissing en die interpretasie van Van Leeuwen 4 34 14 betwyfel waar gesê is dat vergoeding direk met die *actio legis Aquiliae* van die onregmatige daders geëis kan word nie. Die hof bevind gevolglik dat die eiseres

> "had a relationship with an intrinsic quality which is adequate to give rise to the duty to bury, and in any event to an entitlement to claim the costs of burial from the estate. The extension of the right to claim more than damage to the 'heritable property' (De Groot 2 32 10) which came about in the *Britz* case, must apply also to the present plaintiff although she was not a 'relative' of the deceased" (683E).

Die hof wys die eksepsie van die hand maar wys daarop dat dit nie beteken dat K in al haar eise teen F sal slaag nie (683F).

5 Sertifikaatvereiste

'n Tweede eksepsie is opgewerp omdat daar nie aan die vereistes van artikel 31(2) van die Wysigingswet op Swart Wetgewing 76 van 1963 voldoen is nie. Artikel 31 verleen aan deelgenote van 'n gewoonteregtelike huwelik die reg om vir die nalatige doodsveroorsaking van die broodwinner te eis. Dié eis word egter beperk deurdat al die vroue vir doeleindes van die eis saamgevoeg moet word en dat nie meer uitbetaal word as wat vir een vrou betaal sou word nie. Die verweerder het die reg (a 31(4)) om te bepaal of nie-eisers se name op die sertifikaat dat 'n gebruiklike verbinding bestaan, verskyn. Die doel is om finaliteit oor die eise te bereik (a 31(5) en (7)) – die plig word op die verweerder geplaas om die ander gades te voeg.

Artikel 31(2A) is ingevoeg na aanleiding van *Monamodi v Sentraboer Co-operative Ltd* 1984 4 SA 845 (W) waar die howe ander bewyse buite-om 'n sertifikaat begin toelaat het. Die sertifikaat dien as afdoende bewys (684A). Die inligting hoef egter nie meer uit 'n register bekom te word nie maar moet steeds deur 'n landdros (volgens die hof 'n kommissaris – 686A) uitgereik word. Die rede vir laasgenoemde is dat slegs in Natal registrasie van gewoonteregtelike huwelike vereis word. Die hof verwerp *Hlela v Commercial Union Assurance Co of South Africa Ltd* 1990 2 SA 503 (N) 509A (vgl hieroor Olivier en Du Plessis "Artikel 31 – onderhoudseis: billikheid seëvier" 1990 *TRW* 166–171) wat geen doel in die finaliteit van die sertifikaat kon sien nie. Dit lei tot die verkeerde gevolgtrekking dat die sertifikaat 'n "evidential provision" is (684B).

Regter Flemming bespreek die verskil tussen "produce" ("toon" in die Afrikaanse teks van die wet) en "produce in evidence" ("as bewys inhandig"). Die hof opper vier argumente teen laasgenoemde interpretasie (684C–E): (a) 'n gedingsparty "toon" nie 'n dokument aan die hof soos in *Hlela* vereis word nie; (b) die bewoording van die artikel hou nie verband met die "bewysproses" nie maar slaan op die bekomming van regshulp ("legal assistance"): "It would be a peculiar

manner to govern proof by choosing enforceability of the claim as the topic"; (c) die bewyswaarde en belang van die sertifikaat word in artikel 31(2A) behandel; en (d) as artikel 31(2) die stadium reël waarop die inligting voor die hof gelê moet word, sou dié artikel oorbodig wees en sou die eiseres alle aangeleenthede (dus ook die gewoonteregtelike huwelik) soos al die ander feite voor die hof moet bewys.

Die eis van die afhanklike of weduwee kragtens artikel 31(1) kan net afgedwing word as 'n sertifikaat getoon word. Die indiening daarvan word egter nie verbind tot óf die aanvang van die verrigtinge óf die bewys van die feite nie. Dit is nie vir die hof nodig om te doen wat die wetgewer versuim het om te doen deur 'n vaste tydstip te bepaal nie. Daar is geen rede waarom die sertifikaat nie voor die verhoor getoon kan word nie – dit sou selfs aan die dagvaarding geheg kon word alhoewel die doel van die dagvaarding is om te beweer en nie om te "produce" nie (685C–D).

Die beperking van die hof in *Hlela* dat die sertifikaat ten tyde van die verhoor ingedien moet word, wat die "toon" daarvan tot bewys in die hof gewysig het, is volgens regter Flemming ongevraagd ("unwarranted" – 685D). As die indiening van die sertifikaat as 'n voorvereiste by verhoor gestel word, hoef die eiser steeds nie te beweer dat die eis afdwingbaar is nie (685E).

Die hof is van mening dat die eiser nie aan onbillikheid of onmoontlikheid onderworpe gestel moet word nie. Die finaliteit van die sertifikaat begunstig die eiser aangesien die "toon" daarvan 'n beroep deur die verweerder op die onafdwingbaarheid van die eis uitskakel. Die finaliteit van die sertifikaat beperk dus die noodsaaklikheid van getuienis (buiten die sertifikaat self) wat ten aansien van die gewoonteregtelike huwelik kan ontstaan (685H–I). Die hof kom tot die volgende gevolgtrekking (685I–686A):

> "In my view, there is a flexibility. The flexibility arises in two respects. The method is not confined to the method of producing a document in a trial. There is, because of variations in the stage at which a Court will do something because of unenforceability, also flexibility in the latest time when plaintiff has to do something about the producing of a certificate, eg alleging that he can produce . . . If defendant does not raise the point until the trial, it is at the trial when the claimant comes to fatal risk from a litigation point of view."

Die hof oorweeg wat die impak is van dit wat gepleit word met verwysing na die verskillende tydstippe vir die "toon" ("produce") van die sertifikaat soos in die dagvaarding beweer (686B–E): (a) as die sertifikaat getoon word voor die dagvaarding uitgereik is, moet die "toon" daarvan net beweer word – dit impliseer reeds die afdwingbaarheid van die eis; (b) dit kan deur die geregsbode afgelewer word as deel van die dagvaarding – die optrede moet ook in die dagvaarding beweer word; (c) die minimum vereiste waaraan voldoen moet word, is dat beweer moet word dat die eiser in staat is om 'n sertifikaat te toon – die verweerder kan daarop blootlegging vra (686E–F).

Waar twyfel oor die interpretasie van 'n artikel in 'n wet bestaan, moet die hof dit ten gunste van uitvoerbaarheid uitlê – die doel van die wetgewer kon nie gewees het dat die verweerder tot by die sluiting van die eiser se saak moet wag om te bepaal of ander eiseresse gevoeg moet word of nie. (In dié verband verwys die hof na die sogenaamde praktiese oorwegings van *Hlela supra* 515E.)

Eiseres het nie die sertifikaat aangeheg of beweer dat sy in staat is om die sertifikaat te toon nie. Regter Flemming handhaaf gevolglik die eksepsie (687D–F):

> "Contrary to the *Hlela* case, I conclude that when a fact without which the plaintiff has no claim must be proved, the fact that proof need only be given at the trial . . ., is no reason for concluding that a plaintiff need not make allegations about enforceability or existence of her claim. It is not that an allegation can be a substitute for 'producing' (cf 512J in the *Hlela* case). The principle is merely respected that a plaintiff must allege enough to disclose that he has an enforceable claim."

Die regter meen dat dit nie nodig is dat 'n eiseres die betrokke sertifikaat voor die uitreiking van die dagvaarding moet bekom nie maar vind dit nie nodig om hom daaroor uit te laat of *Makgae v Sentraboer (Koöperatief) Bpk* 1981 4 SA 239 (T) (waar lg standpunt wel gehuldig is) inderdaad korrek beslis is nie (687B). Hy is van mening dat die vereiste in *Makgae* en *Monamodi supra* wel korrek is dat die bestaan van die sertifikaat gepleit moet word (687F–G). K word 15 dae gegun om haar dagvaarding reg te stel.

5 1 Bespreking

Artikel 31(1)–(2A) lui soos volg (vgl hieroor Olivier, Olivier en Olivier "Indigenous law" 32 (1994) *LAWSA* 138–142):

> "31(1) 'n Deelgenoot van 'n gebruiklike verbinding soos in artikel vyf-en-dertig van die Swart Administrasie Wet, 1927 (Wet No. 38 van 1927), omskryf, is, behoudens die bepalings van hierdie artikel, geregtig om skadevergoeding vir die verlies van onderhoud te eis van enigeen wat wederregtelik die dood van die ander deelgenoot van so 'n verbinding veroorsaak of regtens ten opsigte daarvan aanspreeklik is, mits bedoelde deelgenoot of bedoelde ander deelgenoot nie ten tyde van sodanige dood 'n deelgenoot van 'n bestaande huwelik is nie.
>
> (2) Geen sodanige eis om vergoeding kan deur iemand wat voorgee 'n deelgenoot van 'n gebruiklike verbinding met so 'n oorlede deelgenoot te wees, afgedwing word nie, tensy–
>
> (a) bedoelde persoon 'n sertifikaat toon wat uitgereik is deur 'n Kommissaris waarin die naam van die deelgenoot of, in die geval van 'n verbinding met meer as een vrou, die name van die deelgenote met wie die oorlede deelgenoot 'n gebruiklike verbinding aangegaan het wat ten tyde van die dood van die oorlede deelgenoot nog bestaan het, vermeld word; en
>
> (b) bedoelde persoon se naam op so 'n sertifikaat vermeld word.
>
> (2A) 'n Sertifikaat in subartikel (2) vermeld, word as afdoende bewys aanvaar van die bestaan van 'n gebruiklike verbinding met meer as een vrou, die deelgenote wie se naam of name op daardie sertifikaat vermeld word."

Soos ook uit die bespreking van *Finlay* hierbo bemerk is, word verskillende interpretasies geheg aan die rol wat die artikel 31(2)-sertifikaat moet speel (vgl Olivier 32 *LAWSA* 139–142). Olivier *Privaatreg* 410 is van mening dat die sertifikaat *prima facie* bewys is van sowel die bestaan van 'n geldige gewoonteregtelike huwelik as die partye daartoe (vgl ook *Mayeki v Shield Insurance* 1975 4 SA 370 (K); Olivier "Mayeki v Shield Insurance" 1976 *De Jure* 168–171).

In *Pasela v Rondalia Insurance* 1967 1 SA 339 (W) 340–341 het die hof beslis dat die sertifikaat tydens die verhoor ingedien kan word. Olivier *Privaatreg* 410–414 is van mening dat die sertifikaat voor die sluiting van die eiser se saak ingedien moet word anders sal die verweerder nie in staat wees om die beskikbare verwere te opper nie. In *Mayeki supra* 373F–G is beslis dat die sertifikaat by die dien van die dagvaarding getoon moet word.

In *Dlikilili v Federated Insurance* 1983 2 SA 275 (K) het die eiser 'n sertifikaat getoon wat deur haar hoofman mede-onderteken was. Daarin het gestaan dat sy die enigste gewoonteregtelike vrou van die oorledene was en dat vier kinders uit die huwelik gebore is. Die hof bevind dat slegs 'n kommissaris die sertifikaat mag

uitreik. Registrasie word egter net in KwaZulu-Natal vereis (*SK* 1040 van 1968-10-25). Dit sal dus buite dié gebied baie moeilik wees om sodanige sertifikaat te bekom (vgl Olivier *Privaatreg* 412; Kerr "Claims by South African customary union widows and foreign widows of similar unions in respect of loss of support on the death of their husbands" 1983 *Speculum Juris* 37; Dlamini "Claim by widow of customary union for loss of support" 1984 *SALJ* 338). In 'n daaropvolgende saak *Msomi v Nzuza* 1983 3 SA 939 (D) is 'n sertifikaat wat deur 'n kommissaris uitgereik is op grond van inligting wat hy uit 'n register bekom het, as voldoende beskou. Die beëdigde verklarings waarna ook verwys is in die sertifikaat, is egter nie toelaatbaar nie omdat die inligting nie uit die register bekom is nie. Dlamini 1984 *SALJ* 338 kritiseer die beslissing aangesien die registrasie van gewoonteregtelike huwelike nie aan die gewoontereg bekend is nie. Hy bepleit dat beëdigde verklarings ook as voldoende bewys aanvaar moet word.

Die hof beslis in *Monamodi supra* dat die sertifikaat aangevra of getoon kan word voor of na *litis contestatio*. Die hof besluit om nie *Dlikilili* en *Msomi* te volg ten aansien van die standpunt dat die inhoud van die sertifikaat slegs op die inligting uit die register mag berus nie. (Daarna is soos hierbo uitgewys is, artikel 31(2A) ingevoer – *Mqoqi v Protea Insurance Co Ltd* 1985 4 SA 159 (K) vorm die basis vir die subartikel.) Die geldigheid van die sertifikaat is aanvaar waar 'n kommissaris bloot gesê het dat volgens sy ondersoek 'n geldige gewoonteregtelike huwelik bestaan. *Finlay* volg *Monamodi* maar distansieer hom van die ander hofbeslissings (*Dlikilili* en *Msomi*) in die verband. Volgens die hof was registrasie van die gewoonteregtelike huwelik nie nodig vir die geldigheid daarvan nie en wou die wetgewer nie die registrasie van die huwelike as voorvereiste vir 'n artikel 31-eis stel nie.

Die uitspraak in *Hlela supra* is ten gunste van die langslewende deelgenote deurdat die hof beslis dat (a) 'n eiser nie gedwing kan word om die sertifikaat voor uitreiking van die dagvaarding te toon nie; (b) die pleitstukke nie 'n bewering hoef te bevat dat die eiser in besit is van 'n artikel 31(2)-sertifikaat wat vir insae vir die verweerder beskikbaar is nie; (c) die sertifikaat aan die hof en nie die verweerder nie getoon moet word; (d) die sertifikaat oorhandig moet word wanneer die bestaan van die gewoonteregtelike huwelik bewys moet word; (e) die pleitstukke nie hoef te beweer dat die oorledene of die eiser(s) deelgenote in 'n gewoonteregtelike huwelik was nie; en (f) die artikel 31(2)-sertifikaat kan berus op inligting wat uit die register of op enige ander wyse bekom is.

In *Finlay* beperk die hof nie die tydperk wanneer die sertifikaat voorgelê moet word nie; daar word egter gestel dat die minimum vereiste is dat daar in die dagvaarding beweer moet word dat die eiser(s) 'n afdwingbare eis het en dat die sertifikaat beskikbaar is. Daar is dus nog steeds geen sekerheid wanneer die sertifikaat getoon moet word nie.

6 Slot

Dit het waarskynlik tyd geword dat die wetgewer weer eens ingryp en artikel 31 eens en vir altyd so bewoord dat dit nie tot aanhoudende litigasie aanleiding gee nie: (a) in die eerste plek moet artikel 31(2A) so gewysig word dat die inligting waarop die sertifikaat (wat afdoende bewys is) berus uit enige bron bekom kan word; (b) in die tweede plek kan *Finlay* nagevolg word deur te bepaal dat daar reeds in die dagvaarding melding gemaak moet word van die bestaan van die sertifikaat sodat die verweerder blootlegging kan aanvra; (c) derdens kan die sertifikaat steeds by die hof ingehandig word soos in *Hlela* vereis; en (d) laastens moet die laaste tydstip van inhandiging ook by wyse van artikel 31 bepaal word.

In *Finlay* verwerp regter Flemming *Hlela* maar die inherente waarde van die beslissing in *Hlela* mag nie oor die hoof gesien word nie. Die hof is bereid om eerder ter wille van geregtigheid en billikheid van die streng prosedures en vereistes af te sien en nie letterknegtig aan die wet vas te hou nie. Daar kan nie met *Finlay* saamgestem word dat die stadige verloop en onderbrekings iets is waarmee daar in die howe saamgeleef moet word nie (686I–J). Deur slordige bewoording van pleitstukke en nie-nakoming van regsvereistes is dit die partye wat deur die vermeerdering van die hofkoste daaronder ly en nie die regspraktisyns nie. Hofkoste is geweldig hoog. Te veel sake word op grond van tegniese oorwegings by die hof uitgegooi of gedinge word onnodig daardeur vertraag en verleng. Die hof moet tog billikheid teenoor die gedingspartye bewerkstellig – veral by artikel 31-eise is die eiser(s) reeds in 'n moeilike posisie en kan die eise daardeur verder verklein word (vgl ook *Lebona v President Versekeringsmaatskappy* 1991 3 SA 395 (W); en daaroor Olivier "Wettigheid van broodwinner se inkomste en artikel 31-eis van afhanklike" 1992 *TSAR* 713).

Ander belangrike aspekte verdien ook vermelding:

(a) Die hof se bereidwilligheid om die eiseres se versoek tot wysiging van die pleitstukke (om die bewering by te voeg dat sy die sertifikaat kan toon) toe te staan, moet verwelkom word; dit is kostebesparend en werk geregtigheid in die hand.

(b) Die hof se ingesteldheid om van 'n regshistoriese bron (Voet *Com ad Pand*) gebruik te maak, is prysenswaardig. Sy slotsom dat "Voet is no authority on how our legal system should cope with demands which were unknown to him but are *bona fide* and real" (681G–H), kan egter nie ongekwalifiseerd onderskryf word nie. Die benadering in *Zimnat Insurance Co Ltd v Chawanda* 1991 2 SA 825 (ZS) (vgl hieroor Du Plessis "Regsvinding en geregtigheid in 'n ontwikkelende land" 1991 *TSAR* 701; Van der Merwe "Van internalistiese na eksternalistiese gemeneregvinding" 1992 *TSAR* 739) dat die gemenereg so wyd moontlik geïnterpreteer moet word met verwysing na die nasionale doelwit van nasiebou en aanpassing van die Romeins-Hollandse regsnorme by moderne omstandighede, is te verkies.

(c) Dit moet verwelkom word dat die hof hom positief oor 'n gewoonteregtelike instelling (die gewoonteregtelike huwelik) uitlaat (679B–F). Ook die regter se (korrekte) interpretasie dat alle howe nou gemagtig is om geregtelik kennis van gewoontereg (679D–E) te neem, is in ooreenstemming met artikel 1 van die Wysigingswet op Siviele Bewysreg 45 van 1988 en is aan te bevole. Hy verwys ook na die feit dat waar die gemenereg 'n beperking op die bereiking van geregtigheid deur die howe geplaas het (deur nie die gewoonteregtelike huwelik te wil erken nie – vgl *Santam Bpk v Fondo* 1960 2 SA 467 (A)), wetgewing (a 31 Wet 76 van 1963) die posisie wel reggestel het (679C–D). Die hof aanvaar as belangrike uitgangspunt (679E–F):

> "The pattern towards protection is among the factors which should incline a Court in the South Africa of 1992, in appropriate cases and if there are no constraints in terms of eg inability of a Court to legislate, to interpret and to apply the prevailing law towards assimilation or reception . . . That is so also when a consequence of a customary union brushes against an outsider to whom the indigenous laws and customs are unknown."

Hierdie uitgangspunt moet onderskryf word. Uitleg van gewoonteregtelike norme moet op sodanige wyse geskied dat gepaste regsgevolge deur die howe aan regshandelinge ooreenkomstig die gewoontereg geheg word. 'n Besonder interessante standpuntinname is dat dit die taak van 'n hof is "to interpret and to apply the prevailing law towards assimilation or reception" (679E). Dié vertrekpunt verskil

wesenlik van 'n meer eurosentriese benadering in *Santam Bpk v Fondo*. Ander opsies (bv die formulering van internasionale privaatregaanwysingsnorme) is een van die alternatiewe opsies (naas assimilasie of resepsie) wat oorweging behoort te geniet.

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VOORDEELTOEREKENING EN VERPLIGTE GROEPLEWENSVERSEKERING INGEVOLGE 'N DIENSKONTRAK

Burger v President Versekeringsmaatskappy Bpk 1994 3 SA 68 (T)

1 Inleiding

Burger v President Versekeringsmaatskappy Bpk volg op 'n reeks sake wat na die bekende appèlhofuitspraak in *Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A) beslis is (sien oa *Gehring v Unie Nasionaal Suid-Britse Versekeringsmaatskappy Bpk* 1983 2 SA 266 (K); *Swanepoel v Mutual and Federal Insurance Co Ltd* 1987 3 SA 399 (W); *Mutual and Federal Insurance Co Ltd v Swanepoel* 1988 2 SA 1 (A); *Du Toit v General Accident Insurance Co of South Africa Ltd* 1988 3 SA 75 (D)). In al hierdie sake was die vraag of voordele wat die benadeelde na die pleging van 'n delik te beurt geval het, van die benadeelde se eis om skadevergoeding afgetrek moet word. Een van die moontlike voordele wat so 'n benadeelde kan toeval en wat in die saak onder bespreking die fokuspunt was, is 'n bedrag wat uit hoofde van 'n groeplewensversekeringskema aan 'n lid van die skema uitbetaal word nadat die lid permanent werksongeskik gelaat is. Alhoewel die howe nog nie 'n aanvaarbare teorie gevind het om die probleem van voordeeltoerekening konsekwent mee op te los nie, het daar in die praktyk reeds heelwat riglyne uitgekristalliseer (Neethling, Potgieter en Visser *Deliktereg* (1992) 220–224).

Volgens Visser en Potgieter *Skadevergoedingsreg* (1993) 221 moet voordeeltoerekening plaasvind of geweier word deur die volgende beginsels op 'n gebalanseerde wyse in 'n konkrete geval toe te pas: die eiser is geregtig op volledige skadeloosstelling; die verweerder hoef die eiser nie te vergoed vir meer as sy skade nie; en ingevolge algemene opvattings van regverdigheid en billikheid behoort voordeeltoerekening geweier te word waar dit slegs die verweerder bevoordeel sonder dat die bron van die voordeel of die gemeenskap baat daarby vind. Laasgenoemde beginsel laat natuurlik ruimte vir 'n soepeler benadering met die moontlike gebruik van beleidsoorwegings, 'n benadering wat deur meerdere skrywers op hierdie punt as 'n oplossing vir die probleem voorgestaan word – naas natuurlik wetgewing (sien Pauw "*Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A)" 1979 *TSAR* 258; Van der Walt "Die voordeeltoerekeningsreël – knooppunt van uiteenlopende teorieë oor die oogmerk met skadevergoeding" 1980 *THRHR* 26; Reinecke "Nabetragtinge oor die skadeleer en voordeeltoerekening" 1988 *De Jure* 227; Davel "*Senior v National Employers General Insurance Co Ltd* 1989 2 SA 136 (W)" 1989 *De Jure* 368–372; Claasen en Oelofse "Berekening van skadevergoeding by verlies van verdienvermoë" 1979 *De Rebus* 588–589 591).

Die *Dippenaar*-saak *supra* is in hierdie stadium die *locus classicus* vir gevalle waar die eiser verlies van verdienvermoë ingevolge 'n dienskontrak wil bepaal. Hierdie appèlhofuitspraak het ongelukkig 'n aantal onsekerhede op die pad van 'n eenvoudige en billike uitspraak in soortgelyke gevalle gelaat.

2 Die *Dippenaar*-beginsels

In die *Dippenaar*-saak het die appellant (wat oorlede is voor die appèl aangehoor is) geëis vir die verlies aan inkomste nadat hy weens 'n onregmatige daad permanent werksongeskik gelaat is. Aangesien hy nie langer geld verdien het nie, moes die verlies aan inkomste aan die hand van sy dienskontrak vasgestel word. Hoofregter Rumpff lê in sy uitspraak die volgende vier beginsels neer (920B–D):

(a) verdienvermoë moet as deel van 'n persoon se boedel beskou word;

(b) indien die eiser op sy dienskontrak steun, dien dit as bewys van sy verdienvermoë op die datum van deliksspleging;

(c) indien die eiser op sy "verdienvermoë" steun (eerder as op "toekomstige inkomste", wil dit voorkom), word ontvangstes en voordele uit vrygewigheid of gewone versekeringskontrakte van voordeeltoerekening uitgesluit;

(d) indien die eiser op sy dienskontrak steun om sy verdienvermoë te bewys, kan die monetêre waarde daarvan ingevolge die kontrak alleen bewys word deur na die kontrak as 'n geheel te kyk, insluitende al die voordele waarop die werknemer ingevolge sy dienskontrak geregtig is.

3 Trefwydte van die *Dippenaar*-beginsels

Die eerste twee van bogemelde beginsels van die *Dippenaar*-saak verskaf nie probleme nie. Dit is egter onduidelik of die derde beginsel, naamlik dat gebruikmaking van verdienvermoë daartoe lei dat voordele uit vrygewigheid of gewone versekeringskontrakte van voordeeltoerekening uitgesluit is, toegepas moet word *ongeag* of daar inderdaad op die dienskontrak gesteun word of nie. Verder verduidelik hoofregter Rumpff nooit wat hy met 'n "gewone versekeringskontrak" bedoel nie. Regter Heyns se hantering van hierdie beginsel in die *Burger*-saak maak die toepassing daarvan effens duideliker (sien par 5 hieronder). Volgens Boberg *Law of delict: vol 1 Aquilian liability* (1984) 610 behoort die gebruikmaking van verdienvermoë as regverdiging te dien vir die argument dat die geheel van die dienskontrak nie noodwendig relevant is nie:

> "If the true compensable loss is a loss of earning capacity rather than a loss of future earnings . . . then the employment contract produced by the plaintiff in support of his claim should be looked at *only as far as it is relevant to prove the value of what the plaintiff has lost* – ie his pre-accident earning capacity, in so far as he has lost it. Not every part of the contract is necessarily relevant for this purpose."

In die *Gehring*-beslissing *supra* bespreek regter De Kock (272C–273B) die trefwydte van die vierde beginsel van die *Dippenaar*-saak. Hy vra (272F–H) of dié beginsel slegs toegepas moet word waar die eiser inderdaad op sy dienskontrak steun om die waarde van sy verlies aan verdienvermoë te bepaal, en of die beginsel só toegepas moet word dat alle voordele wat inderdaad uit hoofde van die dienskontrak die eiser toeval in berekening gebring moet word, ongeag of die eiser op die dienskontrak steun of nie. Indien laasgenoemde wyer benadering nagevolg word, sal dit volgens regter De Kock (273A) teenstrydig wees met hoofregter Rumpff se eie benadering in 'n vorige uitspraak, naamlik *Santam Versekeringsmaatskappy v Byleveldt* 1973 2 SA 146 (A) (sien ook Boberg 615).

In die appèlhofuitspraak van *Swanepoel supra* laat appèlregter Van Heerden hom ook oor die toepassing van die vierde *Dippenaar*-beginsel uit. Hy stel (10H) dat dit vir hom duidelik is dat hoofregter Rumpff nie bedoel het om 'n onbuigbare reël te formuleer nie en (10I) dat die reël slegs op gevalle van toepassing is waar vermoënskade geëis word. (Sien Visser "Gedagtes oor voordeeltoerekening by nie-vermoënskade" 1994 *THRHR* 98–102 vir 'n bespreking oor voordeeltoerekening by nie-vermoënskade.)

Die onsekerhede wat *Dippenaar* dus gelaat het, is of die eiser in wese nou verhoed word om die dienskontrak te gebruik om verlies aan verdienvermoë te bewys, aangesien dit tot gevolg sal hê dat ander voordele soos pensioen en siekverlof wat ingevolge die dienskontrak afdwingbaar is, van die eis afgetrek moet word; of uitbetalings ingevolge gewone versekeringskontrakte buite rekening gelaat kan word *ongeag* of die eiser op die dienskontrak steun al dan nie; en wat presies met gewone versekeringskontrakte bedoel word.

4 Feite van die *Burger*-saak

Die eiseres is 'n werknemer van YSKOR en is as permanent werksongeskik verklaar na 'n motorvoertuigongeluk waarin sy betrokke was. Die verweerder is die benoemde agent van die Multilaterale Motorvoertuigongelukkefonds kragtens die Multilaterale Motorvoertuigongelukkefondswet 93 van 1989. Die verweerder erken aanspreeklikheid vir al die geëisde bedrae, behalwe vir die eis vir verlies aan verdienvermoë. Die verweerder voer aan dat by die berekening van die bedrag wat aan die eiseres weens verlies aan verdienvermoë toegeken moet word, die bedrag van R111 700 wat deur die YSKOR-groeplewensversekeringskema aan die eiseres uitbetaal is, in berekening gebring moet word. Die eiseres voer aan dat die betaling van hierdie bedrag *res inter alios acta* is en dus buite beskouing gelaat moet word by die berekening van haar eis om verlies aan verdienvermoë.

5 Hantering van die *Dippenaar* onsekerhede

In die *Burger*-saak het regter Heyns hom tereg duidelik uitgespreek ten gunste van die benadering dat die vierde *Dippenaar*-beginsel beperkend uitgelê moet word. Regter Heyns beklemtoon (78B–C) dat "die uitspraak van die Appèlhof net van toepassing is in gevalle waar die *bepalings van die dienskontrak* [my beklemtoning] aangewend word om te bepaal wat die toekomstige verlies aan inkomste van 'n eiser is". Alhoewel die eiseres nie haar dienskontrak as bewysstuk voorgelê het nie, het sy wel 'n getuie gehad wat oor die inhoud daarvan getuig het. Regter Heyns laat hom nie uitdruklik daaroor uit of hy weens die feit dat daar nie 'n skriftelike kontrak voorgelê is nie, hom daarom nie aan hierdie *Dippenaar*-beginsel gebonde hou nie. Hy gaan bloot voort om die getuienis van die getuie te ontleed (78D–E). Volgens dié getuie was die eiseres as werknemer van YSKOR verplig om 'n lid van die groeplewensversekeringskema te word. Regter Heyns maak dan die volgende opmerking:

> "My siening is dat die enigste *nexus* tussen eiseres se dienskontrak met haar werkgewer, YSKOR, en die betaling wat sy uit die polis verkry het net die feit is dat sy deur YSKOR verplig is om 'n lid te word van die groeplewensversekeringskema. Nadat sy so lid geword het, het sy die premies op die polis met haar eie geld betaal. Myns insiens is dit nie relevant nie as die werkgewer 'n bedrag aan haar betaal wat sy kan aanwend om haar bydraes tot die skema te betaal sodat die skema die premies op die polis kan betaal" (78E–F);

en:

> "Alhoewel die rede dat sy daardie kontrak aangegaan het, is omdat sy deur haar werkgewer verplig was om so 'n kontrak te sluit, meen ek nogtans dat dit nie gesê kan word dat die bedrag aan haar uitbetaal sal word uit hoofde van haar dienskontrak met YSKOR nie. Dit was net 'n voorwaarde van haar dienskontrak met YSKOR dat sy moet aansluit by die groeplewensversekeringskema, maar nadat sy aangesluit het, het YSKOR niks verder met enige verbintenis en optrede van die groeplewensversekeringskema te doene gehad nie" (80A–C).

Regter Heyns swyg egter oor die gevolg wat dit op haar dienskontrak sou gehad het indien sy op enige stadium tydens die bestaan van haar dienskontrak haar bydraes tot die skema sou beëindig het. Dit sou heelwaarskynlik daartoe kon gelei het dat sy afgedank word aangesien dit een van haar diensvoorwaardes was om lid van die skema te wees, en sekerlik ook om vir die duur van haar dienstermyn lid te bly. Verder meen ek dat dit wel relevant is of die werkgewer 'n bydrae tot die betaling van die premies maak, aangesien dit dan een van die byvoordele sal wees wat sy ingevolge haar dienskontrak ontvang en daarom 'n *nexus* tussen die polis en haar dienskontrak daar sal stel. Om te sê dat daar geen verband tussen haar dienskontrak en die groeplewensversekeringskema is nie, is myns insiens derhalwe nie heeltemal korrek nie.

In beide die *Dippenaar*- en die *Swanepoel*-saak is daar duidelik met *verlies aan verdienvermoë* gewerk om sodoende die moontlike toekomstige verdienste van die eiser nie net tot die huidige dienskontrak of betrekking te beperk nie. Dit is ook duidelik wat die eiseres in die *Burger*-saak poog om te doen. Dit is derhalwe onverklaarbaar waarom regter Heyns deurlopend na die eiseres se "toekomstige inkomste en verdienste" verwys (sien 77B 78A 78C 79D 80C) terwyl hy eintlik van haar verdienvermoë moet praat.

Regter Heyns haal ook die passasie in *Dippenaar* aan waar hoofregter Rumpff beklemtoon dat indien met verlies aan verdienvermoë, in plaas van verlies aan toekomstige inkomste, gewerk word, voordele uit "gewone versekeringskontrakte" by die berekeningsproses uitgesluit word. Regter Heyns poog dan om die polis as 'n gewone versekeringskontrak in te kleur om sodoende nie die uitbetaling in berekening te bring nie. Dit is egter onduidelik of hy hierdie weg volg omdat daar *nie* met 'n dienskontrak gewerk word *nie* en alle voordele dus nie in berekening gebring hoef te word nie, en of hy juis hierdie weg volg omdat daar *wel* met die bepalings van 'n dienskontrak gewerk word en dit volgens *Dippenaar* die enigste wyse is waarop hy te werk kan gaan om die eiseres tegemoet te kom. Hy formuleer dan die volgende regsvraag (79G–H):

> "Die vraag is in wese of die voordeel wat eiseres gekry het weens haar lidmaatskap van die groeplewensversekeringskema van YSKOR, verkry is uit 'n *gewone kontrak van versekering* [my beklemtoning] voortvloeiend uit die feit dat sy 'n werknemer van YSKOR is of uit die feit dat sy 'n werknemer van YSKOR was en toe sy nie verder kon werk nie volgens haar dienskontrak met YSKOR sekere betalings gekry het."

Omdat regter Heyns dié vraag op hierdie wyse formuleer, kon hy verklaar dat die bedrag wat aan haar uitbetaal is, nóg deur haar werkgewer, nóg deur 'n ander party namens haar werkgewer aan haar betaal is. Daarom het sy volgens die regter 'n gewone versekeringskontrak aangegaan (79I–80A). Nêrens in sy uitspraak laat regter Heyns hom egter uitdruklik uit oor wat hy onder 'n "gewone versekeringskontrak" verstaan nie, net soos hoofregter Rumpff ook nêrens in sy uitspraak in die *Dippenaar*-saak verduidelik wat 'n gewone versekeringskontrak is nie. Uit regter Heyns se verduideliking (79I) wil dit voorkom of 'n gewone versekeringskontrak

alle versekeringskontrakte omvat wat nie deel van die dienskontrak vorm nie. Dit kan dan 'n verklaring bied waarom uitbetalings ingevolge so 'n versekeringskontrak nie in berekening gebring moet word nie selfs al word daar van 'n dienskontrak gebruik gemaak.

6 Slotsom

'n Paar belangrike punte het in die *Burger*-saak na vore gekom. Eerstens blyk duidelik hoe regsverteenwoordigers die probleem wat *Dippenaar* met betrekking tot die dienskontrak geskep het, in die toekoms gaan hanteer. Bykomende getuies om oor die inhoud van die dienskontrak te getuig, sal benodig word; dit sal weer lei tot verhoogde uitgawes net omdat die gepaste bewysstuk, naamlik die dienskontrak self, nie sonder nadele vir die eiser voorgelê kan word nie. Verder sal die eiser moet aantoon dat daar geen verband tussen die dienskontrak en die versekeringspolis bestaan nie. Hier wil dit voorkom of die belangrikste punt wat die howe in oorweging sal neem, die vraag is of die versekerde self die premies betaal het ongeag of die werkgewer 'n bydrae daartoe gemaak het al dan nie. Alhoewel die *Burger*-saak van die onsekerhede wat die *Dippenaar*-saak gelaat het, uit die weg geruim het, bly daar nog heelwat vrae onbeantwoord. Die beslissing bevestig weer eens die behoefte aan 'n duidelike appèlhofuitspraak op hierdie punt.

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DELIKTUELE AANSPREEKLIKHEID WEENS LIGGAAMSKENDING AS GEVOLG VAN SPERMAVERNIETIGING: 'N VERREIKENDE UITSPRAAK VAN DIE DUITSE BUNDESGERICHTSHOF

BGH, Urt v 9/11/1993, 1994 *NJW* 127

1 Inleiding

Die Duitse Bundesgerichtshof (BGH) is onlangs met die volgende feitestel gekonfronteer: Eiser sou 'n operasie ondergaan wat steriliteit tot gevolg het. In die lig daarvan het hy van sy sperma laat vries met die doel om dit later te gebruik sodat hy kinders van sy eie kon hê. Hierdie gevriesde sperma is egter deur verweerder sonder sy toestemming vernietig (BGH, Urt v 9/11/1993, 1994 *NJW* 127). Eiser eis vervolgens, kragtens artikels 823(1) en 847(1) *BGB*, genoegdoening van laasgenoemde weens liggaamskending ("Körperverletzung"). Die BGH was in dié saak wesenlik geroepe om te beslis of die menslike liggaam (*corpus*) vir doeleindes van dié persoonlikheidsgoed deelbaar is.

2 Dinamiese aard van die reg op liggaamlike integriteit

In beide die Duitse straf- en deliktereg is die begrip "liggaamskending" nie beperk tot die fisieke aspek van die menslike liggaam nie (a 323(1) *BGB*; Schäfer en Horn *J von Staudigers Kommentar zum bürgerlichen Gesetzbuch* vol 2 (1986) 123; a 223 *StGb*; Schönke *et al Strafgesetzbuch* (1991) 1626–1628; Lackner *Strafgesetzbuch* (1993) 1059–1060; Dreher en Tröndle *Strafgesetzbuch* (1993) 1285–1287). Boonop is die toevoeging van pyn nie 'n onontbeerlike voorwaarde vir

liggaamskending nie. Sterk gemoedsbewegings wat die liggaamlike welsyn in 'n ernstige mate benadeel, kan liggaamskending daarstel (Dreher en Tröndle 1286). Dit is moeilik, indien nie onmoontlik nie, om die menslike liggaam en psige in afsonderlike kompartemente te beskou (vgl Schönke *et al* 1626).

Insgelyks het die liggaamsbegrip by aanranding in die Suid-Afrikaanse reg duidelik 'n elastiese en dinamiese onderbou (sien bv *S v Marx* 1962 1 SA 848 (N) 850–854; *S v A* 1993 1 SASV 600 (A) 610). Ons howe neem inderdaad kennis daarvan dat psigiese pyn meermale 'n aanrandingsbestanddeel is (*S v Mokgalaka* 1993 1 SASV 704 (A) 705). Ook in Amerikaanse jurisdiksies word aanranding of liggaamskending 'n wyer konnotasie as die fisieke toegeken (*State v McIver* (1949) 231 NC 313, 56 SE 2d 604, 12 ALR 2d 967 (North Carolina SC)). Die bekende Engelse skrywer Glanville Williams gebruik selfs die begrip "psychic assault" (*Textbook of criminal law* (1983) 174). In sy bespreking van dié aangeleentheid in die deliktereg wys Neethling daarop dat aanknopingspunte vir die siening dat primêr psigiese benadeling 'n *iniuria*, in die sin van liggaamskending, kan daarstel, karig is. Hy voer verder aan dat, in die lig van die beslissing *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) aanvaar kan word dat, soos die nalatige krenking van die psige die aksie *sui generis* vir pyn en lyding fundeer, die opsetlike krenking van die psige deur die *actio iniuriarum* gedek behoort te word (*Persoonlikheidsreg* (1991) 91–92; vgl *Boswell v Minister of Police* 1978 3 SA 268 (OK)). 'n Mens kan nie anders as om hierdie sienswyse te onderskryf nie. Die menslike psige en liggaam vorm 'n interaktief-organiese eenheid.

3 Deelbaarheid van die menslike liggaam

In bogenoemde saak wys die BGH daarop dat liggaamsdele of -stowwe wat van die menslike liggaam ontneem of verwyder is, in die algemeen die "status" van sake aanneem (vgl a 18–23 van die Wet op Menslike Weefsel 65 van 1983). In die lig van medies-tegnologiese vooruitgang is dit tans moontlik om liggaamsdele of -stowwe te verwyder vir latere aanwending op of terugplasing in dieselfde liggaam. In dié verband word gedink aan bloed wat weer, indien benodig, in die liggaam van waar dit kom, teruggeplaas kan word, vel- en beenbestanddele wat in latere oorplantings op dieselfde liggaam gebruik kan word en die bevrugting van eierselle wat weer in die betrokke vrou se liggaam teruggeplaas word (127–128). Hierdie liggaamsbestanddele of -stowwe behou ook tydens verwydering 'n funksionele verband met die liggaam. Beskadiging of vernietiging daarvan stel liggaamskending ingevolge artikels 823(1) en 847(1) *BGB* daar (128).

Die sperma, wat vir die spesifieke doel in bogenoemde saak beskikbaar gestel is, is finaal van die liggaam afgeskei. Dit is egter bestem om 'n spesifieke liggaamsfunksie, naamlik voortplanting, in die toekoms te vervul. Laasgenoemde is intiem verbind met die eiser se liggaamlike integriteit en sy persoonlike selfbestemming en -verwesenliking en het duidelik nie 'n geringer betekenis of waarde as eierselle of ander liggaamsbestanddele of -stowwe, soos hierbo genoem, nie. In die lig hiervan word die eis deur die BGH toegestaan (128).

4 Konklusie

Die kern van die beslissing van die BGH word myns insiens saamgevat in die idee dat die regsgoed wat in artikels 823(1) en 847(1) *BGB* beskerm word, nie die materie is nie, maar die bestaan en bestemming van die menslike persoonlikheid wat in 'n liggaamlike identiteit materialiseer (127). Die menslike liggaam, en

bygevolg die menslike persoonlikheid, het myns insiens ook 'n toekoms- en, in 'n genetiese sin, 'n ewigheidsdimensie. Dit sluit aan by die Bundesverfassungsgericht se standpunt dat die mens se waardigheid na sy dood voortduur. (BVerfGE 30 173 194; 1971 *NJW* 1645 1647; Labuschagne "Menseregte na die dood? Opmerkinge oor lyk- en grafskending" 1991 *De Jure* 150.) Die menslike reg op en outonomie tot voortplanting en gevolglike genetiese kontinuering vorm 'n belangrike basis van die persoonlikheidsreg (BGH Urt v 18/3/1980, *BGHZ* 76 259; sien ook in die algemeen Deutsch "Des Menschen Vater und Mutter" 1986 *NJW* 1971). Die Suid-Afrikaanse howe behoort die benadering van die BGH in dié verband te volg. Die *actio iniuriarum* is elasties genoeg om dit te hanteer. Vir doeleindes van die persoonlikheidsreg is die menslike liggaam in die algemeen deelbaar. Daar is tog omstandighede waarin die liggaam en die afgesonderde deel of stof deur 'n sekere toekomsgerigtheid van die reghebbende se psige – vir doeleindes van die persoonlikheidsreg – as eenheid behoue bly. Die menslike psige (met bewussynsgrondslag) dien derhalwe as 't ware in persoonlikheidsregtelike verband as "liggaamselement". Hier het ons 'n goeie voorbeeld van die werking van die (universele en onafgelope) dekonkretiseringsproses in die persoonlikheidsreg (sien Labuschagne "Die voorrasionele evolusiebasis van die strafreg" 1992 *TRW* 27 38–40). Aan die menslike liggaam word 'n minder konkreet-sigbare en 'n meer abstrakte bestaan toegeken.

Ek wil ten slotte op 'n analogiese probleem in dié verband wys. Veronderstel 'n persoon se arm word in 'n ongeluk afgeruk. Hedendaags is dit moontlik om ledemate weer aan die liggaam vas te heg. Veronderstel verder dat iemand die arm, om watter rede ook al, skend voordat dit weer aangeheg word. Het 'n mens hier met liggaamskending en gevolglike persoonlikheidskending te make? In die lig van die voorafgaande uiteensetting is die antwoord op dié vraag onvermydelik positief. Selfs al sou die aanhegting onsuksesvol of onmoontlik wees, het 'n mens myns insiens nogtans in dié geval met liggaamskending te make. Ook in hierdie verband speel die menslike psige, as koppelingsfaktor, 'n deurslaggewende rol. Wat duidelik blyk, is dat die mediese wetenskap en tegnologie voortdurend nuwe en andersoortige denkvelde open en nuwe eise aan die reg, in besonder ook aan die persoonlikheidsreg, stel.

JMT LABUSCHAGNE
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Rape is a horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of his victims. Any award of damages in a situation of this kind should be substantial (per Williamson J in *N v T* 1994 1 SA 862 (C) 864).

BOEKE

LAW AND DEVELOPMENT IN THE THIRD WORLD

Edited by YASH VYAS, KIVUTHA KIBWANA, OKECH OWITI and SMOKIN WANJALA

University of Nairobi Nairobi 1994; xi and 614 pp

Price $20

The reviewer was privileged to represent the Unitra Law Faculty at the Regional Conference of the Commonwealth Legal Education Association held at the University of Warwick in Coventry, United Kingdom, in July 1994, where I was able to meet scholars from the various Commonwealth countries. It was in these circumstances that when, at the end of the conference, the only ten available copies of the present publication were placed on the table for sale on a "first come first served" basis, I rushed from my seat to make sure that I would not miss out.

For us in Africa South of the Limpopo, this book is important in that it introduces us to Commonwealth writers and Commonwealth thinking on a large scale. There are 38 contributors to the publication, mainly professors and senior lecturers at universities; however, one of the 38 chapters (each contribution constitutes a chapter) has been written by a judge of the High Court of Gwalior Bench, India, one by a director of Kenya Legal Education in the Kenya Adult Education Association, and one by the Manager of the Urban Management Programme of the United Nations Centre for Human Settlement.

The publication is divided into two parts: part one (24 chapters) is devoted to law and development with reference to *Democracy in the Third World.*

Prominent among these is chapter 19, written by Professor NRM Menon, currently president of the Commonwealth Legal Education Association and director of the National Law School of India, Bangalore, India. The author deals with the cultural diversities and problems of social justice and democratic governance which are manifest in India perhaps more than in any other country in the world. The problem of access of the impoverished millions of India to the legal system and the problem of secularism and minority rights are considered. In chapter 20, Kembo Sure, a lecturer in the English Department at Moi University, Eldoret, Kenya, writes under the heading "Language, law and integration in Kenya". Considering language use in the judicature, the author points out that in the whole history of judicature, the language of the law changes least. In Europe the law was for centuries expressed in Latin, while in India it was expressed in Persian. In Africa it was originally expressed in the various African languages, but it is now expressed in Koranic Arabic in the Arab-dominated North, in the Romance languages, French and Portuguese in the former French and Portuguese colonies, and in the Germanic language English in the areas of former English influence.

In those areas bills are drafted and debated in Parliament and court proceedings are conducted and recorded in English. The serious problems inherent in using a new language in a serious domain such as the administration of justice, are ably pointed out by the author with reference to two examples drawn from the district courts of Kenya.

(a) As recently as February 1992 a police inspector prosecuting a case before a district court in Nakuru, Kenya said: "My honour, I would like to apply for an adjournment because my witnesses are far-fetched." The idiomatic use of the expression "far-fetched" used as a compound and not as the individual words "far" and "fetched", has nothing to do with geographic location!

(b) A female witness was asked if she was familiar with certain places in Kisumu and her reply was interpreted as: "I don't just walk." This English rendition of the witness's statement missed the point completely because she meant to say: "I am not a woman of loose morals (*ihule*) who would be expected to roam all over the town and thereby get to know many places."

English is therefore a very inefficient medium in the administration of justice as the author concludes. He further makes out a strong case for the proposition that English helps to promote inequality and social disintegration as some people are left out completely because of its use in a court case, where discourse that concerns them is in a foreign language.

Volume 2 of the work is devoted to economic issues such as the "Role of law in reforming urban land markets" by Patrick McAuslan, and "The problem of urban squatting in African countries" by Victor Nkiwane.

All in all, the book's most striking characteristic is its rich diversity. It deals with philosophical issues such as the relationship between national sovereignty and individual liberty. It features case studies in issues like the constitutional development of Kenya and the implications of this for human rights. It deals with practical issues such as the law of political parties, the law of patents, the impact of structural adjustment programmes on the social welfare of the poor, and the operation of credit co-operatives in the Third World. Territorially the book ranges widely, from Kenya through Uganda and Tanzania to Zimbabwe, and from Singapore through Malaysia to India.

This book is important because it opens the legal "motor highway" for South Africans to cross the Limpopo River and become part of African legal thinking. While doing so they will also inevitably contribute to legal thinking in Africa. There is no doubt that Africa in particular, and the Commonwealth legal fraternity in general, eagerly await the contribution of their learned colleagues from the South. The August 1995 Conference of the Commonwealth Legal Education Association scheduled for Nairobi, Kenya, could greatly facilitate the achievement of these goals.

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DISPUTE RESOLUTION

deur PAUL PRETORIUS (redakteur)

Juta Kaapstad Wetton Johannesburg 1993; 229 bl

Prys R98,00 (plus AVB en hanteringsgelde) (sagteband)

Alternatiewe dispuutbeslegting is ongetwyfeld een van die gewildste onderwerpe van die jare negentig. Ook in Suid-Afrika waar konflik op verskeie terreine voorkom, is dit 'n aktuele onderwerp. Behoeftes van die praktyk het tot gevolg dat nuwe beslegtingstegnieke en nuwe vorme van beslegting voortdurend ontwikkel. Hierdie werk is 'n samestelling van artikels deur twaalf verskillende skrywers en elke artikel is voorsien van 'n inleiding deur die redakteur. Hierbenewens tref 'n mens 'n uiters nuttige inleidingshoofstuk aan deur die redakteur wat nie alleen 'n oorsig gee van wat hierdie (vir Suid-Afrika) relatief nuwe studieveld behels nie, maar waarin ook riglyne gegee word vir die keuse van 'n toepaslike

beslegtingsprosedure. Wat die skrywers betref, kan verder opgemerk word dat elkeen in eie reg bekend is vir die baanbrekerswerk wat hulle op verskillende terreine verrig het.

In die voorwoord wys die redakteur daarop dat hierdie werk bedoel is as 'n inleiding tot die vakgebied "dispuutbeslegting" en gemik is op 'n teikengroep wat praktisyns, akademici, studente en selfs persone insluit wat in dispute betrokke is. Benewens hierdie persone behoort dispuutbeslegters ook die werk nuttig te vind. In hierdie verband word byvoorbeeld gedink aan hoofstuk twaalf wat 'n lys bevat van organisasies waarvan die primêre of sekondêre funksie dispuutbeslegting is. Volledige besonderhede van hierdie organisasies vir kontakdoeleindes word voorsien; en dit sluit ook 'n kort beskrywing in van hul onderskeie doelstellings en/of spesialisasievelde.

Hoofstuk een handel oor die onderhandelingsproses en aandag word geskenk aan die verskillende benaderings wat gevolg kan word asook aan die tegnieke verbonde aan onderhandeling. Hoofstuk twee verduidelik die basiese beginsels en tegnieke van versoening en dui aan dat waar versoening tradisioneel aangewend is op die gebied van die arbeidsreg en in dispute rakende gemeenskaps- en familie-aangeleenthede, versoening tans ook aangewend word in dispute rakende kommersiële en omgewingsaangeleenthede. Versoening as 'n beslegtingsprosedure word verder toegelig in hoofstuk drie waar op baie interessante wyse uitgelig word watter rol menslike persepsie in konflik speel en hoe die mediator te werk gaan om partye se persepsies sodanig te verander dat hulle tot 'n konstruktiewe oplossing van hul dispuut kan kom. Versoening in egskeidingsgedinge word in hoofstuk vier behandel en die skrywer van hierdie hoofstuk wys heeltemal tereg daarop dat kinders daarby baat indien 'n egskeiding in minder vyandige omstandighede geskied aangesien die hele egskeidingsproses reeds vir hulle traumaties is. Versoening kan ongetwyfeld daartoe bydra om vyandigheid tussen partye te verminder. Hierdie hoofstuk is besonder nuttig vir almal wat gemoeid is by versoening in gesinsverband.

In hoofstukke vyf en ses kom arbitrasie aan die beurt. Eerstens word die aard van die prosedure, die aanwendingsveld daarvan en, baie belangrik, wanneer dit die nuttigste wyse van beslegting is, bespreek; hierdie bespreking word deur dieselfde skrywer opgevolg deur 'n kernagtige dog duidelike oorsig van die prosedure wat gevolg word. Dit word op so 'n wyse gedoen dat dit ook vir 'n leek toeganklik is. Hibriede vorme van arbitrasie en versoening word in hoofstuk sewe ontleed, en dispuutbeslegting in die gemeenskap en met betrekking tot omgewingsaangeleenthede onderskeidelik in hoofstukke agt en nege. Ten aansien van laasgenoemde aangeleentheid merk die betrokke skrywer tereg op dat alternatiewe dispuutbeslegtingsmeganismes in 'n toenemende mate hier aangewend sal word. Die rede hiervoor is die feit dat die beskerming van die omgewing en 'n land se hulpbronne al hoe belangriker word. Dispuutbeslegting in kommersiële aangeleenthede word in hoofstuk tien bespreek en die betrokke skrywers staan tereg groter gebruikmaking van hierdie tegnieke in die kommersiële veld voor. Die konstruksiebedryf is eiesoortig en gespesialiseerde kennis word vereis alvorens hierdie terrein betree word – die aard van dispute en die verhouding tussen partye is kompleks. Hierdie feite het bygedra tot die besondere aard van dispuutbeslegting in hierdie bedryf. In hoofstuk elf kom dié onderwerp aan die beurt en sal ongetwyfeld van belang wees vir diegene wat op een of ander wyse in vermelde bedryf betrokke is.

Hierdie werk is 'n welkome toevoeging tot die literatuur oor alternatiewe dispuutbeslegting. Nie alleen is die bydraes interessant en leersaam nie maar die inhoud word op die punt af en in 'n maklik leesbare taal aangebied. Die volgorde van die bydraes is sinvol en die redakteur kan gelukgewens word met 'n uiters geslaagde bundel. Die kort inleidende gedeelte deur die redakteur wat die inhoud van elke hoofstuk voorafgaan, plaas die hoofstuk op baie innoverende wyse vir die leser in konteks en dra daartoe by dat die werk vir 'n wye leserskring toeganklik is. Daar kan saamgestem word met die mening in die voorwoord dat die werk verpligte leesstof behoort te wees vir besigheids- en professionele persone. Die boek word sonder voorbehoud aanbeveel by enigeen wat in alternatiewe dispuutbeslegting belangstel.

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UNDERSTANDING CHEQUE LAW
by ROBERT SHARROCK and MICHAEL KIDD
Juta Cape Town Wetton Johannesburg; xli and 227 pp
Price R89,80 (soft cover)

The law relating to bills of exchange is one of the great levellers. Faced with an assortment of strange concepts and a sometimes very idiosyncratic logic, law students are reduced to parrots, and practitioners frantically initiate and (with relief) conclude a search for the standard form of summons someone (we forget who) in the firm drew up a long time ago. To date, this branch of law has been well served by a number of heavyweight publications reflecting its low level of tolerance of the casual acquaintance. The need for an accessible text to provide a sound basis, however, is ever-present.

With this in mind, the book currently under discussion promises a good deal. Aimed primarily, according to the preface, at the student and the practitioner, its purpose is to provide a "systematic and progressive understanding" of cheque law which, in the end, will fuse into a "broad overall perspective". The prospective user is furthermore informed that it is not meant to be an "encyclopaedic treatise", as the text of a mere 170 pages serves to confirm.

There is little doubt that the authors succeed in achieving the goals mentioned above. In providing a progressive understanding of cheque law, they focus on the fundamental issues concerning this branch of the law. After discussing the practical importance of cheques and the structure of regulation of cheque law in part 1, the authors proceed to the definition of, necessary parties to, and elements of a cheque (part 2: ch 3–4). This, in turn, is followed by a discussion of: payment by cheque (part 3: ch 5–7), negotiating a cheque (part 4: ch 8–9), liability on a cheque (part 5: ch 10–15) and unauthorised payment (part 6: ch 16). The text is supported by four appendices: the text of the Bills of Exchange Act, which includes cross references to page numbers where a specific section is discussed; the text of Rule 8 of the Supreme Court Rules regarding provisional sentence; provisional sentence summons; and a brief appendix dealing with conflict of laws. As such, the book covers all the important topics necessary for a sound basis in this branch of the law.

No doubt hard choices had to be made when the authors opted for this approach – one apparently being the treatment of provisional sentence in a mere six pages of text (bearing in mind that the book is expressly stated to be aimed at the practitioner). What is important, however, is that this does not detract from the basic goal of the book (to promote understanding) and what little surprises there might be in the form of a seemingly incomplete text, are addressed through references to authority and thus become negligible in the hands of an experienced lecturer or a practitioner prepared to make use of those references. Some purists may also feel that the book is deficient in that it concentrates only on cheques. This is a non-argument given practical reality and a basic commitment to augmentation through effort on the part of the user.

The authors have to be commended on the clear style of writing and the consistent use of practical examples in the form of cheque reproductions which substantially contribute to the attainment of the book's basic aim. The approach chosen does make for a lot of cross referencing, but this is done consistently and accurately. Mistakes are few and far between – see, for example, the reference to the discussion of the aval at 6 which should be to 124 and other minor slips (see eg the reference to the first article by De Beer xiv, the second case note by De Beer xv and also 66 fn 42).

In summary, it is a pleasure to report that in a world characterised by sometimes over-zealous authors and publishers, this book has a clear goal which is attained. In a difficult branch of the law this book does and can do much to promote understanding and, as such,

to provide a sound basis for the student and the practitioner. And those who feel that this publication is decidedly lightweight should perhaps remember that "making sure everything is there" is, on its own, hardly a legitimate goal of academic writing and, especially in case of cheque law, very often signifies the demise of comprehension on the part of the reader.

CHRISTOPH GARBERS
University of South Africa

INTERLOCUTORY INTERDICTS

deur CB PREST

Juta Kaapstad Wetton Johannesburg 1993; 236 bl

Prys R155,85 (BTW en hanteringsgelde ingesluit) (sagteband)

Van meet af aan kan gesê word dat hierdie werk 'n uiters bruikbare en welkome toevoeging tot die boekery van enige juris – ook praktisyns – sal wees nieteenstaande die diepgaande akademiese inhoud daarvan.

Die werk is die gepubliseerde weergawe van die skrywer se doktorale proefskrif. Ondanks die indruk wat die titel skep, word die onderwerp egter nie omvattend behandel nie, maar val die fokus slegs op die vereistes vir die toestaan van interlokutoriese interdikte in die Suid-Afrikaanse reg. (Die skrywer stel egter 'n omvattender werk in die vooruitsig.) Vir doeleindes hiervan word nie alleen 'n regshistoriese ondersoek na die vereistes in die Romeinse en Romeins-Hollandse reg gedoen nie, maar ook 'n regsvergelykende ondersoek na die Engelse reg. Laasgenoemde is veral van belang weens die groeiende belangstelling plaaslik in prosedures soos veral die "Mareva injunction" en "Anton Piller"-bevele. Die skrywer behandel hierdie vorme van die interdik in besonderhede en sluit ook 'n waardevolle prosessuele bespreking vir die uiteindelike verkryging van die bevel in. Wat veral in hierdie verband opval, is die feit dat geen kennis aangaande die Engelse reg by die leser veronderstel word nie; die werk is dus weens hierdie rede des te meer toeganklik. In sy gevolgtrekking na die ontleding van die "Mareva injunction" spreek die skrywer die mening uit dat aangesien die remedies in die Engelse en die Suid-Afrikaanse stelsels in baie opsigte ooreenstem, daar geen rede bestaan waarom die Engelse gesag oor die onderwerp nie oorredende waarde in Suid-Afrika kan hê nie. 'n Mens vind hierdie opmerking vreemd onder andere weens die feit dat die historiese basis in elke geval totaal van mekaar verskil. Dit is ongetwyfeld so dat regsontwikkeling op die terrein van beide hierdie remedies in Suid-Afrika sal plaasvind. Die hoop word egter uitgespreek dat voldoende aandag in so 'n geval gegee sal word aan 'n suiwer ontleding van die regshistoriese basis van 'n bepaalde remedie; voorts moet in gedagte gehou word dat die Romeins-Hollandse reg soepel en vatbaar vir ontwikkeling is. Onnadenkende oorname van remedies uit 'n vreemde regstelsel strek ons eie stelsel nie noodwendig tot voordeel nie.

In die finale hoofstuk maak die skrywer 'n sestal aanbevelings en lê veral klem daarop dat remedies soepel moet wees ten einde te verseker dat litigante regshulp bekom. Die skrywer maak ook 'n sterk saak uit vir die herevaluering van die huidige vereistes vir die toestaan van interlokutoriese interdikte sodat die howe groter vryheid kan hê om die oorwig van gerief te oorweeg in plaas daarvan dat tyd bestee word aan die vraag of 'n *prima facie* reg bestaan of nie.

'n Nuttige kenmerk van die werk is dat daar 'n volledige inhoudsopgawe aan die begin van elke hoofstuk voorkom sodat die inhoud daarvan met een oogopslag waargeneem kan word. Die naspoor van 'n bepaalde aspek word ook hierdeur vergemaklik.

Ten slotte kan opgemerk word dat die tegniese versorging van die werk keurig en die stofomslag smaakvol is. Ten spyte van wat ten aanvang van hierdie bespreking gesê is oor die akademiese inhoud van die werk, word dit tog vir praktisyns aanbeveel aangesien daar veel uit geleer kan word en dit veral nuttig kan wees ter voorbereiding van betoog en advies.

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Uit hierdie fonds word finansiële hulp vir die publikasie van regsproefskrifte en ander verdienstelike manuskripte verleen.
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The principle of equality in the law of contract*

L Hawthorne
BA LLD
Professor of Private Law, University of South Africa

OPSOMMING

Die beginsel van gelykheid in die kontraktereg

Die fundamentele regte waarvoor die tussentydse Grondwet voorsiening maak, sal op alle gebiede van die reg belangrike gevolge inhou. By die kontraktereg lê die grootste moontlikheid van ontwikkeling in die uitwerking wat die reg op gelykheid op die klassieke kontraktereg kan uitoefen. Die kontraktereg beheer ope mark-ooreenkomste en gevolglik bepaal dit in 'n groot mate die orde van rykdom en mag. Die reg op substantiewe gelykheid bied die uitdaging om die verdelende skema wat deur die kontraktereg geskep is, te evalueer en om die herverdeling van rykdom aan te spreek. Substantiewe gelykheid beteken nie dat die verkryging van mag, rykdom en kennis deur die reg verbied word nie, maar eis dat hierdie middele uitgeoefen word sonder uitbuiting van die swakkere party. Die reg op gelykheid maak voorsiening vir die erkenning van die leerstuk van ongelykheid in die kontraktereg. Die reg op gelykheid sal verder ook die inhoud van soepele norme soos die goeie trou en die openbare belang bepaal en sodoende die onderliggende klassieke teorie van die Suid-Afrikaanse kontraktereg hervorm.

1 INTRODUCTION

One of the cornerstones of South Africa's transitional Constitution is the principle of equality.[1] The fact that this principle has been made part of positive law and its application by the legislature, by the executive and by the judiciary, will have a significant effect on the development of the law of contract. In this regard it should be mentioned that by regulating market transactions the law of contract constitutes the market order and will therefore largely determine the order of wealth and power.[2] To provide relief from hardship and poverty, legislative intervention[3] in the law of contract has become a common occurrence and the right to equality presents two challenges: the evaluation of the distributive scheme created by the law of contract, and the opportunity to examine the

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1 S 8 of the Constitution of the Republic of South Africa Act 200 of 1993.

2 Collins *The law of contract* (1993) 3 ff; Smith and Weisstub *The Western idea of law* (1983) 618 ff.

3 Baxter *Administrative law* (1984) 7; Smith and Weisstub 618.

redistribution of wealth.[4] It is therefore necessary to look briefly at the principle of equality before discussing its effect on the law of contract.

2 THE CONCEPT OF EQUALITY

During the eighteenth century the enlightenment ideals of liberty, equality and fraternity were formulated by critical philosophers who based their theories on the concept of natural law.[5] After the American and French Revolutions, these ideals were positivised in most Western legal systems with the aim of legitimising the emancipation of the bourgeoisie. Now, two centuries later, South Africa is embarking on this road in its acceptance of fundamental rights which recognise the principle of equality.

3 WHAT DOES EQUALITY MEAN?

The content of the principle of equality is not circumscribed. Consequently, there are varying interpretations.[6] One extreme interpretation is that circumstances and people are never completely identical: there will always be differences. Since all people are different, they must be treated differently. Without subscribing to this view, we must bear in mind that reality is complex and multifaceted, that practically nothing is absolutely identical to anything else. This makes it difficult to explain why two cases are equal. Furthermore, reality can be interpreted and categorised from different viewpoints and tolerance for varying world views does not facilitate the decision in regard to the question whether two cases are equal.[7] Nevertheless, not every interpretation will be acceptable and the interpretation of the principle of equality revolves around the question of deciding characteristics or qualities: those in respect of which people and cases are equal or those in respect of which they differ. Consequently claims to equality or inequality must be tested against two requirements: First, the quality or characteristic may not be illusory; and secondly, the quality or characteristic must be relevant.[8] Whenever differentiation does not measure up to these criteria, there is discrimination. Discrimination may therefore be defined as differentiation *vis-à-vis* a specific group on the basis of illusory or irrelevant criteria. The right to equality is, therefore, primarily interpreted negatively, that is, it constitutes the prohibition of discrimination.

During the eighteenth and nineteenth centuries liberal interpretation emphasised equal opportunities of development for each individual, namely, equality in regard to the starting position in the struggle to live. However, during the nineteenth century, socialism opposed the unequal results of liberal equality. Socialism emphasised solidarity rather than competition between individuals, and

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4 Gabel and Feinman "Contract law as ideology" in Kairys (ed) *The politics of law: a progressive critique* (referred to as *Politics*) (1982) 176.

5 Maris "Inleiding: recht tussen macht en emancipatie" in Maris (ed) *Gelykheid en recht* (referred to as *Gelijkheid*) (1988) 18.

6 McKean *Equality and discrimination under international law* (1983) 2.

7 Maris "Gelykheid en recht filosofisch beschouwd" in *Gelijkheid* 52–54.

8 *Idem* 54–59.

propagated and realised social rights which the state has to recognise, regardless of whether this state intervention infringes on the freedom of the individual.[9] Thus, in the last quarter of the nineteenth century, the state began to play an increasingly active role in the emancipation of the socially disadvantaged.

An extreme interpretation which demands absolute equality, that is, the absolutely identical treatment of every individual, finds little support because most adherents to the ideal of equality take into account that factual differences between people necessitate different handling. Consequently, the interpretation of equality contained in the Universal Declaration of Human Rights does not aim at the elimination of all social inequality, but aims at equality on a fundamental level to provide an equivalent life for all.[10] This interpretation allows for differentiation among people, but rejects differentiation which leads to inequality in regard to human dignity.

Nevertheless, protagonists of equality do not always agree about the criteria for differentiation. The liberal point of view is that different treatment is justified in so far as people achieve differently, while socialists demand different treatment for people with different needs.[11]

These different interpretations of equality are supported by the fact that the French Revolution elevated freedom, equality and fraternity to the status of the moral principles underlying the legal order. Although these ideals overlap to a certain extent (there must be equal freedom), they also contain an inherent potential for conflict. This necessitates an evaluation of these principles. Freedom combined with equality results in the liberal equality[12] of equal opportunity, which accepts the dominance of freedom. Equality in combination with fraternity is the socialist equality, which allows fewer limitations of equality by individual freedoms.[13]

The Western legal order absorbed the principle of equality in various ways. During the first half of the nineteenth century, equality was understood to mean equality before the law, namely formal or juridical equality.[14] However, during the last quarter of the nineteenth century, the law began to take cognisance of the social realities and to correct factual social inequalities. These corrections have mainly a procedural character and the term procedural equality is appropriate.[15] During the last decennium, the vision of material or substantive equality necessary to realise fundamental human equality in society has gained momentum. Formal equality guarantees equal treatment under the law but entrenches existing

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9 *Idem* 45–47; Baxter 6; Smith and Weisstub 618; cf also Dalton "An essay in the deconstruction of contract doctrine" 1985 *Yale LJ* 1010.

10 Cf art 1, 2 and 7 of the Universal Declaration of Human Rights.

11 Maris "Gelijkheid en recht filosofisch beschouwd" in *Gelijkheid* 62.

12 Smith and Weisstub 593 ff 610.

13 Maris "Gelijkheid en recht filosofisch beschouwd" in *Gelijkheid* 63.

14 Sloot "Gelykheid: een rechtssociologische beschouwing" in *Gelijkheid* 121; Smith and Weisstub 594 ff 618.

15 Sloot in *Gelijkheid* 118–112; Smith and Weisstub 618.

social and economic inequality. Substantive equality includes affirmative steps to redress these existing social and economic inequalities.[16]

Three phases can thus be distinguished. Formal equality means that the law is applied regardless of the individual. Both the legislature and the judiciary must take cognisance of this requirement, but the law does not take cognisance of social reality and is applied without exception. Consequently, the existing social inequalities are reproduced by the application of the law. Procedural equality introduced special procedures to compensate for the unequal social position of the parties; for example, employees or tenants, the abolition of restrictions of freedom of association, which led to the creation of trade unions. The law attempts to correct social inequalities by way of procedure. Material equality is directed at the results of the application of the law. Each social inequality is evaluated by the law and only those forms which stand up to the test of social justice are permitted to continue. This interpretation of the principle of equality makes it possible to prescribe unequal treatment in cases of unequal societal circumstances, if this will lead to equality on a more fundamental level.[17]

Which form of equality the South African legal system will embrace, is open to discussion. Section 8(1) of the transitional Constitution sets forth the right to equality before the law, namely formal equality. Section 8(2) interprets the right to equality negatively by prohibiting discrimination on the grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language, thus deeming those criteria illusory or irrelevant in regard to differentiation. However, section 8(2) remains open. The criteria enumerated do not form a *numerus clausus*. Section 7(4)(b)(iv) opens the door to class actions and creates an important procedural mechanism to redress social inequality. Furthermore, the preamble to the Constitution justifies the presumption that substantive equality is the ultimate goal.[18]

4 HORIZONTAL EFFECT OF THE FUNDAMENTAL RIGHTS

During the twentieth century recognition and protection of fundamental human rights have developed in such a way that its application to the relationship between private individuals (what is known as the horizontal effect of fundamental rights) has gained increasing recognition.[19] In regard to the question whether and to what extent the fundamental rights in the new Constitution have or should have horizontal effect,[20] the following can be noted. Section 7(2), which governs the application of chapter 3, the bill of fundamental rights, provides that the chapter and the rights entrenched therein apply to all law. The term "law" must

16 Smith and Weisstub 618.

17 Sloot in *Gelijkheid* 117–123; Smith and Weisstub 593 ff.

18 Whether s 8(3)(a), which deals with affirmative action, will form an exception to this preamble or complement it remains to be seen.

19 Akkermans and Koekkoek (eds) *De Grondwet – een artikelsgewijs commentaar* (1992) 19 ff.

20 Cachalia *et al Fundamental rights in the new Constitution* (1994) 19 ff.

be interpreted as being wider than mere statutory law if section 7 is read in the context of the rest of the chapter and with reference to the Afrikaans text.[21] The term "law" in section 35(3) is translated as "wet" in the Afrikaans text, while in section 7(2) it is translated as "reg". It can therefore be argued that chapter 3 applies to the common law as well. Section 33(2) states specifically that the common law is subject to the rights contained in chapter 3, while section 33(3) recognises common law rights to the extent that they are not inconsistent with chapter 3. Section 35(3) provides:

> "In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of [chapter 3]."

These provisions, seen in the context of the preamble[22] to the Constitution and section 7(4),[23] give a strong indication that chapter 3 has horizontal application, whether direct or indirect. Unless Civil Rights Acts, which would make provision for direct horizontal application of fundamental rights, are introduced, indirect horizontal application can be achieved by interpretation of what is known as open norms such as good faith and public interest. Interpretation of these open norms will have to reflect the values and standards laid down in the fundamental rights, as protected by the Constitution.[24] Furthermore, all legislation, including that governing private law relationships, must be interpreted in such a manner as to give maximum effect to the values and principles contained in the provisions of the Constitution. The effect of this is that all private law rules and principles will be indirectly subject to the fundamental values provided for in the Constitution.[25] The fact that chapter 3 also provides that it (chapter 3)

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21 The Afrikaans text of Act 200 of 1993 was signed. However, s 15 of the Constitution of the Republic of South Africa Amendment Act 2 of 1994 provides that, even though the Afrikaans text was the signed text, the English text will prevail for purposes of interpretation (ie in the event of irreconcilable conflict between the texts) as though it were the signed text.

22 The Preamble to the interim Constitution states that "there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms".

23 S 7(4) introduces an important change to the common law of *locus standi* by providing that an association acting in the interest of its members, a person acting on behalf of another person who is not in a position to seek relief in his or her own name, a person acting as a member of or in the interest of a group or class of persons, or a person acting in the public interest, is entitled to apply to a competent court of law for appropriate relief when an infringement of or threat to any right entrenched in chapter 3 is alleged. Under the common law a litigant is required to show a direct and substantial interest in the subject matter of the litigation. Furthermore, the capacity to represent a class and the revival of the *actio popularis* in the public interest open new avenues for the enforcement of the fundamental rights.

24 S 35(3); Van der Vyver "Constitutional options for post-apartheid South Africa" 1991 *Emory LJ* 795 ff.

25 In this regard compare *Drittwirkung* in German law, "Grundrechte und Privatrecht" in Habsheid *et al* (eds) *Freiheit und Zwang. Rechtliche, wirtschaftliche und gesellschaftliche Aspekte. Festschrift zum 60. Geburstag von Professor Dr. iur. Dr. phil. Hans Giger*

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shall bind all legislative and executive organs of state at all levels of government[26] creates another possibility of indirect horizontal application. The constitutional instruction to the legislature to realise the fundamental rights may not constitute horizontal effect in the strict sense, but it will necessarily affect all new legislation, including legislation applicable to private relationships, which may not infringe on or be in conflict with the fundamental rights beyond the limitation sanctioned by the general limitation clause.[27]

Finally, fundamental rights are now positive law and their effect will be determined by interpretation. The interpretation by the courts will be decisive whether and to what extent the various fundamental rights will have horizontal effect. The outcome will depend on views about state, society and the individual.[28] It is submitted that the approach to the interpretation of fundamental rights will be a purposive one, to ensure that the values embodied in the Constitution influence the approach to interpretation.[29] The equality clause interpreted in terms of the preamble[30] and the constitutional principles of schedule 4, will have a dramatic effect on the common law in general, and specifically also on the classical doctrine of contract, which characterises the South African law of contract.

5 FREEDOM OF CONTRACT

The principle of liberty is embodied in freedom of contract. This concept was theoretically developed in the sixteenth and seventeenth centuries in their social, economic and political philosophies.[31] By emphasising man's unique ability to reason, the idea was propagated that, by means of rational argument, a universal body of rules could be developed to achieve justice in the light of the current economic, political and social conditions. Rational argument developed the idea that man possessed certain fundamental rights, which, since they were based on reason, could be actively acquired in view of the fact that an entire society itself, based on reason, was created.[32] Freedom of contract was formulated as one of the basic human rights and thus became the cornerstone of the theory of the law of contract.[33] The doctrine of freedom of contract found favour with the eighteenth-

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(1989) 627–642; *cf* also Van der Vyver 1991 *Emory LJ* 795–796; Forster *German law & legal system* (1933) 116 ff; Norr "From codification to constitution: on the changes of paradigm in German legal history of the twentieth century" 1993 (1) *Codicillus* 37 ff.

26 S 7(1) Act 200 of 1993.

27 S 33(2) Act 200 of 1993.

28 Cf Böckenförde "Grundrechtstheorie und Grundrechtsinterpretation" in *Staat, Gesellschaft, Freiheit* (1976) 221–252.

29 Cachalia *et al* 9 ff.

30 "Whereas there is a need to create a new order . . . in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms . . ."

31 Feenstra and Ahsmann *Contract* (1980) 6; Atiyah *The rise and fall of freedom of contract* 69 ff.

32 Aronstam *Consumer protection, freedom of contract and the law* (1979) 1.

33 Mill "Three essays" in *On liberty* 15 ff.

and nineteenth-century proponents of political economy.[34] The economist Adam Smith[35] paved the way for economic liberalism and its popularised version, *laissez faire*. The latter developed into an ideology, which promoted faith in the self-interested, freely bargained, value-exchange mechanism as the key to all rational economic thought.[36] One of the basic principles of this political economy was that legislation should not be used to interfere with freedom of contract, since this freedom was necessary for the successful expansion of trade and industry. In this social, political and economic atmosphere, where freedom of the individual was regarded of paramount importance, these ideas gained ready acceptance among lawyers.[37]

The pure doctrine of freedom of contract appears to be used in four distinct senses.[38] First of all, it is used to mean that persons should be free to negotiate the terms of their contracts without legislative interference. Secondly, the meaning attached is that where parties have concluded a contract, the terms of the contract should not be interfered with and should be given full effect.[39] Thirdly, it has been interpreted to mean that a person should be free to select the parties he contracts with; and fourthly, that a person should be free to decide not to contract.[40] In all interpretations the premise is that both contracting parties are equal. Nevertheless, true equality seldom exists and many contracts are concluded out of necessity.[41] Equality between the parties is a prerequisite to the attainment of the ideal of freedom of contract. Early utilitarianism and democratic theory regarded formal equality as automatically conducive to social liberty and equality.[42] Nevertheless, the doctrine of freedom of contract, coupled with formal equality, reproduces social inequalities and allows the domination and exploitation of one contracting party by the other.[43] Formal equality before the law is an engine of oppression.

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34 Atiyah 292 ff; cf Campbell *Seven theories of human society* (1981) ch 5; Horwitz *The transformation of American law 1780–1860* (1977) 160 ff.

35 *Inquiry into the nature and causes of the wealth of nations* (1776) book 4 ch 9; Campbell ch 5 92–112.

36 Atiyah 321 ff; Campbell ch 5; Horwitz 181.

37 Atiyah 112 ff; Horwitz 182 ff; Hartkamp *C Asser's handleiding tot het beoefening van het Nederlands burgerlijk recht. Verbintenissenrecht. Deel 2. Algemene leer der overeenkomsten* 9ed (referred to as *Overeenkomsten*) 35–36; Eiselen *Die beheer oor standaardbedinge: 'n regsvergelykende ondersoek* (1988) 64 ff.

38 Beekhuis *Contract en contractsvrijheid* (1953) 5; Rutten *C Asser's handleiding tot het beoefening van het Nederlands burgerlijk recht. Verbintenissenrecht. Deel 2. Algemene leer der overeenkomsten* 6ed (1982) 31; Bloembergen and Kleyn (eds) *Contractenrecht* ch 1 par 134; Guest *Anson's law of contract* (1984) 4; Aronstam 13.

39 Cf Von Hippel *The control of exemption clauses* 443; Feenstra and Ahsmann 12 ff.

40 Aronstam 14.

41 *Ibid*; Collins 11.

42 Friedmann *Law in a changing society* (1959) 124; cf Smith and Weisstub 609 ff.

43 Friedmann 124; Horwitz 181 ff.

6 THE CLASSICAL THEORY OF CONTRACT

Freedom of contract forms the foundation of the classical theory of contract,[44] which still informs the South African law of contract, regardless of the fact that social and political values and conditions have changed.[45] Formulated by English and continental judges and treatise writers during the nineteenth century,[46] its origins appear to be a matter of controversy. Atiyah[47] in England and Horwitz[48] in the United States represent one school of thought which holds that the development ran concurrently with the growth of industrial capitalism in the period 1770–1870. These authors identify a shift of emphasis from relationships such as reliance or the receipt of benefits, to a consensual basis founded on executory agreements.[49] These agreements take the form of bargains which create expectations, the content of which was almost entirely a matter for the parties concerned. The role of the courts was restricted to the enforcement of those bargains. Unfairness in the bargain was not a matter for the courts.[50] This change in emphasis is identified as a change from an essentially paternalistic agrarian society in the eighteenth century to an aggressive entrepreneurial industrial society in the nineteenth century.[51] The values reflected in the classical theory of contract were those of *laissez faire* and economic liberalism rather than those of a prior protective society.[52] The philosophical theories of the seventeenth and eighteenth centuries on the social contract provided the theoretical background and justification.[53] Eighteenth and nineteenth century economic liberalism was characterised by freedom of trade and the freedom of an individual to work where he/she pleased.[54] The nineteenth century jurists adopted the principle of *laissez faire* and the theories of the classical economists were incorporated into the classical theory of contract, despite increasing criticism from the utilitarians and a later generation of economists known as neo-classicists.[55] Thus the

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44 The clearest formulation of the basic model of classical contract law is to be found in *Smith v Hughes* (1871) LR 6 QB 597 604–605; cf Feinman "Critical approaches to contract law" 1983 *UCLA LR* 831 ff (referred to as "Critical approaches").

45 Lubbe and Murray *Farlam and Hathaway. Contract – cases materials and commentary* (1988) 26.

46 Cooke and Oughton *The common law of obligations* (1993) 26; Feinman 831 ff.

47 *The rise and fall of freedom of contract.*

48 *The transformation of American law* (1977) cf ch 6 160 ff.

49 Cooke and Oughton 17; Feinman "Critical approaches" 832; Kennedy "The structure of Blackstone's Commentaries" 1979 *Buffalo LR* 320–325.

50 Collins 8; cf Aronstam 13 where he makes the following statement about the classical theory of contract in South Africa: "[T]he fact that a contractual provision is harsh or oppressive is often of little concern to judges"; Mensch "The history of mainstream legal thought" in *Politics* 23 ff; Gabel and Feinman "Contract law as ideology" in *Politics* 177; Feinman "Critical approaches" 831 ff.

51 Cooke and Oughton 17; Atiyah 427 ff; Mensch "Freedom of contract as ideology" (referred to as "Ideology") 1981 *Stanford LR* 756; Feinman "Critical approaches" 830; Kennedy 320–325.

52 Cooke and Oughton 17; cf Smith and Weisstub 550 ff; Mensch "Ideology" 756 ff.

53 Cooke and Oughton 18; cf also Graveson "The movement from status to contract" 1940 *MLR* 261.

54 Aronstam 4 ff.

55 Atiyah 324 ff 602 ff; Cooke and Oughton 24.

classical model of contract was designed for businessmen negotiating at arm's length and negotiating a future deal. The advantages of this model were that businessmen were able to plan ahead and that it protected reasonably engendered expectations.[56] However, as Simpson aptly describes the law's tendency to monism,[57] this model was applied to all contracts, regardless of subject matter or parties, and marked a move from a law of contracts to a law of contract.[58] The purpose of this law of contract was to create a facility for individuals to pursue their voluntary choices by facilitating the creation of legal obligations on any terms freely chosen by those individuals.[59] Thus the law of contract maximises the liberty of the individual. Although this law is neutral in respect of the social model, the latent social ideal embodied a liberal state in which the law maximised the liberty of individual citizens and encouraged self-reliance.[60] These goals are obtained by facilitating the creation of legal obligations on any terms which individuals freely choose.[61] A uniform system, to which market theory was applied, evolved.[62]

Friedman describes the cornerstones of the classical theory of contract as freedom of movement, insurance against calculated economic risks, freedom of will and equality between the parties. Furthermore, he states that these four elements are characteristic of the social function of contract in the formative era of modern industrial and capitalist society.[63] The first two elements are essentially formal while the latter two also express political and social ideologies. In adopting this monolithic system the law of contract sowed the seeds of its own destruction. What was appropriate for businessmen of theoretically equal bargaining power was singularly inappropriate for employers and employees, retailers and customers.[64] The ideal of freedom of contract permeates the classical theory. While freedom of contract implies equality, it is believed to establish equality.[65] Consequently, the concepts of freedom and equality in contract are interchangeable to some extent.[66] Lack of freedom to make or terminate a contract, or to negotiate its terms, also implies lack of equality.[67] The one implies the other, if viewed from the limited meaning accorded them in the classical theory of contract.[68] The law will, impartially, according to the same principles of corrective justice, enforce the sanctions of the law of contract regardless of

56 Cooke and Oughton 42; cf also Gabel and Feinman *Politics* 176.
57 Simpson *History of the common law of contract* (1974) 325.
58 Gabel and Feinman *Politics* 176.
59 *Ibid*; Feinman "Critical approaches" 834 ff.
60 Collins 1; Feinman "Critical approaches" 831 ff.
61 Collins 1sq. Gabel and Feinman *Politics* 176; Feinman "Critical approaches" 831sff.
62 Feinman "Critical approaches" 832.
63 Friedman 119 ff; cf also Feinman "Critical Approaches" 832 ff.
64 Cooke and Oughton 42; cf Gabel and Feinman *Politics* 183; Feinman "Critical approaches" 852 ff.
65 Collins 9; Gabel "Reification in legal reasoning" (referred to as "Reification") 1980 *Research in Law and Sociology* 45.
66 Friedmann 124; Gabel and Feinman *Politics* 176; Gabel "Reification" 45.
67 Friedmann 124; Gabel and Feinman *Politics* 176.
68 *Ibid*.

the parties, since both are equal before the law, but is not concerned with social and economic equality and the resulting inequality.[69] The chasm between the formal and substantive aspects of both freedom and equality is evident in the contrast between the law of contract as it is taught in most textbooks, and modern contract as it functions in society.[70] This situation can be ascribed to socio-economic developments, for example the concentration of power in business and industry, the increasing awareness of fundamental human rights and the expansion of the functions of the state.

Classical theory does not take into account the discrepancies in resources such as ownership, wealth and knowledge, which sustain inequality between the parties to a contract. In overlooking these disparities, the classical theory tacitly permits domination and exploitation of the weaker party.[71] By stating that no one can be forced to contract, the classical theory ignores the reality that economic necessity provides strong compulsion to contract; that many members of society fail to achieve economic conditions which enable them to enjoy freedom of contract, and that private individuals rarely possess the resources to litigate.[72]

The contracting party in the classical theory is a disembodied, unsituated person, who can afford to ignore basic needs. Moreover, he represents the average person in terms of skill and knowledge.[73] All contracting parties are treated like this average person without needs and thus all parties are treated as equal. Finally, the invisible hand of the market is neutral and thus treats everyone equally.

7 EQUALITY VERSUS FREEDOM OF CONTRACT

7 1 Introduction

Freedom of contract, originally hailed as a fundamental human right and viewed as the solution to all social and economic ills, gradually lost its halo as it failed to deliver and attention focused increasingly on the societal ills of unlimited freedom. Although the classical theory of contract does not work in practice,[74] the South African law reports provide a substantial number of *obiter dicta* in which members of the judiciary profess to be adherents to this theory.[75] However, in no

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69 Friedmann 124; Gabel and Feinman *Politics* 176 ff; Feinman "Critical approaches" 836.

70 Gabel and Feinman *Politics* 183; Friedmann 119; Mensch "Ideology" 754; Feinman "Critical approaches" 836. However, see the contribution made by Van der Merwe *et al* *Contract. General principles* (referred to as *Contract*) (1994) and their discussion of the topics of good faith and public interest.

71 Collins 11–13; Gabel and Feinman *Politics* 176; Hale "Bargaining, duress, and economic liberty" 1943 *Col LR* 621 ff.

72 Collins 58.

73 *Idem* 59.

74 Cf Cooke and Oughton 42.

75 Lubbe and Murray 20 ff; cf eg *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 1 SA 398 (A); *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A); *Portwig v Deputation Street Investments (Pty) Ltd* 1985 1 SA 83 (D); *Govender v Sona Development Co (Pty) Ltd* 1980 1 SA 602 (D); *Law Union & Rock Insurance Co*

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legal system has there ever been absolute freedom of contract or complete passivity in respect of patent inequality between the parties and a mixture of legislative developments and judicial interpretations have, in varying degrees, bridged the gap between the early philosophy of contract and the reality of contemporary society.[76] Freedom of contract and the principle of *pacta servanda sunt* are not absolute values.[77] They did not prevent the modification in England of the common law by equity, which gives relief from unconscionable bargains *inter alia*.[78] Neither did they halt developments in the Netherlands, which culminated in the *Nieuw Burgerlijk Wetboek* making provision for the requirement that the consequences[79] of contracts as well as the application of any legal rules[80] must be both reasonable and equitable. Similar development took place in the United States of America. The Uniform Commercial Code[81] contains a proviso against unconscionable contracts which has gone so far as to have entered the general law of contract [82] In France there is consensus that the current law of contract does not rest on the single principle of freedom of contract. Justification for state intervention lies in the concept of protecting weaker parties and restoring the inequality of bargaining power.[83]

In this regard Collins[84] analyses various doctrines developed within the classical theory to remedy some of the perceived evils and injustices resulting from a free market. In order to rectify inequality between the contracting parties a gradual erosion of the freedom of contract has taken place. The motivation for legislative and judicial intervention is to redress an imbalance of power engendered by freedom of contract. In this regard legal paternalism has been identified as playing an important role in the protection of the weaker party in the law of contract.[85]

Ltd v Carmichael's Executor 1917 AD 593 598; *Tjollo Ateljees (Edms) Bpk v Small* 1949 1 SA 856 (A); *Theron v Joynt* 1951 1 SA 498–598 (A); *Frumer v Maitland* 1954 3 SA 840 (A); *Cebekulu v Peppler NO* 1947 4 SA 580 (W); *Wells v South African Alumenite Company* 1927 AD 69 73; *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 4 SA 760 (A) 767; *Standard Bank of SA Ltd v Wilkinson* 1993 3 SA 822 (C).

76 Dalton 1985 *Yale LJ* 1010.

77 *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 613.

78 Meagher, Gummow and Lehane *Equity* par 1601.

79 *Nieuw Burgerlijk Wetboek* art 6.5.3.1.1.

80 *Idem* art 6.5.3.1.2.

81 *Uniform Commercial Code* par 2.302.

82 Calamari and Perillo *Contracts* (1970) par 9–39. They cite *Restatement of the law of contract* vol 2 (1979) par 208.

83 Rouhette "The obligatory force of contract in French law" in Harris and Tallon (eds) *Contract law today* (1989) 38 ff.

84 Collins 115 ff.

85 *Idem* 115–137.

7 2 Paternalism

Paternalism, the principle or system of governing or controlling in a parental manner,[86] has acquired negative connotations to-day. In general, any legal rule that prohibits an action on the ground that it would be contrary to the actor's welfare is paternalistic:[87] examples are the prohibition of suicide, compulsory education and restraints on contractual freedom. Legislatures select categories of persons deserving protection against freedom of contract and the introduction of legislation constraining unbridled freedom of contract in order to protect the weaker party constitutes a form of paternalism. Thus paternalism and freedom of contract are incompatible. However, the classical theory never eclipsed the strong moral stance of the nineteenth century judges.[88] They adhered to the familiar conservative political philosophy of complete freedom in economic transaction, but with rigorous enforcement of moral standards, infused by Christian religious sentiments.[89] If a contract offended these moral standards, the courts refused to enforce it. Thus even the classical theory could not eliminate legal paternalism, even if it was a narrower concept of paternalism and primarily negative in orientation.[90] It invalidated contracts which subverted the shared moral standards of the community, but refrained from examining the fairness or social utility of the contract. Classical law justifies this form of control by adhering to the notion that a society ultimately preserves its identity and stability through observance of fundamental moral norms, and thus the judiciary should not defer to the principle of freedom of contract if that undermines the moral foundation of the social order itself.[91]

However, this classical approach, in accordance with which courts declined to enforce an illegal or immoral contract, has undergone a change. This new form of paternalism is reflected in the South African law in the following instances. The law of restitution allows a party to recover money paid in terms of an illegal contract where the court exercises its discretion to relax the *in pari delicto* rule because simple justice between man and man demands it;[92] a restraint of trade is not invalid or unenforceable *per se* but will be if it offends against public interest;[93] a court may reduce a stipulated penalty to such an extent as it may consider equitable in the circumstances.[94] Furthermore, growing concern for the protection of the intended beneficiaries of regulatory legislation has led to the acceptance that a contract concluded contrary to a direct prohibition of the law is not void where such avoidance of a contract would cause grave injustice to innocent members of the public. The argument proferred in this instance is that the

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86 Cf *Webster's new twentieth century dictionary of the English language* (1979).
87 Kronman "Paternalism and the law of contracts" 1983 *Yale LJ* 763 ff.
88 Collins 117.
89 *Ibid.*
90 *Idem* 115; Kronman 764 ff.
91 Collins 114 ff.
92 Lambiris *Orders of specific performance and* restitutio in integrum *in South African law* (1989) 65 ff.
93 *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 891.
94 S 3 Act 15 of 1962.

purpose of the legislation is usually sufficiently served by the prescribed penalty.[95] Moreover, legislation increasingly protects certain groups against themselves and others. In this regard reference may be made to the protection provided to potential buyers from door-to-door sales. In terms of the Credit Agreements Act,[96] a credit receiver has an opportunity to reconsider his position if he is of the opinion that, because of pressure, he has entered into a contract without giving the necessary consideration to the obligations, financial or otherwise, that he has undertaken. In such an instance he may unilaterally cancel the contract without committing breach of contract.

Thus legal paternalism can take various forms within the law of contract. In the strictest sense the courts will refuse to enforce immoral or illegal contracts. In its widest form, paternalism will oppose any freedom of the parties to a contract from deciding on the terms of their contract. This is done by the introduction of legislation prescribing standard form or adhesion contracts. However, the notion that the legislature should intervene on behalf of the community to determine or change terms of contracts in the public interest is, generally speaking, foreign to the classical theory of contract.[97] However, legislative protection for certain classes of persons to nullify the inequality between the parties is part of developed legal systems. Examples of legislation introducing special rules governing the contracts of consumers, borrowers, and tenants are, for example, the Credit Agreements Act,[98] the Usury Act[99] and the Rent Control Act.[100] However, in contrast to the legislature, who selects openly for social interests, the judiciary seeks to appear neutral in strict adherence to the principle of equality before the law, and prefers to hide its moral vision behind technical rules and legal doctrines. It is therefore necessary to investigate the existing doctrines in the law of contract: have they contributed to the realisation of equality in this branch of the law, or have they the potential to do so?

7 3 Doctrines within the classical theory which could redress inequality

First of all, the doctrines of *duress* and *undue influence*, introduced to ensure the voluntariness of contract, may be transformed by the courts by means of the inclusion of economic duress,[101] as well as the shortage of resources caused by

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95 Collins 120; *Metro Western Cape (Pty) Ltd v Ross* 1986 3 SA 181 (A); cf the enforcement of lease contracts even though they are in contravention of the Rent Control Act 80 of 1976 in Cooper *Landlord and tenant* (1994) 16.

96 S 13 Act 75 of 1980; cf also Kronman 764 794 ff.

97 Friedmann 123.

98 75 of 1980.

99 73 of 1968.

100 80 of 1976.

101 Atiyah *An introduction to the law of contract* (1989) 284 where he states that both duress and undue influence have to do with "redressing the balance between the parties in particularly gross cases of inequality . . ."; *Chitty on contracts* vol I *General principles* (1989) no 503 (conclusion); Treitel *The law of contract* (1991) 363; Cartwright *Unequal bargaining* (1991) 157–158. For the French law where economic duress is recognised to some extent, cf Ghestin *Traite de droit civil, Le formation du contrat* (1993) no 580; for the American law where economic duress is recognised cf *The American*

continued on next page

poverty and ignorance.[102] Although these factors are considered irrelevant in terms of the traditional approach, expansion of these doctrines can be used potentially, to examine the problem of unequal bargains.[103] However, the introduction of elements such as resources, poverty, ignorance and costs into the question of voluntariness, would invalidate many everyday contracts, since most consumers lack the resources to make a considered and informed choice about the products they buy; many employees have few options but to accept their contracts of employment, and the tenant has the choice between high rent and homelessness; and many necessities of life are offered by monopolies. Thus a distinction will have to be made between ordinary inequality in the market and the kind of inequality for which the law of contract can and should provide relief. The South African courts have, unfortunately, not been required to express themselves on this issue. However, the thin edge of the wedge has been introduced by the legislation regulating door-to-door sales[104] in terms of the Credit Agreements Act, and consequently a shortage of resources has been taken into consideration. Thus illiteracy and naivety in business have been implicitly recognised as relevant factors.

7 4 Implied terms

Implied terms appear to be another suitable mechanism for securing equality, because of their flexibility and their compatibility with the principles of the classical law.[105] Their flexibility make it possible to redress inequalities arising from both privileged access to information and superior expertise, while their compatibility with the classical principles enables the courts to remain purely technical. In this regard the courts have on occasion been prepared to import an implied term where it was in the public interest.[106] In legal language, the expression "implied term" is an ambiguous one in that it is often used, without discrimination, to denote two or three different concepts. First of all, it is used to describe an unexpressed provision of the contract which the law imports into it,

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Law Institute, Restatement of the law second, Contracts vol 2 (1981) 482; Dalton 1985 *Yale LJ* 1029; Dawson "Economic duress – an essay in perspective" 1947 *Mich LR* 254 ff; Hale 621 ff.

102 Van der Merwe *et al Contract* 96 ff.

103 Dalton 1985 *Yale LJ* 1029; Hale 603 612 621 ff.

104 Eg, s 13 of the Credit Agreements Act provides the credit receiver with the opportunity to reconsider his position if he is of the opinion that he has entered into a contract hastily because of pressure. In this instance he may unilaterally cancel the contract without committing breach of contract (cf Grove and Jacobs *Basic principles of consumer credit* (1993) 20 ff).

105 Collins 122.

106 Vorster *Implied terms in the law of contract in England and South Africa* (1987) 177–178; Vorster "The basis for the implication of contractual terms" 1988 *TSAR* 172–177; Findlay and Kirk-Cohen "On fictitious interpretation" 1953 *SALJ* 147–148; Lotz *Die billikheid in die Suid-Afrikaanse kontraktereg* (unpublished inaugural lecture Unisa 1979) 12; Scholtz "*Pacta sunt servanda* en verandering van omstandighede na kontraksluiting" 1976 *Responsa Meridiana* 153; Van der Merwe *et al Contract* 199–200; Kerr *The principles of the law of contract* (1989) 274.

generally as a matter of course, without reference to the actual intention of the parties. The intention of the parties is not totally ignored. Such a term is not normally implied if it is in conflict with the express provisions of the contract. On the other hand, it does not originate in contractual consensus: it is imposed by the law from outside. Terms are often implied by law in cases where it is by no means clear that the parties would have agreed to incorporate them into their contract. Examples of such terms implied by law are found in the law of sale in the seller's implied warranty against defects; in the law of lease, in the undertaking by the lessor as to quiet enjoyment and absence of defects; and in the law of negotiable instruments in the engagements of drawer, acceptor and endorser, as imported by sections 52 and 53 of the Bills of Exchange Act 34 of 1964. Such implied terms may derive from common law, trade usage or custom, or from statute. Secondly, "implied term" is used to denote an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the court from the express terms of the contract and the surrounding circumstances. It may be said that in supplying such a term the court is declaring the whole contract entered into by the parties. Consequently, the court implies not only terms that the parties must actually have had in mind, but did not bother to express, but also terms which the parties, whether they actually had them in mind or not, would have expressed if the question or the circumstances had been drawn to their attention.[107] This process of implying terms can be described as the development by the courts of standard models of fair contracts which contain a fair distribution of rights and obligations between the parties, with the aim of keeping the parties within those limits, unless they have clearly and unequivocally contracted out of those traditional obligations.[108] By means of such a technique the courts could rectify inequalities of knowledge and skill between the parties by imposing duties on the stronger party.

7 5 Good faith

The hegemony of the classical theory in the South African law of contract and the principle of individual autonomy has been tempered by the expectations of a countervailing principle, namely that good faith in contractual relations requires protection.[109] The duty to contract in good faith governs the creation, consequences and performance of contracts[110] and has the potential to take inequality between contracting parties into consideration to redress the situation. Although it has explicitly been said that the South African legal system is equitable,[111] the current position in regard to the application of the principle of good faith only

107 *Alfred McAlphine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 531 ff.

108 Collins 122.

109 Lubbe and Murray 26.

110 *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A); *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W).

111 *Bank of Lisbon & South Africa Ltd v De Ornelas supra* 606.

goes so far as to accept that contracts are acts which involve good faith.[112] Good faith serves as an overriding contractual norm, which underlies the substantive law.[113] It is submitted[114] that what is necessary is that good faith be given concrete content in its application both to particular instances and to the operation of the contract. This would make it possible to supplement or limit the operation of contracts.[115] In this sense, good faith requires development,[116] either by way of specific applications, or by being imposed as a general duty. At present, there is no direct requirement in our law of contract that parties to a contract must perform in good faith.[117] The courts give expression to the requirement of good faith by indirect means,[118] namely by interpretation of the contract[119] and by *ex lege*[120] and tacit terms.[121] These indirect methods have proved to be unreliable, since application of the norm of good faith takes place indirectly within the boundaries of the intention theory, as a result of which courts are hesitant to project *ex lege* and tacit terms on contracts. However, a properly developed norm of good faith could provide the justification for the implication of *ex lege* and tacit terms on contracts.[122] Development in this regard will depend on the content ascribed to the norm of good faith in the future. The introduction of the right to equality in positive law will provide a powerful determinant of the content of this ambiguous, underdeveloped open norm in the law of contract. This will promote the just enforcement of contracts. It should provide a mechanism by means of which South African contract doctrine can move away from a

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112 Van der Merwe *et al* 232; *Meshkin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) 802; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis supra* 652; *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) 433.

113 Lubbe and Murray 391; Van der Merwe *et al Contract* 232.

114 Van der Merwe *et al Contract* 233 and fn 406.

115 *Tuckers Land & Development Corporation (Pty) Ltd v Hovis supra* 645; Van Huyssteen and Van der Merwe "Good faith in contract: proper behaviour amidst changing circumstances" 1990 *Stell LR* 244; *Bank of Lisbon & South Africa Ltd v De Ornelas supra* 613.

116 *Bank of Lisbon & South Africa Ltd v De Ornelas supra* 616C where Jansen JA stated that *bona fides* in our law has not yet developed to the extent that it has absorbed the principles of the *exceptio doli generalis*.

117 Van der Walt "Die huidige posisie in die Suid-Afrikaanse reg met betrekking tot onbillike kontraksbedinge" 1986 *SALJ* 659 is of the opinion that it is doubtful whether the courts will develop such a requirement in the future.

118 Van der Walt 1986 *SALJ* 652; Brassey "The common law right to a hearing before dismissal" 1993 *SAJHR* 179.

119 Lubbe and Murray 469.

120 In *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) 433C the duty to disclose material facts was regarded as *ex lege* rather than *bona fide* duty. Cf Van der Merwe, Lubbe, Van Huyssteen "The *exceptio doli generalis: requiescat in pace – vivat aequitas*" 1989 *SALJ* 242 are of the opinion that a properly developed conception of good faith could provide the reason for the implication of a duty *ex lege*.

121 Van der Walt 1986 *SALJ* 653.

122 Van der Merwe *et al* 1989 *SALJ* 242.

rigidly individualistic stance to one which takes into account the structural inequalities in society.[123]

7 6 Public policy

The principle of *pacta sunt servanda*, one of the foundations of the classical theory of contract, is not adhered to in all instances and every legal system recognises exceptions.[124] In the case of contracts perceived as incompatible with general social customs, the principle of freedom of contract and the rule that contracts seriously concluded should be enforced, are superseded by other policy considerations.[125] Thus certain contracts are not enforced for the sake of the public interest.[126] The reason for the conferment of this jurisdiction has gradually been transformed. In the classical period, judges exercised this power in order to express disapproval of certain behaviour and to avoid being perceived to condone it. The modern rationale for this supervisory jurisdiction emerging from the reported decisions, is the broader concept of paternalism. This was clearly illustrated in the landmark decision of *Sasfin (Pty) Ltd v Beukes*,[127] in which it was held that agreements that are inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will not be enforced on the grounds of public interest. This interpretation of public interest has unfortunately been viewed with grave resistance by the judiciary[128] and has not been applied to provide the much needed latitude which our law requires in this regard. Nevertheless, it has been held in contracts in restraint of trade, that courts will be less inclined to find a clause which may be considered to work unreasonably *inter partes* as contrary to public policy and therefore unenforceable, than in the case where one of the parties may well be considered to have contracted from a position of inferiority.[129] This also applies to contracts between an employer and employee.[130] To determine public interest is especially difficult in a heterogeneous society.[131] In this regard not many criteria have been identified to guide a court in its function of weighing conflicting issues of public interest. There has been no serious examination of matters of which a court may take judicial notice in this regard, nor of the type of evidence relevant to an assessment of the requirements of public interest.[132]

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123 Lubbe and Murray 469.
124 *Idem* 237.
125 Christie *The law of contract in South Africa* (1991) 419 ff; Wessels *The law of contract in South Africa* 2ed by Roberts (1951) par 463 480 ff; Joubert *General principles of the law of contract* (1987) 132–151.
126 Van der Merwe *et al Contract* 140 and fn 2 3.
127 1989 1 SA 1 (A).
128 *Standard Bank of South Africa v Wilkinson supra* 822; *Standard Bank Financial Nominees (Pty) Ltd v Bamberger* 1993 4 SA 84 (W); *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* 1993 4 SA 206 (W).
129 Cf *Basson v Chilwan* 1993 3 SA 742 (A) 762I–J 763A–B.
130 *New United Yeast Distributors (Pty) Ltd v Brooks* 1935 WLD 75 83 ff; *Van de Pol v Silberman* 1952 SA 561 (A) 571E–572A; *Wohlman v Buron* 1970 2 SA 760 (C) 764; *Malan v Van Jaarsveld* 1972 2 SA 243 (C) 246A–247F.
131 Van der Merwe *et al Contract* 140.
132 *Ibid.*

Neither has the issue of conflicting values and customs inherent in any society composed of people of various beliefs, ideologies or cultures been examined.[133] Thus good faith is not the only norm that informs the structure and content of contract law, but it is one determinant among many other open norms such as reasonableness, equity and public policy to which the principle of equality will give content in the future.

7 7 Equitable jurisdiction

It is submitted that the principle of equitable jurisdiction, which has been proposed by the South African Law Commission,[134] could replace the strict enforcement of contracts advocated by the classical theory. In this regard it is to be noted that South African courts are generally of the opinion that the law of contract does not recognise a judicial discretion in the enforcement of an unconscionable contract or term.[135] Neither Roman-Dutch nor South African law provides a general substantive defence based on equity.[136] In administering the law, due regard is paid to considerations of equity only in those instances where equity is not inconsistent with legal principles.[137] Equity cannot override a clear rule of law. Nevertheless, recognition of the right to equality will force the law of contract to move towards the broader concept of paternalism; a paternalism extending its sphere beyond that of warding off moral corruption to the regulation of the relations of power between parties to a contract with morally inoffensive purposes. This can be effected either directly by way of statutory enactments imposing model contracts, or indirectly, by extending the duty to negotiate in good faith, or by utilising the concept of public interest in relations of inequality.

The dominance of freedom of contract at the expense of social and economic realities is obvious in our case law.[138] Most judges ignore the discrepancy between the formal requirements of freedom and equality and socio-economic reality, and continue to uphold the assumptions of the nineteenth century. In this respect they share the sentiment of the courts in most countries, namely that postulates such as equality and freedom are political values and as such must be made part of legal reality by the legislator and not by the judiciary. Thereby they refuse to use the judicial function for measures of social and economic redistribution. The traditional South African law of contract appears to have limited means available[139] or a limited inclination[140] to adapt the existing doctrines to

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133 Lubbe and Murray 241.

134 Project 47.

135 *Bank of Lisbon & South Africa Ltd v De Ornelas supra* 580.

136 *Idem* 605 606 609–610.

137 *Idem* 606A.

138 Cf fn 75 *supra*.

139 *Bank of Lisbon & South Africa Ltd v De Ornelas supra* 610A where Joubert JA made the following statement: "Even in our modern textbooks on the law of contract hardly any mention is made of *bona fides* unless it is based on some substantive rule of law."

140 Cf the decisions regarding reported cases of suretyship contracts since *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A), eg *Standard Bank of South Africa v Wilkinson supra*, *Standard*

continued on next page

ensure equality in this field, as the courts only touch upon the fringe of the chasm that exists between formal equality and the actual inequality caused by socio-economic differences.

7 8 Doctrine of inequality

It is submitted that the right to equality coerces the law of contract to develop a doctrine of inequality. As has been suggested, the mechanisms to guarantee contractual equality are available, and are part of South African contract law. However, as there is a reticence to apply these mechanisms, another rather more drastic solution can be proposed: to introduce into contract law the right to equality by way of the doctrine of inequality.

As stated earlier, equality and its concomitant inequality are relative concepts. It is, however, possible to evaluate the comparative positions of the parties and the comparative degree of control enjoyed by the parties during the conclusion of their contract. This doctrine of inequality forces the courts to examine the fairness of the market relations and the fairness of the practices therein,[141] instead of assuming a satisfactory level of resources for each party and fairness of market relations. The crucial question becomes the unfairness of the market and evidence of this is provided by the terms of the contract.[142] Too literal an interpretation of this doctrine could lead to the invalidation of all contracts in which one of the parties has vast financial or other resources. But this would be a misconstruction.[143] Inequality of resources can be counterbalanced by competition or information.

In England the principle of inequality of bargaining power was proposed by Lord Denning in *Lloyds Bank Ltd v Bundy*[144] in which he formulated a general proposition that a contractant who enters into a very unfair contract and whose bargaining power is grievously impaired by reason of his own needs or desires, may rescind the contract if undue influence or pressures have been brought to bear on him.[145] The effect of Lord Denning's judgment was that it accepted the principle of inequality of bargaining power as a test to ascribe responsibility.[146]

It follows, therefore, that by forcing the courts to examine the fairness of the market, elements such as poverty, illiteracy, homelessness and ignorance, will be brought into the law of contract and the courts will be able to challenge the distribution of wealth achieved by an unfettered market. The existing reluctance to intervene will fall away and the courts will be forced to make a moral decision about the desirability of enforcing contracts and a concern to ensure fair market conditions.

Bank Financial Nominees (Pty) Ltd v Bamberger supra 84 and *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd supra* 206.

141 Collins 66; Dalton 1985 *Yale LJ* 1036 ff; Feinman "Critical approaches" 857 ff.

142 Collins 67; Gabel and Feinman *Politics* 183; cf Dalton 1985 *Yale LJ* 1031 ff 1036 ff; Feinman "Critical approaches" 857 ff.

143 Collins 68.

144 1975 QB 326 3 All ER 757.

145 Van der Merwe *et al Contract* 96.

146 Collins 68 ff; Atiyah *Essays on contract* (1986) 343 ff; Smith *The law of contract* (1993) 242 ff; *contra Anson's Law of contract* 26ed (ed Guest) 249.

8 CONCLUSION

Classical law regarded the market sphere as composed of egotistic individuals, each maximising his or her self-interest at the expense of others. Modern law rejects this classical ideal both as an interpretation of business practice and as a normative ideal. The right to equality aspires to an egalitarian society and therefore demands that the legal rules governing the market control the contractual allocation of power between the parties. The law of contract regulates transactions in the market and thus also the distribution of wealth. The right to equality insists that the law take the distributive consequences into consideration. Freedom of contract is based on the assumption that contracting parties possess equal resources. However, the inequality of resources necessitates the law examining the actual resources of contracting parties. The principle of equality does not mean that the law prohibits the acquisition of power, wealth and knowledge, but requires that these resources be utilised in a manner which protects weaker classes. The principle of equality as contained in the Constitution provides for the inclusion of the doctrine of inequality into the law of contract. It is by these means, together with an ongoing introduction of legislation, that the South African law of contract can achieve the transition from the classical to the modern. However, the judiciary generally believes that postulates such as equality, freedom and other political values, need to be made a legal reality by the legislature rather than by the courts. Whether the right to equality, which is entrenched in the Constitution and accessible to judicial interpretation, will lead to a judicial revolution in the law of contract remains to be seen.

The modern vision of contracts provides a new definition of the terms on which market transactions are to be conducted. Modern law permits the acquisition of bargaining resources, but requires skills to be exercised with care, and information to be shared to prevent the creation of unjust domination.

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Die begunstigdeklousule in die versekeringsreg: regsoorwegings en -gevolge

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SUMMARY

The beneficiary clause in insurance law: legal considerations and consequences

A life assurance policy is an important asset in any estate. One of the ways in which the policyholder can dispose of his policy proceeds, is by the insertion of a beneficiary clause in the life assurance contract. A beneficiary clause caters for those cases where the policyholder wants his policy benefits to devolve to a third party after his death. Beneficiary clauses are extremely popular in life assurance contracts. Their widespread use can be attributed to a variety of factors, most notable of which is that the policy proceeds are immediately made available to the beneficiary. The beneficiary clause is, in essence, a mechanism that affords speed, convenience and cost-effectiveness to all the parties concerned.

Despite this popularity, there are still uncertainties regarding various aspects of the beneficiary clause. These uncertainties, such as the rights of the various parties in a given situation (insolvency, marriage, etcetera), originate from the *stipulatio alteri*, which is the legal construction underlying the beneficiary clause.

These uncertainties result in practical problems. It is furthermore evident that, in addition to these practical problems, certain aspects of the law regarding beneficiary clauses are in dire need of legislative or judicial attention. The article provides a legal and practical exposition of the beneficiary clause, focusing on the problems that arise in certain circumstances, as well as the proposed solutions to these problems.

To understand the beneficiary clause, one needs first to distinguish the *stipulatio alteri* from other legal concepts such as cession, agency and the *adiectus solutionis causa*. The nature of the *stipulatio alteri* is also investigated. This is essential if one considers the two forms that the beneficiary clause may take, that is, it may be revocable or irrevocable. A concomitant factor in this regard is the legal position of the beneficiary in each of the above-mentioned cases. This is linked to the rights of the parties upon their insolvency, as well as the legal position of the beneficiary clause in a marriage in community of property. In the latter case the Insurance Act and the Matrimonial Property Act are not on par, and need to be addressed by the legislator. A further aspect that warrants inspection is the revocation of the beneficiary clause by the policyholder in his will. As the legal position in this regard is dualistic, it leads to legal uncertainty for the parties concerned, especially for the insurer. The tax consequences of the beneficiary clause are also scrutinised.

1 INLEIDING

Die begunstigdeklousule by 'n lewenspoliskontrak is 'n algemene en gewilde verskynsel in die Suid-Afrikaanse lewensversekeringsreg. Die begunstigdeklousule verskaf 'n meganisme waardeur die polishouer kan bewerkstellig dat

die polisvoordele ná sy dood so spoedig moontlik aan 'n betrokke persoon, die begunstigde, betaal word.

Dié praktiese gewildheid is toe te skryf aan 'n aantal faktore. Een van die faktore is dat die sterftevoordeel onmiddellik aan die begunstigde beskikbaar gestel word. Laasgenoemde hoef dus nie te wag tot na die afhandeling van die bestorwe boedel voordat hy die betrokke sterftevoordeel verkry nie. 'n Verdere voordeel van die begunstigdeklousule is dat die sterftevoordeel nie deel uitmaak van die bestorwe boedel vir doeleindes van die berekening van eksekuteursvergoeding nie. Die gewildheid van die begunstigdeklousule is dus primêr geleë in die relatiewe gerief wat dit vir alle partye meebring.

Die begunstigdeklousule is 'n verskyningsvorm van die beding ten behoewe van 'n derde – die *stipulatio alteri*. Die beding ten behoewe van 'n derde is 'n regsfiguur van die kontraktereg wat ook wyer aanwending vind.[1] So word die beding byvoorbeeld met vrug in die versekeringsreg,[2] die maatskappyereg[3] en die trustreg[4] aangewend.

'n Beding ten behoewe van 'n derde vind in versekeringsverband plaas waar twee partye, die *stipulans* (die polishouer) en die *promittens* (die versekeraar), 'n kontrak sluit ingevolge waarvan die *promittens* onderneem om teenoor 'n derde te presteer indien die derde (die begunstigde) die bevoegdheid uitoefen om, deur die *promittens* in kennis te stel, 'n kontrak tussen homself en die versekeraar te sluit.[5] 'n Omvattende omskrywing van die beding lui soos volg:

> "A contract in favour of a third person is a contract in terms of which one party, the promittens, agrees with another party, the stipulans, that he will perform something for the benefit of a third person . . . The appellate division has stated that a contract for the benefit of a third person is not simply a contract to benefit a third person, but is a contract between two persons which is designed to enable a third person to step in as a party to a contract with one of those two."[6]

In versekeringsverband gebeur dit dus dat die polishouer[7] en die versekeraar ooreenkom dat die sterftevoordele ingevolge die polis by die dood van die polishouer aan die begunstigde aangebied moet word.[8]

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1 Lubbe en Murray *Farlam and Hathaway. Contract – cases, materials and commentary* (1988) 408–409; Christie *The law of contract in South Africa* (1991) 313–314.

2 By die begunstigdeklousule: *Borman & De Vos v Potgietersrusse Tabakkorporasie* 1976 3 SA 488 (A) 506F–507A: Davis *Gordon & Getz: The South African law of insurance* (1993) 277 329.

3 Waar 'n promotor optree namens 'n te stigte maatskappy: *Nine Hundred Umgeni Road (Pty) Ltd v Bali* 1986 1 SA 1 (A) 4J; Oosthuizen "Die aanspreeklikheid van die maatskappypromotor by voorinlywingskontrakte" 1986 *TSAR* 360.

4 Die beding is onderliggend aan 'n trust *inter vivos*: *Crookes NO v Watson* 1956 1 SA 277 (A); *CIR v Crewe* 1943 AD 656.

5 *Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 3 SA 155 (A) 172A.

6 Reinecke en Van der Merwe *General principles of insurance* (1989) 243. Sien die omskrywing in die *Crookes*-saak *supra* 291B–C en die *Joel Melamed*-saak *supra* 172B–D wat byna *verbatim* dieselfde is.

7 Vir doeleindes van dié bespreking is die polishouer ook die versekerde lewe.

8 Sekere versekeraars laat wel toe dat die hele poliskontrak, en nie net die sterftevoordele nie, begunstig kan word. Dit is die geval waar die polishouer en die versekerde lewe van

vervolg op volgende bladsy

Die beding ten behoewe van 'n derde is egter 'n omstrede figuur in die Suid-Afrikaanse reg, aangesien die aard, werking en gevolge daarvan in sekere gevalle onduidelik en onseker is. Die onderlinge meningsverskil tussen die howe en die skrywers oor hierdie aspekte is 'n direkte uitvloeisel van dié onsekerheid.[9] Dit is gevolglik net logies dat die onduidelikhede na die begunstigdeklousule sal deurwerk en tot praktiese probleme in die versekeringsbedryf sal lei.[10] Die gevolg hiervan is dat daar, ten spyte van die gewildheid van die begunstigdeklousule, steeds sekere aspekte is wat onseker is, soos die regte van die onderskeie partye in 'n aantal gevalle, byvoorbeeld by insolvensie van die polishouer, 'n huwelik binne gemeenskap van goed, asook die testamentêre bevoegdheid van die polishouer met betrekking tot daardie polis.

Ten einde regsekerheid te bereik – van kardinale belang in die versekeringsbedryf – moet daar sekerheid wees oor veral die regsaard en werking van die begunstigdeklousule, asook die onderskeie partye se regte en pligte in sekere omstandighede. Daar sal egter ook gesien word dat daar verskeie probleme ontstaan het betreffende bogenoemde aspekte. Die doel van dié artikel is dus tweeledig: eerstens word daar gepoog om 'n uiteensetting te gee van die regs- en praktiese implikasies van die begunstigdeklousule, en tweedens word gepoog om, waar toepaslik, voorstelle te maak ten einde sekere probleme aan te spreek.

2 DIE BEGUNSTIGDEKLOUSULE EN ANDER REGSFIGURE

Die beding ten behoewe van 'n derde is 'n kontrak tussen twee persone wat beoog om 'n derde te betrek by hulle verbintenis met die gedagte dat die derde 'n kontrak met een van hulle sluit.[11] In dié opsig is die bedoeling van die partye deurslaggewend: die derde moet 'n kontraksparty word en nie bloot 'n ekonomiese of 'n ander voordeel uit die kontrak tussen die *stipulans* en die *promittens* verkry nie.[12] In die regspraak is 'n beding ten behoewe van 'n derde al onderskei van daardie gevalle waar 'n derde bloot 'n voordeel uit die kontrak verkry:

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mekaar verskil, en die polishouer te sterwe kom terwyl die versekerde lewe nog nie oorlede is nie. In so 'n geval word al die regte ingevolge die polis aangebied, by aanvaarding waarvan die begunstigde dan eienaar van die polis word. Dié geval word egter nie in die onderhawige bespreking behandel nie. Sien *supra* vn 7.

9 Sien bv Van Jaarsveld (red) *Suid-Afrikaanse handelsreg* vol 1 (1988) 115; Reinecke en Van der Merwe 242–243; Malan "Gedagtes oor die beding ten behoewe van 'n derde" 1976 *De Jure* 85.

10 Veronderstel die polishouer en die begunstigde kom tesame in 'n ongeluk te sterwe. In so 'n geval ontstaan die vraag aan wie die versekeraar moet betaal: die boedel van die polishouer of dié van die begunstigde? Veronderstel byvoorbeeld die polishouer vul die begunstigdeklousule ten gunste van X in, maar benoem Y as erfgenaam van die polisvoordele in sy testament. Aan wie moet die versekeraar uitbetaal: X of Y?

11 Sien in dié opsig die toonaangewende *Crookes*-saak *supra* 291B–F.

12 Otto "Oorsig van regspraak" 1987 *De Rebus* 78; *Goldfoot v Myerson* 1926 TPD 242 247; *Commercial & Industrial Holdings (Pty) Ltd v Braamfontein Industrial Sites (Pty) Ltd* 1969 1 SA 479 (T) 493E–H; *Joel Melamed*-saak supra 172E–F.

> "The mere fact that a third party may gain an advantage from an agreement does not necessarily point to the existence of a stipulation in his favour because there is a material difference between the case where the parties to an agreement intend that an obligation be created in favour of a third person and to that where the parties agree, purely for their own convenience, that one of them will render performance to a third party, without the intention to create a claim for the third party."[13]

'n Beding ten behoewe van 'n derde moet ook van 'n drieledige ooreenkoms, dit wil sê waar drie partye *ab initio* kontrakteer, onderskei word.[14] By die beding word die derde 'n party tot 'n selfstandige kontrak tussen homself en die *promittens*, terwyl die derde by 'n drieledige ooreenkoms van aanvang af 'n kontraksparty is. Daar is by laasgenoemde ooreenkoms eintlik nie sprake van 'n derde nie aangesien daar drie kontrakspartye is.[15]

Die kontrak ten behoewe van 'n derde persoon moet verder onderskei word van verteenwoordiging,[16] die regsfiguur waardeur een persoon, die agent, 'n regshandeling verrig namens of vir 'n ander, die prinsipaal.[17] Die *stipulans*, anders as die agent, het geen mandaat van die prinsipaal nie.[18] In die geval van verteenwoordiging kom 'n kontrak tussen die prinsipaal en die derde onmiddellik tot stand. In teenstelling hiermee kom 'n kontrak tussen die *promittens* en die derde tot stand eers wanneer die derde die aanbod aanvaar. Verder, die *stipulans* sluit nie die kontrak in die naam van die derde nie, soos die geval is by verteenwoordiging waar die agent die kontrak in die naam van die prinsipaal sluit.

'n Verdere regsfiguur wat van 'n beding ten behoewe van 'n derde onderskei moet word, is die *adiectus solutionis causa*.[19] Twee partye (byvoorbeeld A en B) kom ooreen dat A aan 'n derde kan betaal en sodoende aan sy verpligting teenoor B voldoen. Die tegniese benaming vir dié derde is 'n *adiectus solutionis causa*. Indien A aan die *adiectus* betaal, voldoen hy aan sy verpligting teenoor B.[20] Die derde is nie 'n agent nie aangesien hy geen regte het om ingevolge die kontrak (tussen A en B) te eis nie: sy regte is beperk tot ontvangs van die betaling.[21] By die beding word die derde deur aanname van die aanbod 'n party tot 'n selfstandige kontrak tussen homself en die *promittens*.

Die beding moet laastens van sessie onderskei word. Alhoewel die doel van die twee regsfigure dieselfde is, te wete die polishouer wil die polisvoordele aan 'n derde laat toekom, verskil hulle tog van mekaar. By 'n sessie gaan

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13 *Barnett v Abe Swersky & Associates* 1986 4 SA 407 (K) 411F–H.
14 Sien bv *Consolidated Frame Cotton Corp Ltd v Sithole* 1985 2 SA 18 (N) 23I–J.
15 *Idem* 23I–24A.
16 Van Jaarsveld 114–115; Christie 314–316.
17 Joubert *Die Suid-Afrikaanse verteenwoordigingsreg* (1979) 1.
18 Van Jaarsveld 115.
19 Sien Joubert "*Solutionis causa adjectus*" 1979 *THRHR* 1.
20 Lubbe en Murray 706–709.
21 Christie 320; *Malelane Suikerkorporasie (Edms) Bpk v Streak* 1970 4 SA 478 (T) 482B–H. In teenstelling hiermee verkry die derde by die beding wel die reg om ingevolge die beding te eis en daardie regte in 'n geregshof af te dwing: sien bv *Young v Liberty Life Association* 1991 2 SA 246 (W); sien ook Lubbe en Murray 706; *Palmer v President Insurance Co Ltd* 1967 1 SA 673 (O).

eiendomsreg onmiddellik op die sessionaris oor sodat die sedent tydens sy lewe geensins handelingsbevoegdheid ten opsigte van die polis het nie. By die begunstiging word die reg om die sterftevoordele te eis gewoonlik aan die begunstigde oorgedra, maar dan slegs by dood en dit kan te eniger tyd deur die polishouer herroep word. Die polishouer behou dus sy handelingsbevoegdheid ten opsigte van die polis aangesien die polis sy eiendom bly.[22]

Die toets om 'n beding ten behoewe van 'n derde van ander regsfigure te onderskei, word soos volg deur die howe omskryf:

> "The test whether a contract is made for the benefit of a third party is whether that party, by adopting the contract can become a party to it."[23]

Die vraag of die derde die aanbod aanvaar het, is 'n feitevraag wat aan die hand van die reëls van aanbod en aanname beslis moet word.[24] By kontrakte moet ook telkens die bedoeling van die partye oorweeg word om seker te maak dat hulle inderdaad 'n beding ten behoewe van 'n derde wou sluit.[25]

'n Vraag wat soms gevra word, is of 'n begunstigdeklousule nie 'n *pactum successorium* is nie, en derhalwe ongeldig. 'n *Pactum successorium* is 'n ooreenkoms waarin die partye die vererwing van die nalatenskap (of van 'n deel daarvan, of van 'n bepaalde saak wat deel daarvan uitmaak) van een of meer van hulle na die dood van die betrokke party of partye reël.[26] 'n *Pactum successorium* is dus basies 'n ooreenkoms wat die effek het of sal hê dat 'n persoon sy testeervryheid inboet. Die howe stel twee toetse om te bepaal of 'n beding of klousule so 'n *pactum* daarstel: die vestigingstoets en die testeervryheidstoets.[27] Aangesien die begunstigdeklousule prakties altyd herroeplik is tydens die lewe van die polishouer, sal die begunstigdeklousule nie 'n *pactum successorium* daarstel nie.[28] Probleme kan egter by onherroeplike begunstigdeklousules ontstaan. Vir doeleindes van die onderhawige bespreking word egter aanvaar dat 'n onherroeplike begunstiging geen *pactum successorium* daarstel nie.

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22 By sessie sal die sedent dus bv nie meer die dekking op die polis of die premie kan verhoog nie. By die begunstigdeklousule kan die polishouer, ten spyte van die begunstiging, steeds bogenoemde bevoegdhede uitoefen.

23 *Jankelow v Binder, Gering & Co* 1927 TPD 364 370; *Goldfoot*-saak *supra* 247.

24 Lubbe en Murray 408; *Buttar v Ault* 1950 4 SA 229 (T) 238E.

25 *George Ruggier & Co v Brook* 1966 1 SA 17 (N) 23H. Die bedoeling van die partye is deurslaggewend om te bepaal of daar inderdaad 'n beding ten behoewe van 'n derde is: *Protea Holdings Ltd v Herzberg* 1982 4 SA 773 (K) 779G–H.

26 *Borman*-saak *supra* 501A–B; *Jubelius v Griesel* 1988 2 SA 610 (A) 622A–C; Hutchison "Isolating the *pactum successorium*" 1983 *SALJ* 221.

27 Radesich en Roos "The effect of a resolutive condition on the formation of a *pactum successorium*" 1988 *TSAR* 572; *Jubelius*-saak *supra* 623.

28 Die grondslag van 'n *pactum successorium* is die feit dat die persoon wat mbt sy eie opvolging kontrakteer, homself tot daardie kontrak yerbind. Hy sal nie vir homself die eensydige reg voorbehou om die begunstiging te herroep nie: sien *Ex parte Calderwood: In re Estate Wixley* 1981 3 SA 727 (Z) 735G.

3 AARD VAN BEDING

'n Belangrike kenmerk van die begunstigdeklousule is dat dit een van twee verskyningsvorme kan aanneem. 'n Begunstigdeklousule kan naamlik herroeplik of onherroeplik wees. Dié verskil is belangrik aangesien die spesifieke verskyningsvorm sekere gevolge meebring wat belangrike implikasies vir die partye en hulle regte het. Die onderlinge regsverhouding tussen die partye verskil ook na gelang van die spesifieke verskyningsvorm. Daar moet egter in die opsig pertinent genoem word dat die onherroeplike begunstiging tans, sover vasgestel kan word, deur geen lewensversekeraar gebruik word nie. Die bespreking oor die onherroeplike begunstigdeklousule is dus hoogstens teoreties van aard.

By 'n herroeplike begunstigdeklousule mag die polishouer die klousule te eniger tyd herroep of wysig.[29] In die praktyk sal dit van die bewoording van die klousule afhang of die begunstigde inderdaad enigiets voor die polishouer se dood kan aanvaar. In die meeste gevalle word aanvaarding voor dood van die polishouer deur 'n sogenaamde "geen regte"-klousule uitgesluit. Die klousule is so bewoord dat dit duidelik gestel word dat daar geen aanvaarding voor dood kan wees nie. Die partye se bedoeling is juis dat die derde, terwyl die polishouer nog lewe, geen reg of bevoegdhede verkry nie. In daardie beperkte gevalle waar aanvaarding wel moontlik is voor die dood van die polishouer, is sy regte onderworpe aan 'n ontbindende voorwaarde.[30]

Die herroeping deur die polishouer kan eensydig, uitdruklik of stilswyend, geskied. Enige polis waarvan die aanwysing van 'n begunstigde herroepbaar is (en waar 'n "geen regte"-klousule geld), bly die eiendom van die polishouer aangesien die regte van die begunstigde gewoonlik eers by die afsterwe van die versekerde vestig.[31]

Indien die polishouer egter 'n onherroeplike begunstigdeklousule in sy polis sou vervat, verkry ander partye ook regte tot die benoeming.[32] Die polishouer mag die benoeming bloot met die toestemming van die begunstigde herroep mits laasgenoemde die benoeming aanvaar het. Alvorens die begunstigde die benoeming aanvaar, verkry hy geen regte uit die beding tussen die versekeraar en die versekerde nie.[33] Die polishouer het selfs voor aanvaarding deur die begunstigde geen reg om die aanwysing eensydig te herroep nie, tensy hy wel só 'n reg ingevolge 'n kontraksklousule verkry het. Ontbreek só 'n reg, moet die toestemming van die versekeraar verkry word alvorens die benoeming herroep word. Indien die begunstigde voor aanvaarding te sterwe kom, val die reg op aanvaarding die eksekuteur van sy bestorwe boedel toe.[34] Volgens Bouwer[35] is

29 Davis 335.
30 Bouwer *Die regte van derdes ingevolge versekeringskontrakte* (LLD-proefskrif Unisa 1990) 321.
31 *Idem* 320–322.
32 Sien die opmerkings hierbo oor die afwesigheid van enige praktiese aanwending van die onherroeplike begunstiging.
33 Reinecke en Van der Merwe 247–248; Christie 320.
34 *Mutual Life Insurance Co of New York v Hotz* 1911 AD 556 567.
35 324.

'n onherroeplike begunstiging wat voor die dood van die polishouer aanvaar word, ook nog steeds onderworpe aan 'n ontbindende voorwaarde, te wete dat die polishouer nie die poliskontrak gedurende sy lewe kanselleer of laat verval deur nie-betaling van die premies nie.

Uit bogenoemde blyk duidelik dat die regte van die betrokke partye afhanklik is van die aard van die begunstigdeklousule. Dié regte word vervolgens in oënskou geneem.

4 DIE REGTE VAN DIE DERDE (BEGUNSTIGDE)

4 1 Algemeen

In versekeringsverband kan die derde enige natuurlike persoon, instelling of regspersoon wees. Die begunstigde moet bloot geïdentifiseer word in die poliskontrak of identifiseerbaar wees.[36] Die begunstigde hoef nog nie te bestaan by benoeming nie maar moet wel later, naamlik by dood van die polishouer, die aanbod kan aanvaar.[37] Die derde word onbevoeg om 'n voordeel te ontvang waar hy die risiko waarteen verseker word, opsetlik veroorsaak.[38] Dit kan as 'n geïmpliseerde term in die poliskontrak ingelees word, en word weens oorwegings van openbare beleid toegepas.[39] Dit is egter onduidelik of dit ook die geval by nalatige veroorsaking van dood is. Vermoedelik sal elke geval volgens eie meriete behandel word. Daar kan egter na my mening aanvaar word dat waar die begunstigde die polishouer se dood op 'n growwe nalatige wyse veroorsaak het, daardie begunstigde onbevoeg sal wees om die voordeel te ontvang.

Die regte van die derde ingevolge die begunstigdeklousule hang ten nouste saam met die konstruksie van die beding ten behoewe van 'n derde deur die howe en juriste. Die appèlhof het wel al geleentheid gehad om die aard van die beding te oorweeg.[40] Alhoewel dié saak oor die trustreg handel, kan die beginsels net so op die begunstigdeklousule van toepassing gemaak word. Die Suid-Afrikaanse reg op dié punt word soos volg opgesom:

> "The beneficiary obtains no right on the mere execution of the agreement between the settlor and the trustee. The agreement constitutes an offer of a donation by the settlor to the beneficiary through acceptance of which the beneficiary obtains a jus perfectum against the trustee."[41]

Die ooreenkoms tussen die *stipulans* (die polishouer) en die *promittens* (die versekeraar) funksioneer as 'n aanbod aan die derde om 'n kontraksparty te word.[42] Dit staan die derde uiteraard vry om dié aanbod te aanvaar of

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36 Die begunstigde is bv die oudste van die oorlewende kinders van die polishouer: sien Davis 330.

37 Reinecke en Van der Merwe 245.

38 Hy vermoor bv die polishouer.

39 Bouwer 138–139.

40 *Crookes NO v Watson supra.*

41 *Idem* 286A–C.

42 Sien ook *Gayather v Rajkali* 1947 4 SA 706 (D) 708: "Where an agreement is made for the benefit of a third party, the agreement operates as an offer to the third party"; *Malelane Suikerkorporasie*-saak *supra* 481; Malan 86–87.

nie.[43] In die versekeringsbedryf gebeur dit egter nooit dat 'n begunstigde die aanbod voor die polishouer se dood kan aanvaar nie, aangesien so 'n aanvaarding meestal deur 'n "geen regte"-klousule uitgesluit word. Aanvaarding van die aanbod lei uiteraard daartoe dat daar 'n afdwingbare verbintenis tussen die derde en die versekeraar ontstaan.[44]

Voor aanvaarding deur die derde kan die polishouer en die versekeraar ooreenkom om die kontrak tussen hulle te kanselleer en gevolglik sal die aanbod aan die derde verval.[45] Gevolglik mag die versekeraar voor aanvaarding deur die derde (en sonder dat die ooreenkoms tussen polishouer en versekeraar gekanselleer is) nie eensydig die aanbod herroep nie.[46] Die kontrak tussen versekeraar en polishouer verhinder dié eensydige optrede. Een van die gevolge hiervan is dat die polishouer onder andere 'n interdik kan verkry om die versekeraar te verhinder om sy onderneming te verbreek.[47] Dié onderneming behels dat die versekeraar onderneem om 'n kontrak te sluit met die derde wanneer laasgenoemde so verkies.[48]

By die vasstelling van die regte van die derde is dit belangrik om daarop te let dat die inhoud van die beding – en dus ook die begunstigdeklousule – uitsluitlik in die hande van die polishouer en die versekeraar is. Hulle kan gevolglik bepaal wat die regte van die derde in enige gegewe stadium sal wees.[49] Dié standpunt word goed deur die volgende aanhaling geïllustreer:

> "The essential characteristic of a contract for the benefit of the third party is that he is given the right, should he so choose, to come in as a party on the *terms*, advantageous or disadvantageous to him, *which the original parties have already agreed*."[50]

Die regte van die derde moet gevolglik aan die hand van bogenoemde oorweeg word by beide die herroeplike en die onherroeplike begunstigdeklousule.

4 2 Die herroeplike begunstigdeklousule

Daar is hierbo gesien dat die kontrak tussen versekeraar en polishouer as 'n aanbod aan die derde funksioneer.[51] Die derde kan die aanbod aanvaar,[52] met die

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43 Malan 87–88.

44 Sien bv Kerr *Principles of the law of contract* (1989) 70–82; *Botes v Afrikaanse Lewensversekeringsmaatskappy Bpk* 1967 3 SA 19 (W) 23E–G.

45 *McCullogh v Fernwood Estate Ltd* 1920 AD 204 207; *Crookes*-saak *supra* 285F–G; Gibson en Comrie *South African mercantile and company law* (1988) 97.

46 *McCullogh*-saak *supra* 207.

47 *Gardner v Richardt* 1974 3 SA 768 (K) 770A; *African Universal Stores Ltd v Dean* 1926 CPD 390 395: "In my opinion the plaintiff as one of the contracting parties is entitled to hold defendant to his agreement pending the decision of the third party."

48 Lubbe en Murray 408.

49 *Botes*-saak *supra* 23 *in fine* – 24A; Oosthuizen 1986 *TSAR* 363.

50 Coaker (red) *Wille & Millin's Mercantile law of South Africa* (1984) 76 (eie kursivering); Christie 323.

51 Sien *supra* vn 42.

52 Dit sal van die bewoording van die kontrak afhang of die derde sy aanname moet oordra aan die *promittens: Croce v Croce* 1940 TPD 251. Meestal is aanvaarding geïmpliseer, en

vervolg op volgende bladsy

gevolg dat daar 'n regsband tussen die versekeraar en die derde ontstaan. Daar moet egter verder onderskei word tussen daardie gevalle waar die derde die aanbod voor die polishouer se dood aanvaar en waar hy die aanbod aanvaar na die dood van die polishouer.

In daardie gevalle waar die begunstigde weet dat hy genomineer is, kan hy begunstiging nog voor die dood van die polishouer aanvaar.[53] Deur sy aanvaarding kom daar wel 'n regsband tussen die begunstigde derde en die versekerde tot stand.[54] In so 'n geval sal die regte van die derde egter onderworpe wees aan die voorwaardes soos deur die polishouer en die versekeraar ooreengekom.[55] Dié regte sal naamlik onderworpe wees aan 'n opskortende termyn, te wete dat die regte eers geaktiveer sal word wanneer die polishouer sterf, asook aan 'n ontbindende voorwaarde, naamlik dat die polishouer nie die begunstiging mag herroep nie.[56]

Dit moet duidelik gestel word dat aanname deur die begunstigde voor die dood van die polishouer net moontlik is by daardie poliskontrakte waarin daar geen sogenaamde "geen regte"-klousule vervat is nie. Dit is 'n klousule wat aanname op enige stadium voor die dood van die polishouer onmoontlik maak.[57] In só 'n geval maak die partye dit duidelik dat geen aanvaarding voor dood kan plaasvind nie. In die versekeringsbedryf is dit by uitstek die geval: die meeste begunstigdeklousules bevat die bepaling dat die begunstigde geen regte kan verkry voor die dood van die polishouer nie.

Waar hy die aanbod voor die dood van die polishouer (kan) aanvaar, verkry die derde wel 'n voorwaardelike reg en nie bloot 'n hoop of *spes* nie.[58] Die lewensversekeringskontrak maak by 'n herroeplike begunstiging steeds gedurende die polishouer se lewe deel van sy boedel uit.[59] Die polishouer behou

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in versekeringsverband vind aanname gewoonlik deur gedrag plaas, tw as die derde met kennis van die begunstigdeklousule optree: Reinecke en Van der Merwe 245.

53 Bouwer 140. Volgens Reinecke en Van der Merwe 247 en Davis 335 vn 169 is dit onmoontlik dat die derde voor die dood van die polishouer kan aanvaar, aangesien hy in dié stadium slegs 'n *spes* het. In *CIR v Estate Crewe supra* 675 is beslis dat die begunstigde geen reg verkry nie aangesien die reg herroep kan word deur ooreenkoms tussen versekeraar en polishouer (sien egter *supra* vn 45). Daar moet op dié punt met genoemde skrywers verskil word. Aanvaarding in die stadium verander die *spes* juis in 'n voorwaardelike reg. In *Crookes NO v Watson supra* 299F word dit soos volg gestel: "He (the beneficiary) can accept before the time of fulfilment has arrived, for, as Voet points out, acceptance turns the spes of a future action into a transferable asset."

54 Van Jaarsveld 119; Bouwer 321–322.

55 Christie 323; Coaker 76; Bouwer 321.

56 Bouwer 141 321–322.

57 Sien bv *Botes*-saak *supra* 23C; *Wolmarans v Du Plessis* 1991 3 SA 703 (T) 707C–D.

58 Sien bv *Ex parte MacIntosh NO: In re Estate Barton* 1963 3 SA 51 (N) 54C. Die verskil tussen 'n voorwaardelike reg en 'n *spes* word goed opgesom deur Scott *The law of cession* (1990) 49: "A future right or a *spes*, is a right which is not yet in existence, but which will materialise in the future. A future right should be distinguished from a contingent right, that is an existing right which is not immediately enforceable because it is, for example, subject to a condition or a time clause." Sien *supra* vn 53.

59 Davis 335; Reinecke en Van der Merwe 247–248.

dus sy beskikkingsbevoegdhede oor die polis ongeag of die derde die voordeel aanvaar het of nie.[60]

In daardie uitsonderlike geval waar die derde nie die polisopbrengs aanvaar nie, is die eksekuteur van die polishouer se boedel geregtig om te eis dat betaling aan hom moet geskied. In dié opsig is die versekeringskontrak 'n uitsondering op die algemene reël by die beding ten behoewe van 'n derde wat bepaal dat die *stipulans* nie geregtig is op die prestasie waarop die derde sou kon aandring ná aanvaarding nie.[61] 'n Verdere punt van verskil tussen die begunstigdeklousule in versekeringsverband en die gewone beding ten behoewe van 'n derde is dat by laasgenoemde die derde, benewens sekere regte, ook verpligtinge deur aanvaarding kan opdoen.[62]

4 3 Die onherroeplike begunstiging

Die benaming "onherroeplik" is in dié opsig miskien misleidend.[63] Gewoonlik word 'n begunstiging as onherroeplik bestempel indien die polishouer onbevoeg is om die begunstiging op sy eie te herroep.[64] Die aanbod kan nietemin herroep word waar die polishouer en die versekeraar ooreenkom om die aanbod te herroep voordat die derde dit aanvaar.[65]

Waar die derde die aanbod voor die dood van die polishouer aanvaar,[66] kom daar 'n regsband tussen die derde en die versekeraar tot stand en kan die aanbod nie meer deur onderlinge ooreenkoms tussen die versekeraar en die polishouer ongedaan gemaak word nie.[67] Die reg van die derde om die polisopbrengs te eis, kan egter eers by die dood van die polishouer afgedwing word.[68]

Verder moet genoem word dat mits dit nog nie herroep is nie, die aanbod aan die derde bly staan al sterf hy in dié periode. Die eksekuteur van sy boedel kan in so 'n geval die aanbod aanvaar.[69]

Indien die polishouer te sterwe kom, moet die versekeraar die aanbod aan die begunstigde maak, welke aanbod laasgenoemde na 'n redelike tyd kan aanvaar.[70]

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60 Bouwer 321.

61 Lubbe en Murray 409 som dit soos volg op: "The stipulans is not, in the absence of an agreement to this effect, entitled to such a performance . . . to which the third party would have been obliged upon acceptance."

62 Van Jaarsveld 108; Oosthuizen 1986 *TSAR* 363; *Malelane*-saak *supra* 482A–C.

63 Reinecke en Van der Merwe 247.

64 Davis 334.

65 Reinecke en Van der Merwe 247–248; Bouwer 323.

66 Dit spreek vanself dat daar in só 'n geval geen sprake van 'n "geen regte"-klousule is nie.

67 Davis 334–335. Genoemde skrywer gee in oorweging dat die begunstigde die eienaar word van die polis en dat die polishouer geensins meer 'n party is nie. Hiermee kan nie saamgestem word nie: die regte van die derde is hoogstens voorwaardelik van aard, aangesien die polishouer steeds die premies moet betaal en die kontrak nie moet kanselleer of laat verval nie.

68 Bouwer 324.

69 *Mutual Life Insurance Co*-saak *supra* 567 ev.

70 Bouwer 325; *Ex parte Calderwood NO: in re Estate Wixley* 1981 3 SA 727 (Z) 730A 737E.

Daar moet in dié opsig egter genoem word dat die onherroeplike begunstigdeklousule nie baie gewild in die Suid-Afrikaanse versekeringsbedryf is nie en sover vasgestel kon word, in onbruik verval het.[71]

5 INSOLVENSIE VAN DIE PARTYE

Die regsposisie by insolvensie moet vervolgens oorweeg word. By insolvensie moet weer eens 'n onderskeid gemaak word tussen 'n herroeplike en 'n onherroeplike begunstigdeklousule. By 'n herroeplike begunstiging val die polis te alle tye voor die dood van die polishouer in sy insolvente boedel.[72] Omdat sy benoeming te eniger tyd herroep kan word, kan die derde hoogstens 'n voorwaardelike reg onderworpe aan 'n ontbindende voorwaarde in die polishouer se insolvente boedel aantoon.[73] Intussen is die polishouer egter die persoon wat bepaal aan wie die voordele van die polis toekom.[74] Dié ontbindende voorwaarde kan te eniger tyd deur die polishouer herroep word.[75] Indien die polishouer te sterwe kom sonder om die begunstiging te herroep, word die begunstiging onherroeplik en kry die derde dienooreenkomstig regte.[76]

By 'n onherroeplike begunstiging val die polis, selfs voor aanvaarding deur die derde, nie langer in die insolvente boedel van die polishouer nie. Volgens Reinecke en Van der Merwe verkeer die begunstigde in 'n soortgelyke posisie as 'n persoon met 'n reg onderworpe aan 'n opskortende voorwaarde.[77] Die polishouer kan nie sy polis sedeer of dit afkoop nie, maar behou nogtans 'n reversionêre belang in die polis indien die derde nie die voordeel sou aanvaar nie.[78] Die regte val in die insolvente boedel van die begunstigde maar moet hanteer word soos 'n reg onderworpe aan 'n opskortende voorwaarde. Indien die derde egter alreeds aanvaar het, val die polis of die opbrengs (na gelang die geval of die versekerde oorlede is of nie) wel in sy boedel.

Indien die derde te sterwe kom vóór aanvaarding, kan die eksekuteur van sy bestorwe boedel die aanbod aanvaar.[79] In só 'n geval kan geredeneer word dat die derde se kurator by eersgenoemde se insolvensie die reg om te aanvaar behoort te ontvang.

Bogenoemde is onderworpe aan die bepalings van die Versekeringswet.[80] Ingevolge artikel 39(1) is 'n lewenspolis beskerm tot R30 000 indien 'n persoon

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71 Die hoofrede hiervoor is die feit dat polisvoordele eers ná die dood van die polishouer na die begunstigde moet oorgaan. Tydens die lewe van die polishouer is daar meestal 'n "geen regte"-klousule in werking, aangesien die praktiese behoeftes gewoonlik is dat die polishouer tydens sy lewe beheer moet behou.

72 *Wilcocks v Visser and New York Life Insurance Co* 1910 OPD 99; Reinecke en Van der Merwe 248.

73 Sien Bouwer 141 321–322.

74 Sien a 1 van die Versekeringswet 27 van 1943 *sv* "eienaar".

75 Reinecke en Van der Merwe 248: hy kan die begunstigde nl te eniger tyd vervang.

76 *Idem* 243 247.

77 *Idem* 243; Davis 334–335; Bouwer 323.

78 Davis 334 vn 156.

79 *Mutual Life Insurance Co*-saak *supra* 567.

80 Wet 27 van 1943 a 39–44.

se boedel insolvent verklaar word en daardie polis drie jaar of langer voor insolvensie uitgeneem is. Verder word die posisie van begunstigde polisse by insolvensie in artikel 44 van die wet uiteengesit. Dié artikel het betrekking op 'n lewenspolis wat 'n man uitgeneem het ingevolge artikel 42 of 43. Dié artikels maak melding van polisse wat die man gesedeer het of gesluit het "ten gunste van" sy vrou. Die betekenis van "gesluit" soos gebruik in die bewoording "gesluit ten gunste van" kan slegs "begunstig aan" beteken. 'n Persoon kan die polisvoordele kragtens sy polis aan 'n derde laat toekom slegs deur middel van 'n sessie of deur 'n begunstiging.[81]

Ingevolge artikel 44 word 'n polis wat "gesluit is ten gunste van" 'n vrou in die man se insolvente boedel beskerm tot 'n bedrag van R30 000, mits die polis ten minste twee jaar voor insolvensie van krag was en die begunstiging te goeder trou was. Die betrokke artikel meld egter net die tydperk van twee jaar wat moet verloop tussen die sluit van die polis "ten gunste van" die vrou en die datum van sekwestrasie. Dit wil uit die bewoording van artikels 42 en 43 voorkom of die man by die uitneem van die polis die bedoeling moet gehad het om dit tot voordeel van sy vrou uit te neem.[82] Gevolglik sal die beskerming van artikel 44 slegs beskikbaar wees waar die begunstiging by die uitneem van die polis geskied, en nie waar die begunstiging eers in 'n latere stadium gedoen is nie.

6 HERROEPING VAN DIE BEGUNSTIGDEKLOUSULE[83]

Uit bogenoemde blyk duidelik dat die herroeplike begunstigdeklousule te eniger tyd deur die polishouer herroep kan word. By 'n onherroeplike begunstigdeklousule kan die klousule slegs voor aanvaarding deur die polishouer en versekeraar gesamentlik herroep word. Ná aanvaarding deur die begunstigde kan die klousule slegs herroep word deur die polishouer en die versekeraar met die toestemming van die derde.

'n Problematiese aspek in dié verband is dat die versekeraar gewoonlik 'n bepaling in die begunstigdeklousule invoeg wat lui dat die herroeping slegs geldig sal wees indien dit op skrif is en die betrokke kantoor van die versekeraar voor die dood van die polishouer bereik. Wat sou die posisie wees indien die polishouer sy begunstiging nie op die voorgeskrewe wyse herroep nie, maar op 'n alternatiewe wyse, soos by wyse van 'n testament?

Die howe aanvaar nie geredelik dat die begunstigdeklousule stilswyend deur 'n testament herroep is nie, veral nie waar die testamentêre bepalings geen

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81 Daar bestaan, vir doeleindes van bg, 'n fundamentele verskil tussen sessie en 'n begunstigdeklousule. By lg sal die polis steeds in die polishouer se boedel val vir doeleindes van insolvensie, terwyl by sessie die polis in die boedel van die sessionaris val.

82 Die bewoording van die betrokke artikels benadruk die gevolgtrekking dat die polis by uitname uitgeneem moet gewees het ten gunste van die vrou. A 42(1) bepaal: "[waar] 'n man 'n lewenspolis gesluit het ten gunste van 'n vrou met wie hy voornemens was om te trou . . ."; en a 43 bepaal: "of [hy] kan 'n lewenspolis sluit ten gunste van haar . . ."

83 Sien in die algemeen Henckert "Die herroeping van 'n begunstigdeklousule deur 'n testamentêre bepaling" 1992 *TSAR* 719.

spesifieke melding van die polis maak nie.[84] Indien die polis egter voldoende in die testament geïdentifiseer word of identifiseerbaar is, bestaan daar 'n meningsverskil in die Suid-Afrikaanse reg. Aan die een kant is daar die standpunt dat só 'n klousule uitsluitlik tot voordeel van die versekeraar is en dit gevolglik deur 'n uitdruklike bepaling in 'n testament herroep kan word.[85] Die ander standpunt meen dat regsekerheid vir alle partye net bewerkstellig kan word indien die begunstigdeklousule net op die voorgeskrewe wyse[86] herroep kan word.[87] Volgens sommige beslissings[88] is dié standpunt geregverdig as in ag geneem word dat so 'n bepaling in die klousule deel van 'n kontrak is en dat alle betrokke partye 'n belang daarby het.

Hierteenoor steun die jongste regspraak weer die beskouing dat 'n begunstiging wel deur 'n uitdruklike testamentêre bepaling herroep kan word.[89] Dié standpunt werk egter nie regsekerheid in die hand nie. Dit maak die deur oop vir moontlike deliktuele eise teen die versekeraar waar hy aan die begunstigde uitbetaal het nadat die begunstigdeklousule deur die testament herroep is. Die testamentêre erfgenaam sou kon beweer dat die versekeraar nalatig was deur ingevolge die begunstigdeklousule uit te betaal het sonder om seker te maak of die testament die begunstigdeklousule herroep het al dan nie, dat hy skade (suiwer ekonomiese verlies) as gevolg van die nalatigheid gely het en dat die versekeraar daarom deliktueel aanspreeklik is.[90]

'n Verdere punt van kritiek in dié opsig is myns insiens die feit dat die doel van die bewoording van die klousule juis is dat herroeping op enige wyse anders as deur skriftelike kennisgewing uitgesluit word. Die praktiese implikasie van die jongste standpunt van die howe is daarenteen dat die klousule *inter partes* van nul en gener waarde is, al onderneem die polishouer om daaraan gebonde te wees. Dit werk egter nie regsekerheid vir die versekeraar in die hand nie.[91]

7 DIE BEGUNSTIGDEKLOUSULE IN DIE HUWELIK

Die begunstigdeklousule skep besondere uitdagings insoverre dit van toepassing is op huwelike binne gemeenskap van goed. Dit blyk dat die Suid-Afrikaanse reg veral op dié aspek ver te kort skiet en dat die vrou tans ingevolge heersende

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84 *Ex parte Calderwood NO: In re Estate Wixley* 1981 3 SA 727 (Z) 736D–F; *Ex parte MacIntosh NO: In re Estate Barton* 1963 3 SA 51 (N) 55A–C.

85 *Curtis' Estate v Gronningsaeter* 1942 CPD 531; Reinecke en Van der Merwe 248; Bouwer 319.

86 Die meeste begunstigdeklousules bevat die bepaling dat herroeping slegs geldig is indien 'n geskrewe kennisgewing te dien effekte deur die versekeraar ontvang word voor die dood van die polishouer.

87 *MacIntosh*-saak *supra* 57E–F; Davis 330–331; *Calderwood*-saak *supra* 737C–E; Henckert 724.

88 *MacIntosh*-saak *supra* 57E–F; *Calderwood*-saak *supra* 737A–B.

89 *Wolmarans v Du Plessis* 1991 3 SA 703 (T).

90 Vgl bv *Administrateur Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 832 *in fine* – 833A; *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 498C–D; Neethling, Potgieter en Visser *Law of delict* (1994) 280 ev.

91 Sien Henckert 723–724.

wetgewing "oorbeskerm" word *vis-à-vis* haar man. Dié situasie is onhoudbaar, gegewe die wetgewer se doelwit om alle verskille tussen mans en vrouens van die wetboek te verwyder.[92]

By 'n huwelik binne gemeenskap van goed moet die gades met betrekking tot bates van die gemeenskaplike boedel wedersyds toestem tot die vervreemding van sodanige bates. Artikel 15(2)(c) van die Wet op Huweliksgoedere 88 van 1984 bepaal uitdruklik dat 'n gade getroud binne gemeenskap van goed nie 'n polis van die gemeenskaplike boedel mag vervreem, sedeer of verpand sonder die geskrewe toestemming van die ander gade nie. Die Versekeringswet 27 van 1943 maak nietemin voorsiening daarvoor dat 'n vrou 'n polis mag uitneem op haar eie of haar man se lewe sonder sy toestemming of bystand en dat só 'n polis nie in die gemeenskaplike boedel val nie.[93] Dié polis is haar eiendom en sy kan daarmee handel soos sy wil. Hierteenoor moet 'n man wat 'n polis op sy eie lewe of sy vrou se lewe uitgeneem het, sy vrou se toestemming verkry as hy die polis wil vervreem.

Die vraag wat ontstaan, is of die insluiting van 'n begunstigdeklousule in 'n poliskontrak wel neerkom op 'n vervreemding vir doeleindes van die Wet op Huweliksgoedere. Alhoewel die begunstigdeklousule herroeplik is tydens die lewe van die polishouer, kan dié herroeping nie meer plaasvind wanneer die polishouer te sterwe kom nie. Dit is dus op dié stadium dat die bate vervreem word en gevolglik moet die skriftelike toestemming van die ander gade op dié stadium verkry word. Hou 'n mens in gedagte dat die doel van die wetgewer is om beide gades gelyke beskikkingsbevoegdhede ten opsigte van die gemeenskaplike boedel te gee, is dit billik om aan te neem dat die geskrewe toestemming van die ander gade verkry moet word vir die begunstiging ingevolge die polis.

Bogenoemde vereiste van geskrewe toestemming deur die ander gade geld net vir polisse wat in die gemeenskaplike boedel val. Die polisse is die volgende: waar die man 'n polis uitgeneem het op sy eie lewe; waar die polis uitgeneem is op 'n lewe anders as dié van die man, die vrou of hulle kind;[94] of waar die vrou 'n polis op haar man se lewe vóór huweliksluiting uitgeneem het. Die Versekeringswet plaas sekere polisse egter buite die gemeenskaplike boedel.[95] Dié polisse kan dus sonder toestemming vervreem word.

Dit is onaanvaarbaar dat daar ingevolge huidige wetgewing 'n onderskeid tussen die man en die vrou by 'n huwelik binne gemeenskap van goed is: indien

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92 Sien bv die aanhef tot die Vierde Algemene Regswysigingswet 123 van 1993: "Om bepalings wat onderskeid tref tussen mans en vroue te herroep of te wysig."

93 A 41(1) en (2).

94 Die polis is bv uitgeneem op 'n kind uit een van die partye se vorige huwelik of een van hulle ouers.

95 Dié polisse is die volgende: 'n polis uitgeneem deur die vrou op haar eie lewe (a 41(1)); 'n polis uitgeneem deur die vrou op haar man se lewe (a 41(2)); 'n polis op die man se lewe wat hy aan sy vrou gesedeer het (a 42(1)); 'n polis op die vrou se lewe of hulle kind se lewe wat die man aan sy vrou sedeer het (a 43); of 'n polis op die man se lewe waarop daar by uitneem onmiddellik 'n begunstigdeklousule geplaas is (a 43).

die man 'n polis op sy lewe uitneem, moet hy sy vrou se toestemming verkry indien hy die opbrengs wil vervreem,[96] terwyl die vrou nie haar man se toestemming benodig waar die polis op haar eie lewe uitgeneem is nie.[97] Só 'n toestand is onaanvaarbaar.

Alhoewel daar voorgestel word dat die maritale mag met betrekking tot alle huwelike binne gemeenskap van goed afgeskaf word,[98] is bogenoemde verskil veral te wyte aan die verouderde bepalings van die Versekeringswet,[99] wat na my mening afgeskaf behoort te word ten einde pariteit tussen die gades te bewerkstellig. Dit is verblydend om te sien dat 'n onlangse konsep van die voorgestelde Langtermynversekeringswetsontwerp nie soortgelyke bepalings bevat nie.

8 INKOMSTE-, BOEDEL- EN SKENKINGSBELASTING

8 1 Inkomstebelasting

By 'n begunstiging van die polisvoordeel sal 'n kontantbedrag by die dood van die polishouer aan die begunstigde uitbetaal word. Die vraag is of dié bedrag in die hande van die begunstigde belas sal word.

Die bedrag wat die derde op die wyse ontvang, is van 'n toevallige aard en kan, in die lig van die omskrywing van "bruto inkomste"[100] in die Inkomstebelastingwet,[101] nie as inkomste beskou word nie.[102] Aangesien die bedrag in so 'n geval as kapitaal beskou kan word, sal die bedrag nie inkomste in sy hande wees nie. So gesien, sal die opbrengs van 'n begunstigde polis nie in die hande van die begunstigde in die oorgrote meerderheid van gevalle in die praktyk belas word nie. Dit sal egter van die feite van die geval afhang, en meer spesifiek of die bedrag inderdaad in die derde se hande as "bruto inkomste" beskou sal word, of die spesifieke bedrag belas sal word of nie.

8 2 Boedelbelasting

Boedelbelasting word gehef ingevolge die Wet op Boedelbelasting[103] en kom ter sprake waar 'n boedel afgehandel moet word by die dood van die betrokke persoon. Dit is in dié opsig belangrik om te beklemtoon dat die boedelbelasting-gevolge vir herroeplike en onherroeplike begunstigdeklousules dieselfde is.

Die enigste uitsondering op bogenoemde stelling is waar die begunstigde voor die polishouer te sterwe kom. In dié geval sal die voorwaardelike reg van die derde by 'n herroeplike begunstiging nie in sy boedel val nie. In teenstelling

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96 Die polis val in die gemeenskaplike boedel.
97 Die polis val nie in die gemeenskaplike boedel nie.
98 Sien a 29 van die Vierde Algemene Regswysigingswet 132 van 1993.
99 Dié bepalings was nodig ten einde die vrou in staat te stel om 'n polis uit te neem sonder om haar man se toestemming weens sy (toe bestaande) maritale mag te verkry.
100 Sien a 1 *sv* "bruto inkomste".
101 Wet 58 van 1962.
102 Meyerowitz *Meyerowitz & Spiro on income tax* (1989) par 449.
103 Wet 45 van 1955.

daarmee sal die reg van die derde by 'n onherroeplike begunstiging wel in sy boedel val.[104] Die waardering van dié reg sal egter problematies wees. Daar word in oorweging gegee dat die waarde van die reg ten minste die dekkingsbedrag of die afkoopbedrag[105] daarvan sal wees.

Waar die polishouer te sterwe kom en die polis begunstig het, sal die polisopbrengs 'n geagte bate in sy boedel wees.[106] Die polisopbrengs is 'n geagte bate aangesien die polis uitgeneem is met die oorledene as versekerde lewe. Die kontantbedrag sal natuurlik as eiendom in die derde se boedel val.

8 3 Skenkingsbelasting

Die vraag kan gevra word of die polishouer nie skenkingsbelasting moet betaal op die bedrag wat uiteindelik die derde gaan toeval nie.[107] In dié opsig moet egter na die bepalings van artikel 56 gekyk word wat sekere skenkings vrystel van die verpligting om skenkingsbelasting te betaal. Die gewone klousule by 'n herroeplike begunstiging tree eers in werking op die oomblik wanneer die polishouer sterf (ongeag of daar 'n "geen regte"-klousule in werking is of nie). Gevolglik verkry die derde geen voordeel voor die dood van die polishouer nie.[108] By 'n onherroeplike begunstiging kan daar wel 'n skenking van die kontantwaarde van die polis wees, maar weer eens sal die derde geen voordeel voor die dood van die skenker ontvang nie. Die vrystelling sal gevolglik weer eens geld. Alternatief sal 'n ander vrystelling geld, te wete dié wat 'n *donatio mortis causa* vrystel van belasting.[109]

Dit blyk uit bogenoemde dat skenkingsbelasting nie 'n wesenlike probleem by die begunstiging is nie. Die enigste uitsondering waar skenkingsbelasting ter sprake kan kom, is waar 'n polis in die gemeenskaplike boedel val en die kinders of 'n derde begunstig word. Indien die huwelik binne gemeenskap van goed ná 1984[110] gesluit is, sal skenkingsbelasting ter sprake kom ten opsigte van die langslewende se helfte van die polisopbrengs. Aangesien die polis deel was van die gemeenskaplike boedel, vervreem die langslewende 'n deel van sy boedel. Dit stel wel 'n skenking[111] daar aangesien die ratifikasie van die begunstigdeklousule deur die langslewende wel op 'n skenking neerkom. Die Wet op Huweliksgoedere verskaf nietemin sekere remedies aan die langslewende om dié skenking te verhinder. Die langslewende kan byvoorbeeld aandring op 'n

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104 Sien a 3(2)(a).

105 Waar die afkoopwaarde die dekkingsbedrag oorskry.

106 A 3(3)(a).

107 Skenkingsbelasting word kragtens die Inkomstebelastingwet 58 van 1962 gehef. Ingevolge a 59 is die persoon wat vir die skenkingsbelasting aanspreeklik is, die skenker.

108 Sien a 56(1)(d): geen skenkingsbelasting is betaalbaar by 'n skenking "ingevolge waarvan die begiftigde geen voordeel voor die dood van die skenker daaruit sal ontvang nie".

109 A 56(1)(c).

110 Die datum van inwerkingtreding van die Wet op Huweliksgoedere 88 van 1984.

111 'n Skenking omvat nie net 'n gratis oormaking van eiendom nie, maar ook 'n gratis afstanddoening van 'n reg: a 55(1) *sv* "skenking".

verrekening by die verdeling van die boedel.[112] Voor 1984 was daar nie so 'n moontlikheid nie behalwe as die langslewende 'n man met die maritale mag was, in welke geval skenkingsbelasting weer ter sprake gekom het.

9 GEVOLGTREKKING

Uit bogenoemde blyk dat 'n meganisme soos die begunstigdeklousule 'n hele aantal regsimplikasies kan hê. Dit is belangrik dat versekeraars asook polishouers ten volle van bogenoemde gevolge kennis dra. In elke geval moet behoorlik oorweeg word welke gevolg die kliënt deur die begunstiging wil bewerkstellig, en of hy van die implikasies daarvan kennis dra. Dit is van kardinale belang dat die begunstigdeklousule nie ligtelik ingevul word nie, maar slegs met 'n volle bewustheid van die gevolge daarvan. In dié opsig rus daar 'n uitdaging op versekeraars en makelaars om kliënte van die volle implikasies van die begunstiging in te lig. Na my mening rus daar ook 'n uitdaging op die howe, en in 'n mindere mate die wetgewer, om bogenoemde probleme waar moontlik aan te spreek.

In a free society all freedoms are important, but they are not all equally important. Political philosophers are agreed about the primacy of the freedom of speech. It is the freedom upon which all others depend; it is the freedom without which the others would not long endure. This, of course, does not mean that whenever the right of freedom of speech comes into conflict with the right of human dignity the former must prevail. To allow that to happen would be to abrogate the law of defamation, and would in any case violate the provisions of s 33(1) of the Constitution (*per* Van Schalkwyk J in *Mandela v Falati* 1995 1 SA 251 (W) 259).

112 A 15(9)(b) van die Wet op Huweliksgoedere. Sy kan verder aandring op 'n verdeling van die boedel *stante matrimonio*: a 20.

Migrerende egpare se huweliksgoedereprobleme: *common law* en gemengde regstelsels

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SUMMARY

Matrimonial property problems of migrant spouses

The proprietary consequences of "foreign marriages" under section 7 of the Divorce Act 70 of 1979 used to be beset by many uncertainties. It was never quite clear, for example, which legal system should govern and whether a transfer of assets from one spouse to the other could be ordered where the "foreign" couple married in terms of a common law system. Section 7(9) was promulgated in an attempt to address the uncertainties. This section has cleared away any doubt about the power of a South African court to order a transfer of assets between the parties by virtue of its judicial discretion.

Nevertheless, section 7(9) is not satisfactory from a wider conflict-of-laws perspective. Nagging questions remain – among the most fundamental of these is: which legal system should govern the division of assets as the system that would best satisfy justice and social utility?

This article compares mutability and immutability doctrines in selected common law, civil law and mixed legal systems. It focuses on the classification process in the conflict of laws and evaluates section 7(9) against this background.

1 INLEIDING

Die regterlike funksie is moeilik omskryfbaar omdat dit 'n dimensie het wat op die kontakpunt van reg en moraliteit lê.[1] Die kompleksiteit van huweliksbedelings is eweneens berug:

> "[T]here are many controversial areas in law and policy, [but] few . . . can compare with the law relating to distribution of family property on dissolution of marriage . . ."[2]

Die interaksie van hierdie aspekte met twee van die grootste probleemterreine van die internasionale privaatreg word hier ondersoek. Die eerste is die *quaestio famosissima*, naamlik die vraag of die regstelsel wat deur die verbindingsfaktor aangedui is om die eiendomsaansprake van 'n egpaar te bepaal staties bly dwarsdeur hulle lewe, oftewel tot en met egskeiding of dood, en of dit vervang

1 Pound "Discretion, dispensation and mitigation" 1960 *NY Univ LR* 926.

2 Bates "Comparative common law" 1981 *CILSA* 259.

moet word deur 'n ander regstelsel wanneer die egpaar migreer (van domisilie verander). Die tweede terrein is dié van klassifikasie (kategorisering of kwalifikasie), 'n *bête noire* vir internasionale-privaatregsgeleerdes.

Wanneer 'n buitelandse element deel uitmaak van die feite wat deur die hof toegeskryf moet word aan 'n kategorie wat aan die reg bekend is, word dit nodig om te klassifiseer. Klassifikasie gebeur meestal "vanself", na 'n eenvoudige proses van onderskeid, byvoorbeeld tussen "kontrak" en "delik" of tussen die vermoënsregtelike gevolge van huwelksluiting en die persoonlike gevolge van die huwelik. Uiteraard klassifiseer verskillende regstelsels verskillend. Dit is alles goed en wel om 'n regskeusereël te hê wat die vermoënsregtelike gevolge van 'n huwelik tussen immigrante, genaturaliseer of nie, onderworpe stel aan die reg van die man se domisilie ten tyde van die huwelksluiting, maar hoe word besluit of 'n aangeleentheid inderdaad geklassifiseer moet word as 'n vermoënsregtelike gevolg? Wat onderskei so 'n aangeleentheid van 'n aangeleentheid wat met egskeiding verband hou en dus deur die *lex fori* beheers word? Hoe goed sluit die regskeusereël vir onderhoud by hierdie regskeusereëls aan?

Artikel 36 van die Wet op Huweliksgoedere 88 van 1984 het destyds artikel 7 in die Wet op Egskeiding 70 van 1979 ingevoeg. In April 1992 is subartikel (9) gevoeg by artikel 7(3)–(8) van die Egskeidingswet om die Suid-Afrikaanse regter met 'n "wyer bevoegdheid" te beklee as wat ingevolge artikel 7(3)–(8) die geval was.[3] Die bevoegdheid moes uitgebrei word om die herverdelingsbevoegdheid te omvat wat die hof van die potensiële *lex causae* geniet. Artikel 7(3)–(8) gee aan die hof wat 'n egskeidingsbevel verleen, die bevoegdheid om in bepaalde omstandighede te gelas dat sommige of al die bates van die een gade na die ander gade oorgedra moet word. Hierdie bevoegdheid kan net uitgeoefen word op aansoek van een van die partye by die huwelik

- indien die huwelik buite gemeenskap van goed en van wins en verlies gesluit is en aanwasdeling in enige vorm uitgesluit is, dit wil sê indien die huwelik voor die inwerkingtreding van die Wet op Huweliksgoedere van 1984 gesluit is ingevolge huweliksvoorwaardes, of voor die inwerkingtreding van die Wysigingswet op Huweliks- en Huweliksgoederereg van 1988 aangegaan is ingevolge artikel 22(6) van die Swart Administrasie Wet 38 van 1927, soos dit bestaan het onmiddellik voor die herroeping daarvan deur die Wysigingswet op Huweliks- en Huweliksgoederereg; en
- by ontstentenis van 'n ooreenkoms tussen hulle betreffende die verdeling van hul bates.

Ingevolge artikel 7(4) moet die hof oortuig wees dat dit billik en regverdig sal wees om te beveel dat die bates of 'n gedeelte daarvan van die een party na die ander party oorgedra word. Die bevel sal net ten gunste van dié party gegee word wat direk of indirek bygedra het tot die instandhouding of groei van die

3 GK R13921 *SK* 13921 van 1992. Memorandum tot die Egskeidingswysigingswet 44 van 1992.

boedel van die ander party tydens die duur van die huwelik. Die bydrae kan bestaan in die lewering van dienste of die besparing van uitgawes wat andersins aangegaan sou moes word "of op enige ander wyse".[4]

Henry en Wilma het die grootste gedeelte van hul huwelikslewe in Empire gewoon.[5] Gedurende daardie tyd het die twee roerende goed ter waarde van een miljoen pond bymekaar gemaak. Omdat Henry die meer ekonomies aktiewe een van die twee was, is die oorgrote meerderheid van hierdie bates in sy naam geregistreer. Wilma het haar nie hieroor gekwel nie, omdat Empire se reg bekend is daarvoor dat dit voorsiening maak vir gades in geval van egskeiding en dood. Empire se erfregkode bepaal dat, in geval van dood, die langslewende gade 'n reg van eleksie ten opsigte van een derde van die oorledene se algehele boedel sal hê. Sou Henry dus vir Wilma in sy testament te na kom, sou sy steeds op £333,333 van sy miljoen kon aanspraak maak. Empire se Wet op Billike Verdeling bepaal dat, in geval van egskeiding, die hof aan een party soveel van die ander party se bates mag toeken as wat billik en regverdig in die omstandighede sal wees. Henry en Wilma se besondere omstandighede is van so 'n aard dat Wilma op 'n halwe aandeel in Henry se boedel aanspraak het. Hulle besluit om te emigreer en hulle in Suid-Afrika te vestig. Skaars nadat hulle hier aangeland het, maak Wilma 'n egskeidingsaak aanhangig of Henry sterf. Die hof moet bepaal watter aandeel Wilma in Henry se miljoen het.

Die bekende regskeusereëls wat potensieel toepaslik is op hierdie feitestel, is die reël dat die vermoënsregtelike gevolge van die huwelik of die regte in roerende en onroerende goedere beheer word deur die reg van domisilie van die man ten tyde van huweliksluiting,[6] en die reël dat die *lex fori* toepassing moet vind in egskeidingsdispute.[7] Die reël dat erfregtelike aanspraake op roerende goed beheer word deur die *lex ultimi domicilii* van die erflater[8] kan ook ter sprake

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4 Vgl in die algemeen oor die promulgasie van a 7(3) Thomashausen "The Matrimonial Property Act 1984; some new aspects for marriages out of community and marriages governed by foreign law" 1985 *De Rebus* 167; Dillon "The financial consequences of divorce: s 7(3) of the Divorce Act 1979 – a comparative study" 1986 *CILSA* 271 273; Boberg "Marry abroad, repent in SA" 1986 *Businessman's Law* 230; Kruger "Toepassingsgebied van artikel 7(3) tot (6) van die Wet op Egskeiding 70 van 1979" 1992 *THRHR* 492; Jordaan "Oordrag van bates in geval van egskeiding ingevolge artikel 36 van die Wet op Huweliksgoedere 88 van 1984" 1988 *THRHR* 109; Vrancken "Foreign informal antenuptial contracts and s 7(3) of the Divorce Act 70 of 1979" 1993 *TSAR* 1.

5 Geleen uit "The story of Henry's million" in Symeonides "Louisiana's draft on succession and marital property" 1987 *Am J Comp L* 259 ev 273–274.

6 *Chiwell v Carlyon* (1897) 14 SC 61 CTR 83; *Frankel's Estate v The Master* 1950 1 SA 220 (A); *Sperling v Sperling* 1975 3 SA 707 (A); *Anderson v The Master* 1949 4 SA 660 (OK).

7 Vgl a 2(3) van die Egskeidingswet; *Holland v Holland* 1973 1 SA 897 (T); Schmidt "Conflict of Laws" *LAWSA* 2 par 542; Hahlo *The South African law of husband and wife* (1975) 437–438 623; Hahlo en Sinclair *The reform of the South African law of divorce* (1980) 13–14; Kahn "Conflict of Laws" 1991 *Annual Survey of South African Law* 580; Neels "Die internasionale privaatreg en die herverdelingsbevoegdheid by egskeiding" 1992 *SALJ* 336.

8 *Rosa's Heirs v Inhambane Sugar Estates Ltd* 1905 TW 11; *Estate Wright v Wright* (1908) 25 SC 769; *David and Berlein NO v The Orphan Master* (1897) 4 Off Rep 326; *Ex parte*

vervolg op volgende bladsy

kom. Feit is, *common law*-sisteme verleen aansprake by dood en *civil law*-sisteme verleen aansprake *inter vivos*.

Aansprake kan dus ophoop of wegval wanneer 'n egpaar migreer, omdat verskillende sisteme verskillende regskeusereëls het.

Die idee van elke Henry en Wilma dat "die reg sal voorsien" kan hulle in 'n bra ongemaklike regsituasie laat beland indien hulle aanvanklik in die Engelssprekende wêreld of voormalige Britse kolonies[9] gedomisilieerd was maar later besluit het om hulle huweliksbootjie in Suid-Afrika te anker. Die Suid-Afrikaanse regspraak oor artikel 7(3) het eerder van meganiese en kumulatiewe toepassing van regskeusereëls getuig as van kreatiewe toepassing. Die potensiaal vir vreemde, indien nie onbillike resultate was goed, omdat voormalige buitelandse egpare wat ingevolge die reg van die een of ander *common law* regstelsel getroud is gewoonlik nie hier of elders gekontrakteer het nie. By egskeiding moes hulle sin probeer maak van die siening dat hulle huweliksbedeling *stante matrimonio* geen gemeenskap van goed toelaat nie en aan die einde daarvan geen deling van bates of aanwas tot gevolg het nie. (In geval van dood kan die beginsel van testeervryheid meebring dat 'n langslewende alle erfregtelike aansprake ook verloor.)

Die resultaat was onsekerheid oor die regstelsel wat bate-oordragseise moes beheer, dit wil sê of buitelandse egpare steeds die aansprake het wat deur die reg van die huwelikdomisilie verleen is. Artikel 7(9) lui soos volg:

> "Wanneer 'n hof 'n huwelik waarvan die vermoënsregtelike gevolge volgens die reëls van die Suid-Afrikaanse internasionale privaatreg deur die reg van 'n vreemde staat beheers word, deur egskeiding ontbind, dan het die hof dieselfde bevoegdheid wat 'n bevoegde hof van die betrokke vreemde staat op daardie tydstip sou hê om te gelas dat die bates van die een gade na die ander gade oorgedra word."[10]

Artikel 7(9) magtig uitdruklik 'n bate-oordrag, ook as immigrante hulle nie kontraktueel tot 'n bedeling buite gemeenskap van goed verbind het nie. Nietemin het vrae bly steek nadat artikel 7(9) op die wetboek verskyn het.

Low NO: In re Estate of Mangan 1915 SR 147; *Soomar v Estate Moonda* 1937 NPD 317; Kahn "Choice of law in succession in the South African conflict of laws" 1956 *SALJ* 303 ev 392 ev; 1957 *SALJ* 43 ev 52–54; Hahlo en Kahn *The Union of South Africa. The development of its laws and constitution* (1960) 729 ev 753–754; Kahn *The conflict of laws in the South African law of succession* in Corbett, Hahlo en Hofmeyer *The law of succession in South Africa* (1980) 616 ev 634 ev.

9 Lande soos Engeland, Skotland, Ierland, Australië, Zambië, Zimbabwe en Malawi, al die Amerikaanse *common law property* state en Kanadese *common law* provinsies is hier ter sprake. Tans het nege Amerikaanse state vorme van "gemeenskap van aanwas" in afwesigheid van 'n kontrak tot die teendeel.

10 Die getekende teks lui: "When a court grants a decree of divorce in respect of a marriage the patrimonial consequences of which are according to the rules of the South African private international law governed by the law of a foreign state, the court shall have the same power as a competent court of the foreign state concerned would have had at that time to order that assets be transferred from one spouse to the other spouse."

Gestel Henry en Wilma kan nie daarin slaag om in Suid-Afrika tot 'n vergelyk oor die verdeling van hulle goed te kom voor hulle skei nie. Watter regstelsel behoort die tipering en verdeling van eiendom te beheers? Hoe moet die eiendom getipeer en verdeel word? Hierdie vrae illustreer dat die spanning tussen die Suid-Afrikaanse reg en die *common law* stand hou. Die subtiele verskille en die toevallige en oppervlakkige ooreenkomste in regsopvattings oor diskresie, billikheid, huweliksgoedere, domisilie, kategorisering en internasionale privaatregleerstukke kan suiwer regsvergelykende denke verydel.

Op die gebied van die internasionale privaatreg steun die Suid-Afrikaanse reg op Anglo-Amerikaanse leerstellings wat gebaseer is op die *civil law* stelsel van Wes-Europa voor kodifikasie. Tersaaklike benaderings in lande soos Engeland en Australië, Malawi, 'n staat soos Louisiana en 'n provinsie soos Ontario word hier ondersoek om vas te stel watter regstelsel hierdie sisteme aanwys om die bateverdeling te beheers. Hierdie regstelsels bied interessante raamwerke vir die naasbestaan van *common* en *civil law*, en van *common law* en die reg van gemengde regsisteme.

'n Bepaling dat 'n Suid-Afrikaanse hof die regterlike diskresie van 'n buitelandse hof in egskeidingsaangeleenthede kan uitoefen ten aansien van huweliksgoederedispute kan 'n vaste reël neerlê, of dit kan bloot 'n benadering aandui. Staan dit die toepassing van vreemde reg voor, of verklap die gebruik van die woord "hof" juis 'n voorkeur vir *forum*-reg? Filosofiese vrae kom ook op hierdie besondere snypunt van die reg na vore, onder meer of daar iets soos "regterlike diskresie" in *hard cases* kan wees. Die vraag waarom dit hier gaan, is of so 'n bepaling werklik iets sinvols by ons bestaande reg voeg. Bring dit 'n normatiewe verandering in die sisteem soos dit reeds bekend is, mee wat beregtingsprobleme in die praktyk kan voorkom? Indien die bevoegdheid wat artikel 7(9) verleen in skerper reliëf en perspektief gestel kan word, kan bepaal word of dit 'n effektiewe pynstiller vir die kategoriseringskonflik bied, en of die reg nie beter daaraan toe sal wees indien die "behandeling" liewer gestaak word nie.

Die kombinasie waarin die lastige vrae en kwellings hulle hier voordoen, maak dit onwaarskynlik dat hierdie studie 'n *nugget of pure truth* sal wees wat vinnig in 'n notaboek aangestip kan word vir latere verwysing.[11] Nogtans behoort besef te word dat artikel 7(9) verdere remediëring van wetgewing wat juis remediëring en hervorming beoog, nodig maak.

2 DIE VERANDERLIKHEIDSLEERSTUK EN ONVERANDERLIKHEID

Soos in die kontinentale regsfamilie hink die oplossing van internasionale huweliksgoedereregprobleme in die *common law* op twee gedagtes: veranderlikheid en onveranderlikheid van die reg wat die huweliksgoederebestel beheer indien die egpaar se domisilie ten tyde van huweliksluiting gedurende die huwelik verander. Behoort hulle onderskeie eiendomsregte beheer te word deur die reg van die vroeëre of latere domisilie?

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11 Woolf *A room of one's own* (1928) 5.

Savigny het die teorie ondersteun dat 'n stilswyende ooreenkoms tussen die voormalige gades bestaan dat die huweliksgoedereg onveranderlik deur die reg van die domisilie (ten tyde van die huwelksluiting en van die kontrak) beheer word.[12] In onder meer Argentinië, Oostenryk en Griekeland word altyd weer terugverwys na die reg van die vroeëre domisilie om die man en vrou se onderskeie regte op roerende goed te bepaal. Dit word onveranderlikheid van die regstelsel wat die huweliksbedeling bepaal, genoem. Waar die domisilie van die man soos dit van tyd tot tyd kan verander, regte op roerende goed beheer, word verwys na veranderlikheid van die regstelsel wat die huweliksgoederebestel bepaal. Die uiterste vorm hiervan is outomatiese en volkome veranderlikheid. Dit kom daarop neer dat die nahuwelikse verandering van die verbindingsfaktor – naamlik die domisilie van die verkrygende eggenoot – 'n outomatiese of selfs 'n terugwerkende verandering van die reg wat die huweliksbedeling beheers, teweegbring (Switserse model).

'n Variasie op hierdie tema is gedeeltelike veranderlikheid.[13] Gedeeltelike veranderlikheid verwerp die teorie van stilswyende ooreenkoms, en laat die reg van die bestaande domisilie toe om regte te bepaal, hoewel net vooruitskouend vir sover dit eiendom raak wat verkry is ná die verandering. Afgesien van die terugwerkende of nie-terugwerkende aanwending van die nuwe huweliksgoederebestel verskil regstelsels wat party-outonomie betref.

Onveranderlikheid funksioneer op twee vlakke: op interne vlak het dit op die huweliksgoederebedeling betrekking, en is die vraag of nahuwelikse kontrakte om huweliksvoorwaardekontrakte te wysig, toelaatbaar is.[14] Die *lex causae* vir die huweliksgoederebedeling mag nahuwelikse kontrakte toelaat terwyl dit steeds op interne vlak onaanvaarbaar kan wees.[15] Op internasionale vlak het die leerstuk betrekking op die regsisteem. In die Suid-Afrikaanse reg beteken dit dat, in afwesigheid van 'n kontrak, die vermoënsregtelike gevolge ten aansien van

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12 *Private international law & the retrospective operation of statutes. A treatise on the conflict of laws* (vert Guthrie) (1880) 293–295 par 379.

13 Huber *Hedendaegse rechtsgeleerdheyt* (1686) 1 3 35; Arntzenius *Institutiones iuris Belgici de conditione hominum* (1783–1798) 1 2 26; Burge en Lorenzen tel onder die moderner skrywers wat van mening was dat die reg van die nuwe domisilie regte in eiendom daar verkry, behoort te reël; vgl Burge *Commentaries on colonial and foreign laws* 1 (1838) 626; Lorenzen *Selected articles on the conflict of laws* (1947) 148–149.

14 *Union Government (Minister of Finance) v Larkan* 1916 AD 212; *Honey v Honey* 1992 3 SA 609 (W) 610A–D waar die eiseres onsuksesvol op 'n kontraktuele wysiging van die aanwasbedeling tot algehele skeiding steun; onder meer ook Hahlo (1975) 305; Hahlo *The South African law of husband and wife* (1985) 148 159 283 ev; Barnard, Cronjé en Olivier *The South African law of persons and family law* (1990) 284. Vgl ook Douglas "Change of matrimonial property system without an order of court" 1991 *De Rebus* 205. *Contra* Sonnekus "Onderhandse wysiging van huweliksvoorwaardekontrak onaanvaarbaar" 1992 *TSAR* 683; Van Loggerenberg "Changing the matrimonial property regime in the case of spouses married under a foreign domiciliary law" 1987 *Obiter* 113.

15 A 21(1) van die Wet op Huweliksgoedere ingevolge waarvan daar 'n hofaansoek gebring mag word om verlof om die huweliksgoederebedeling te verander, is deel van die interne Suid-Afrikaanse reg, wat nie noodwendig die *lex causae* is nie (Forsyth *Private international law* (1990) 255–256).

roerende en onroerende eiendom (eenheidsbeginsel),[16] waar ook al geleë en wanneer ook al bekom, deur die reg van die man[17] se domisilie ten tyde van huweliksluiting[18] bepaal word, uitgesluit daardie regstelsel se internasionale privaatregsreëls[19] soos daardie reg van tyd tot tyd aangepas word.[20] 'n Verandering van domisilie verander niks hieraan nie.[21]

Die onveranderlikheidsleerstuk, soos die Romeins-Hollandse reg dit ken, manifesteer in die verwerping van die stilswyende ooreenkomsteorie wat 'n kontrak regtens veronderstel en dien ter illustrasie van Huber se stelreël dat geen staat arbitrêr sal weier om aan buitelandse reg werking te verleen net omdat hy by magte is om sy eie regskeusereël te formuleer nie.[22] As *ratio* vir die onveranderlikheidsbeginsel wys skrywers op die beskerming van die vrou, aangesien dit verhinder dat 'n eggenoot 'n arbitrêre besluit neem om van domisilie te verander en so 'n onaanvaarbare huweliksgoederebestel op sy vrou afdwing. Dit skep sekerheid vir die gades en derdes. As verdere redes doen Savigny aan die hand die onwilligheid van 'n man om aan 'n nuwe stelsel onderwerp te word wanneer sy verplasing teen sy sin en wil plaasvind en die feit dat die wetgewer waarskynlik nie beoog om sy statute op immigranthuwelike van toepassing te maak nie.[23] Onveranderlikheid verhinder dat 'n bestel verander

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16 *Chiwell v Carlyon supra*. Savigny 292 par 379 het gemeen dat daar nie redelikerwys aangeneem kan word dat die gades bedoel om hulle eiendomsreëlings afhanklik te stel van die toevallige toedrag dat 'n deel van die boedel bestaan uit onroerende goed in die buiteland nie. Hy sê sy steun daaraan toe in belang van sekerheid.

17 "Domisilie" Regskommissie Werkstuk 20 Projek 60 (1987) 72. Die Wet op Domisilie 3 van 1992 laat die reël onaangeraak. Vgl in die algemeen Thomashausen "Reflections on 'domicile' as a connecting factor" in Strauss (red) *Huldigingsbundel vir WA Joubert* (1989) 164.

18 *Frankel's Estate v The Master supra*; *Sperling v Sperling supra* (teenoor *Ex parte Evans* 1943 OPD 7 en *Ex parte Marx* 1936 CPD 499).

19 *Renvoi* is uitgesluit in statusaangeleenthede ingevolge a 4 van die Wet op Domisilie 3 van 1992. Vgl ook *Frankel's Estate v The Master supra*, *Sperling v Sperling supra* en *Anderson v The Master supra*.

20 *Sperling v Sperling supra*. Vgl Spiro "Proprietary consequences of marriage and the conflict of laws" 1976 *THRHR* 22.

21 Sien oa Voet *Commentarius ad Pandectas* 4 23 87; Molinaeus *Concilia et responsa* (1568) 251 ev, Concilium 53 van 1525; *Blatchford's Executors* (1861) [1880–1882] EDC 365. Sien in die algemeen Boberg 1986 *Businessman's Law* 229; Hahlo (1975) 631 met verdere verwysing. Die onveranderlikheidsleerstuk is al verbind met die *Las Siete Partidas* IV tit II ley 24, 1265 (die *Siete Partidas* is 'n Spaanse streekskodifikasie wat aan Alfonso X toegedig kan word. Dit is ook vatbaar vir die interpretasie dat verkryging van eiendom na 'n verandering in domisilie nie geraak word nie). Vgl Juenger "Marital property and the conflict of laws: a tale of two countries" 1981 *Col LR* 1065 ev; Symeonides 1987 *Am J Comp L* 259.

22 Huber *Praelectiones juris Romani et hodierni* vol II Bk 1 Tit iii; Davies "The influence of Huber's de Conflictu Legum on English private international law" 1937 *Brit YB Int L* 49 65–66 ev. Die leerstukke van *vested rights* en *acquired rights* is deur Huber aangewend ter verklaring van die vraag hoekom vreemde reg toegepas word. As sodanig het dit al baie kritiek verduur. Die kritiek word saamgevat deur Kegel *International encyclopedia of comparative law* vol 3 hfst 3 par 11 12; sien ook Davies 1937 *Brit YB Int L* 59–60.

23 Savigny 294–296 par 379.

word elke keer as dit in die egpaar se finansiële voordeel sal wees of positiewe belastingimplikasies sal hê.[24] Bodenstein se siening is dat die moontlikheid van verandering net konflik kan veroorsaak.[25] Die voorbeeld van die ryk wewenaar wat met 'n jong vrou trou en direk daarna na Suid-Afrika toe kom vir gesondheidsredes dui ook op die rede waarom onveranderlikheid verkieslik geag word.[26]

Die onveranderlikheidsleerstuk laat nie ruimte vir ander regstelsels se beleid of hulle belange in die toepassing van hulle reg nie. Dit sluit moontlike interaksie tussen huweliksgoederebepalings en erfregbepalings uit. Daar word slegs ag geslaan op die een regstelsel met die beherende verband. Dit is selde so streng dat nahuwelikse wysiging heeltemal onmoontlik gemaak word. 'n Suiwer toepassing van die onveranderlikheidsleerstuk sal ook op interne vlak lei tot die vraag of die reg van die man se domisilie ten tyde van huwelksluiting nahuwelikse kontrakte erken.[27] Die Suid-Afrikaanse regspraak dui wat dít betref op 'n gekwalifiseerde toepassing van die leerstuk.[28]

2 1 Veranderlikheid in die *common law* en die hibriede reg van Louisiana

Die Engelse reg verleen aan die partye die bevoegdheid om die toepaslike reg aan te wys. Die huwelik sê nie eiendom outomaties aan die een of die ander toe nie. Daar is geen enkele voortdurend-toepaslike bepaling wat die statutêre huweliksgoederebestel en die gades se onderskeie regte op huweliksgoedere omskryf nie. Gades is vry om hul eiendom te reguleer deur self 'n bedeling te ontwerp solank dit met Engelsregtelike openbare beleid strook. Waar hulle geen reg uitdruklik of by implikasie aanwys nie, of nie daaroor saamstem nie, word die stilswyende bedoeling geag te wees dat die reg van die huweliksdomisilie (man se domisilie) ten tyde van huwelksluiting die toewyser van regte op roerende goed moet wees. Die Engelse regskeusereël is in ooreenstemming met die leerstuk van splitsing en onderskei dus tussen roerende en onroerende goed. Ten aansien van onroerende goed bestaan daar 'n onwilligheid om enige ander reg as die *lex situs* toe te pas (Engelse howe het geen jurisdiksie om oor die regte

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24 *Frankel's Estate v The Master supra* 221J.

25 Vgl Bodenstein "The validity of pacts between husband and wife" 1917 *SALJ* 22; *Honey v Honey supra* 612H–613C.

26 *Re Egerton's Will Trusts* [1956] Ch 593.

27 Meerdere skrywers is dit eens dat die domisiliêre reg die nahuwelikse kontrak moet toelaat. Volgens Savigny 297 par 379 moet die reg van die domisilie ten tyde van die donasie dit toelaat, al is onroerende goed wat elders geleë is, geskenk. Hy val terug op die behoud van die morele reinheid van die huwelik. Thomashausen 1985 *De Rebus* 167 169; Van Loggerenberg 1987 *Obiter* 113.

28 *Ex parte Evans supra* en *Ex parte Marx supra* steun die toepassing van die reg van die domisilie soos dit van tyd tot tyd verander (*qua* die reg van die domisilie ten tyde van verlyding van die kontrak of toepassing van die bestel wat gegeld het net voor die egpaar hulle in Suid-Afrika gevestig het). Vgl Silberberg "The determination of the matrimonial property rights and the doctrine of immutability in the conflict of laws" 1973 *CILSA* 353 356–358 en sy kritiek op die veranderlikheid soos hierdie uitsprake dit weergee; Forsyth 255–256; Thomashausen "Some problems in the application of South African private international law" 1984 *CILSA* 84–86; teks by vn 55 en 56.

op onroerende goed in ander lande te beslis nie). Regte op roerende goed word deur die reg van die partye se eertydse domisilie bepaal en bly onveranderd nadat 'n nuwe domisilie verkry is tensy omstandighede onweerlegbaar ten gunste van 'n ander stelsel spreek.[29]

In Amerika reël die verskillende regsisteme die uitwerking van die huwelik op huweliksgoedereregte op uiteenlopende wyses. Die potensiaal vir regskonflik is groot en dit het die ontwikkeling van nuwe regskeuseteorieë genoodsaak. Eksperimentering hou met beleidsgerigte benaderings rekening.[30] Die stilswyende bedoelingsteorie is vanuit die staanspoor as 'n fiksie verwerp. Die gedeeltelike (vooruitskouende) veranderlikheidsleer geld sedert die dae van *Saul v His Creditors*.[31] In afwesigheid van 'n huwelikskontrak (waarin verskillende bates aan verskillende regstelsels onderwerp mag word) beteken 'n verandering van domisilie dat die reg van die huweliksdomisilie net daardie roerende goed beheers wat alreeds by huweliksluiting verkry is. Goed wat later verkry is met 'n inkomste wat nie teruggevoer kan word na eiendom verkry in die vorige domisilie nie, is onderworpe aan die reg van die partye se domisilie ten tyde van die verkryging, of van die verkrygende gade se domisilie indien die gades verskillende domisilies het. Die *lex situs* word toegelaat om dit te veto, veral in geval van onroerende goed. Die leerstuk van oorsprong ingevolge waarvan belange in die nuut verkreë bates belange in die eiendom waarmee dit verkry is weerkaats, speel dus ook 'n rol. Daar is vandag heelwat *common law* neerslae op die *civil law* onderbou van die Louisiana kode. Weens Louisiana se reg se gemengde herkoms, sny die benadering tot huweliksgoederekonflik deur al vier pole van die assestelsel: veranderlikheid, onveranderlikheid, roerende en onroerende goed. Die nuwe kodifikasie[32] se Boek IV, Titel III, artikels 3523–3527 fokus op die eiendom wat ter sprake is in die konflik eerder as op die gades. Die beginsel van veranderlikheid is in unilaterale vorm vervat in artikel 2334 en die *Burgerlike Wetboek* van 1870. Artikel 2334 bepaal dat 'n gemeenskap van aanwas en van wins (*acquests and gains*) van toepassing is op gades wat in Louisiana gedomisilieerd is ongeag hul domisilie ten tyde van huweliksluiting of die plek waar hul huwelik voltrek is. Die reg van Louisiana reël die regte op alle bates,

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29 In die Engelse reg is die uitwerking van 'n verandering van die huweliksdomisilie op huweliksgoedereregte steeds 'n ope vraag. Dicey en Morris *The conflict of laws* (vol 2), die invloedrykste Engelse teks, het in die verlede veranderlikheid, soos deur gevestigde regte gekwalifiseer, onderskryf (vgl bv (1987) 1068). Die nuutste uitgawe doen nou aan die hand dat presedent en beleid die onveranderlikheidsleerstuk steun (vgl (1993) 1081–1082). Cheshire en North *Private international law* (1992) 869 ev steun veranderlikheid soos gekwalifiseer deur "vested rights", maar slegs as beide eggenotes hulle huweliksdomisilie prysgee. Sien ook Nygh *Conflict of laws in Australia* (1991) 380 ev; Wolff *Private international law* (1977) 359; Graveson *Conflict of laws Private international law* (1974) 355 ev 360. *Lashley v Hog* (1804) 4 Paton 581 en *De Nicols v Curlier* [1900] AC 21 is die veelbesproke sake in dié verband.

30 Davie "Matrimonial property in English and American conflict of laws" 1993 *ICLQ* 857.

31 5 Mart (n s) 569 (La 1827).

32 Louisiana Private International Law Codification (State of Louisiana) Act 923 1991.

ook bates wat verkry is voor die verandering in domisilie.[33] In hierdie opsig lyk dit na volkome en terugwerkende veranderlikheid. Artikel 2339 van die *Burgerlike Wetboek* kodifiseer die beginsel van party-outonomie in alle aangeleenthede wat nie in stryd met openbare beleid is nie, en laat gades wat hulle in Louisiana vestig toe om gedurende die eerste jaar nadat hulle daar gaan woon het 'n huweliksooreenkoms sonder die toestemming van die hof te sluit. Artikel 3523 van die nuwe kode het belangrike nawerking ten opsigte van roerende goed en laat die reg van die domisilie van die verkrygende eggenoot ten tyde van die verkryging toe om regte en verpligtinge te reël waar die kode geen bepaling tot die teendeel bevat nie. Ten opsigte van onroerende goed is daar geen soortgelyke bepaling nie. Die uitsonderings wat in Louisiana ten opsigte van gedeeltelike veranderlikheid geld, kan soos volg saamgevat word: sekere eiendom val steeds onder totale en terugwerkende veranderlikheid (artikel 3523 van die nuwe kodifikasie saamgelees met artikel 2334 van die 1870-*Wetboek*); die toepassing van die vorige domisiliêre reg word gemagtig en nuwe intrekkers mag ooreenkom dat hulle vorige bestel deels of in geheel behoue bly, of vooruitskouend of terugwerkend verander of vervang moet word.

In die algemeen laat die Amerikaanse reg gevestigde regte onaangeraak[34] omdat bestaande belange geag word "onveranderlik" te wees. Die ongekwalifiseerde aanwending van die volkome veranderlikheidsleerstuk vernietig gevestigde regte en word daarom nie bepleit nie.[35] Die reg van Wisconsin gee byvoorbeeld aan die hof 'n billikheidsdiskresie om huweliksgoedere sonder kwalifikasie te verdeel in ooreenstemming met die reg van die staat van die huweliksdomisilie ten tyde van die verkryging.[36]

In state wat gedeeltelike veranderlikheid aanhang, is die beginsel dat verkrygings voor die verandering in domisilie beheer word deur die reg van die vorige domisilie, ook aan kwalifikasie onderworpe. Indien daar op die reg van die nuwe domisilie gesteun word teenoor derdes, kan die ou reg nie opgeroep word nie en bly state se toepassing van hulle eie reg grondwetlik korrek.[37] In sekere Kanadese provinsies word, in afwesigheid van 'n uitdruklike of stilswyende kontrak, roerende goed wat verkry is nadat van domisilie verander is, beheer

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33 Vgl *In re Estate of Crichton* 281 NYS 2d 811, 228 NE 2d 799 (1967) 804 oor die toepassing van Louisiana se reg waar die potensiële *lex causae* vyandig staan teenoor Louisiana beleid. Hierdie bepaling word beskou as die statutêre uitdrukking van staatlike belang.

34 Vgl *Saul v His Creditors supra*; *Re Thornton's Estate* 33 P 2d 1 (1934). *American restatement (second) of the law, conflict of laws* (1971) 258; Juenger 1981 *Col LR* 1066 ev; Juenger "Conflict rules for marital property" 1987 *Am J Comp L* 255; in die algemeen ook Cheshire en North 869 ev; Nygh 383 met verdere verwysing. Nygh steun die Amerikaanse benadering solank die nuwe huweliksdomisilie die gesamentlike tuiste van die egpaar is, en die reg van die nuwe huweliksdomisilie die verandering toelaat.

35 Wolff 361–363. In Amerika is volkome veranderlikheid in die dertigerjare as strydig met die *due process* klousule in die Federale en staatlike konstitusies bevind; vandag is dit onwaarskynlik dat so 'n bevinding gemaak sal word (vgl Juenger 1981 *Col LR* 1075 vn 97).

36 Wis Stat Ann par 767.255.

37 Symeonides 1987 *Am J Comp L* 272–273.

deur die reg van die nuwe domisilie, en ongeag van waar die goed geleë is. As rede word aangegee dat geen gevestigde regte kan bestaan ten aansien van toekomstige verkrygings nie.[38]

Sedert die promulgasie van die Family Law Reform Act van 1978[39] in Ontario word die huweliksgoedereregte van die partye (nie net getroude pare nie) bepaal deur die reg van hulle laaste gemeenskaplike gewoonlike verblyf.[40] Artikel 15 van die Family Law Act van 1993 bepaal dat die eiendomsregte of gelykmakingaansprake (*equalization claims*) van partye in sowel roerende as onroerende goedere wat uit die verhouding ontstaan, beheer word deur die interne reg van die plek waar beide partye hulle laaste gemeenskaplike vaste verblyf gehad het. Indien hulle geen gemeenskaplike verblyf gehad het nie, vind die reg van Ontario aanwending.[41] Indien die *lex fori* die eiendomsreg en verdeling beheer, mag die waarde van onroerende goed in die vreemde in aanmerking geneem word by verdeling. Presedente van hofbevele ten opsigte van onroerende goed in die vreemde bestaan ook.[42] Artikel 15 respekteer nie die onderskeid tussen die geval waar daar 'n kontrak (sogenaamde *domestic contract*) gesluit is en waar daar geen kontrak gesluit is nie.

In Australië word die huweliksgoederebestel ten opsigte van roerende goed beheer deur die reg van die domisilie ten tyde van die huweliksluiting in afwesigheid van 'n kontrak tot die teendeel. Die huweliksgoedereregten aansien van onroerende goed word beheer deur die uitdruklike huwelikskontrak vir sover die *lex situs* dit toelaat en totdat dit kontraktueel gewysig word. Indien daar geen kontrak gesluit is nie, word dit beheer deur die *lex situs*. Die Australiese howe mag ingevolge artikel 79 van die Family Law Act van 1975 aanpassings maak in eiendomsbelange of gevestigde regte wat verkry is ingevolge vreemde reg. Hulle behou 'n diskresionêre bevoegdheid om die resultaat van toepassing van die *lex fori* (dikwels as *lex domicilii* ten tyde van verkryging) aan te pas sodat regte verkry onder 'n vroeëre toepaslike reg behoue bly. Die Australiese hof het

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38 Castel *Conflict of laws* (1988) 7–33 7–43.

39 RSO 1980 c 152. Die Family Law Acts van 1986, 1990 en 1993 laat a 15, die regskeuse-reël wat geld in afwesigheid van *domestic contracts*, onveranderd.

40 'n Ooreenkoms wat die *prima facie* regte wysig, is voor die Family Law Act 1990 daardie effek gegee wat die *lex causae* vir die huweliksgoederevraag toelaat. Waar uitkontraktering uit die basiese operatiewe reëls toegelaat is deur die *lex causae* vir die huweliksgoederevraag, is die *lex causae* toegepas om regte op sowel roerende as onroerende goed te bepaal, behalwe vir sover dit onversoenbaar was met die kontraktuele regte wat deur die *proper law* van die kontrak geskep is: *Sinnett v Sinnett* (1980) 15 RFL (2d)115 (Ont Co Ct); Castel 7–53 ev. Sedert 1990 is die onsekerhede in kontraktuele interpretasie wat hierdeur veroorsaak is uit die weg geruim (a 2(9) 2(10) 58). 'n Bepaling in 'n *domestic contract* wat 'n aangeleentheid reël wat deur die wet gedek word, mag deel gemaak word van 'n hofbevel. Voorts is so 'n bepaling geldig tensy die wet uitdruklik anders bepaal. Nietemin bly uitsprake wat ingevolge die vroeëre wetgewing gegee is waardevol vir provinsies waar wetgewing analoog aan die Family Law Reform Act 1978 is.

41 Vgl Bissett-Johnson en Holland *Matrimonial property law in Canada* (1980) vol I sub "Ontario" O-85 – O-88; MacDonald en Wilton *The annotated Family Law Act* 1993 (1992) 15 par 4.

42 MacDonald en Wilton 15 par 6 met verdere verwysing.

jurisdiksie om 'n bevel te maak ten aansien van oorsese goedere mits die party binne sy gebied woonagtig is. As die party nie daar woon nie, moet die bevel andersins oorsee afdwingbaar wees of moet daar ander dwingende redes wees om jurisdiksie te aanvaar. Natuurlik moet bevele ten aansien van bates in die buiteland ooreenstem met die huweliksgoederebestel van die *lex situs*.[43]

2 2 Die Haagse Konvensie van 1976

Die 1976 Haagse Konvensie[44] beklemtoon die *nexus* van gemeenskaplike vaste verblyf en skryf aan die *situs* van onroerende goed 'n mate van belang toe (artikel 3 en 4). Die *lex situs* mag gekies word om sommige van die onroerende goed te beheer in die hede of in die toekoms. Erkenning word verleen aan gedeeltelike veranderlikheid waar dit so uitgedruk is deur die partye – egpare mag ter vervanging van die vroeëre toepaslike reg (artikel 6) die reg van die plek waarvan hulle burgers is, of waar hulle gewoonlik woonagtig is, of in geval van onroerende goed die reg van die *situs* gedurende die huwelik aanwys om hulle huweliksgoederebestel te reël. Waar die gades nie die toepaslike reg aangewys het nie en ook nie 'n huwelikskontrak gesluit het nie, mag 'n verandering van vaste verblyf 'n vooruitskouende verandering in hulle huweliksgoederebedeling ten gevolg hê mits die verplasing "betekenisvol genoeg" is, byvoorbeeld 'n verandering van sowel burgerskap as verblyf behels (artikel 7) of indien hulle vir tien jaar in hulle nuwe tuiste gewoon het. Dieselfde geld indien partye nie hulle eerste gewoonlike verblyf in dieselfde land gehad het nie. Beperkte veranderlikheid word dus hier onderskryf.

Die meeste bepalings van die konvensie is onnodig ingewikkeld en bring mee dat meerdere regstelsels die ontbinding van die huwelik kan beheer.[45]

2 3 Migrasie vanaf *common law* sisteem na 'n sisteem van gemeenskap van goedere

Gevestigde regte verskil soos egpare tussen regsfamilies en -stelsels beweeg. Migrasie vanaf 'n sisteem wat van regsweë gemeenskap van goed uitsluit na 'n binne gemeenskap van goedere sisteem het aanleiding gegee tot die ontwikkeling van verskillende tegnieke in die strewe na 'n bevredigende oplossing. Wolff[46] gee te kenne dat die *common law* stelsel *ex nunc* deur gemeenskap van roerende goed vervang word wanneer daar na 'n land met universele gemeenskap beweeg word en dat bestaande eiendomsregte verander. Een van die basiese benaderings tot hierdie problematiek kan die "speurmetode" genoem word.

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43 Nygh 386. A 104 Family Law Amendment Act 1983 gee aan die Family Court magte om 'n huweliksgoederebevel te maak waar egskeiding elders plaasvind en Australië die bevel as geldig erken. Aparte egskeidings- en huweliksgoederejurisdiksie is te verwelkom in 'n land met 'n groot migrerende bevolking.

44 Hague Convention on the Law Applicable to Matrimonial Property Regimes 1976 *Netherlands Int LR* 398.

45 Sien in die algemeen Hoge Raad 27 3 1981 *Nederlandse Jurisprudentie* (1981) 335; Lipstein "One hundred years of Hague conferences on private international law" 1993 *ICLQ* 588–590.

46 326.

Tipering van eiendom as gemeenskaplike of eiegoed, asook "verdeling" van eiendom by egskeiding en dood geskied ooreenkomstig die reg van die plek waar die egpaar hulle huwelikslewe deurgebring het. Verdeling verwys hier na die vasstelling van die onderskeie regte van die voormalige gades op die eiendom – 'n feitelike verdeling vind nie noodwendig plaas nie. Die "tradisionele benadering" verwys na die reg van die voorgaande domisilie om die bates te klassifiseer of te tipeer as eiegoed of gemeenskaplike eiendom, terwyl die reg van die nuwe domisilie die onderskeie regte bepaal.

In Kalifornië en Arizona gebruik die howe die konsep "quasi-gemeenskap", wat dit moontlik maak om bates verkry terwyl die egpaar in 'n *common law* staat gedomisilieer was, te verdeel asof dit gemeenskaplike bates is. Die "quasi-gemeenskapbenadering" pas in sowel tipering as verdeling van die eiendom die reg van die nuwe domisilie toe.[47] Dit is 'n oorvereenvoudigde *forum*-gerigte benadering wat die egskeidingshof magtig om die *lex fori* op alle aangeleenthede en op alle eiendom toe te pas. Louisiana se reg, wat die bestaan van 'n vorm van gemeenskap van goed veronderstel, is 'n meer gesofistikeerde weergawe hiervan. Artikel 3526 van die nuwe kodifikasie bepaal effektief dat klassifikasie ingevolge die *lex fori* moet geskied asof die egpaar op alle kritieke tye daar gedomisilieerd was. Eiendom wat as gemeenskaplike eiendom geklassifiseer word ingevolge Louisiana reg moet ingevolge dié reg om die helfte verdeel word. Die reg van die plek waar die verkrygende eggenoot gedomisilieer was ten tyde van die verkryging (dit wil sê vreemde reg) word net aangewend vir verdelingsdoeleindes: ten aansien van eiendom wat ingevolge die *lex fori* as aparte eiendom tipeer word, het elke party al daardie regte, in waarde, wat hy of sy ingevolge die totale vreemde reg sou gehad het.[48] Hierdie metode word ook in geval van dood gevolg as die oorledene by sy of haar afsterwe in Louisiana gedomisilieerd was. In Kalifornië beperk sogenaamde uitgebreide veranderlikheid die nadelige uitwerking wat gedeeltelike veranderlikheid en die leerstuk van oorsprong in geval van afsterwe kan hê.[49] In 'n 1967-beslissing van die Arizona hooggeregshof[50] het die hof dit juis en regverdig geag om (onroerende) eiendom wat uit fondse wat in Illinois ('n *common law* staat) bekom is, gelykop te verdeel ten spyte van 'n verbod op die afstanddoening en donasie van afsonderlike eiendom in die reg van Arizona. Die wetgewing en regspraak van Illinois is ondersoek om seker te maak dat so 'n beslissing daar 'n behoorlike een sou wees. Na hierdie beslissing is die konsep van "quasi-gemeenskap" in wetgewing

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47 Symeonides 1987 *Am J Comp L* 274 ev; *Addison v Addison* 399 P 2d 897 (1965); 23 Uniform Disposition of Community Property Rights at Death Act 8 *Uniform Laws Ann* 61 (1972); *Rau v Rau* 6 Ariz App 362, 432 P 2d 910 (1967).

48 Vgl die 1991 New Louisiana International Law Codification (State of Louisiana) Act; Symeonides 1987 *Am J Comp L* 279–281; Symeonides "Private international law codification in a mixed jurisdiction: the Louisiana experience" 1993 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (*Rabels*) 486 ev.

49 Juenger 1981 *Col LR* 1074–1075.

50 *Rau v Rau supra* 912.

vervat.[51] Die hof het dus die situasie hanteer deur die veranderlikheidsreël uit te brei.

Dit blyk dus dat die oplossing verfyn kan word om die stelsel voor te skryf wat die klassifikasie van eiendom moet beheer. Die aanpassings wat die basiese teorieë ondergaan het, kan nogtans beteken dat die nie-verdienende eggenoot oorbeskerm word waar die vroeëre domisiliêre reg se erfregbepalings oor die langslewende se wettige erfdeel (uit hoofde van die *lex ultimi domicilii*-reël) en die Louisiana kode kumulatief toegepas word.[52] Wanneer daar van 'n sisteem van gemeenskap van goedere beweeg word na 'n *common law* sisteem van skeiding van goed, is die potensiaal hiervoor feitlik afwesig.

2 4 Migrasie vanaf 'n *common law* sisteem na Suid-Afrika

In die Suid-Afrikaanse reg vind 'n gemeenskap van goedere van regsweë toepassing in afwesigheid van 'n reëling tot die teendeel. Die aanwasbedeling is 'n kontraktuele bedeling wat eers in 1984 statutêr verwoord is. Gemeenregtelik was aanwasdeling[53] ook 'n kontraktuele moontlikheid, maar dit was onbekend en onderbenut. Die kontraktuele huweliksgoederebedeling streng buite gemeenskap van goedere was voor 1984 meer algemeen. Soos die reg van Louisiana, veronderstel Suid-Afrikaanse reg die bestaan van gemeenskap van goed. Daar is reeds verwys na die onderskeid tussen die huweliksgoederebestel wat ingevolge 'n geregistreerde en notarieel verlyde huweliksvoorwaardekontrak teenoor derdes geld en die bestel wat ingevolge 'n ongeregistreerde huweliksvoorwaardekontrak *inter se* geld.[54] Terwyl die bedeling streng buite gemeenskap van goedere teenoor derdes kan wees, kan *inter se* 'n aanwasbedeling geld. Die vraag is of 'n verandering in bestel wat ook teenoor derdes sal geld op die huwelik van toepassing gemaak kan word bloot deur 'n domisilie van keuse in Suid-Afrika te vestig. 'n Ander vraag is of 'n artikel 21(1)-hofbevel sedert 1984 die enigste moontlikheid is, ook vir buitelanders.[55]

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51 Ariz Rev Stat Ann par 25–318 (West Supp 1980–1981); Juenger 1981 *Col LR* 1075.

52 Symeonides 1987 *Am J Comp L* 280 283–284. Aanpassing van die erfreg, dws om kennis te neem van die langslewende se huweliksgoedereregte, is dus nie die enigste oplossing soos Dicey en Morris (1993) 1087 beweer nie.

53 Die aanwasbedeling het 'n vaste helfte-helfte verdeling tot gevolg. A 3 van die Huweliksgoederewet 88 van 1984 bepaal uitdruklik dat middele of rykdom gedeel moet word deur die gades in vaste aandele. Die boedel wat die kleinste aanwas toon, verkry 'n eis teen die ander gade se boedel vir die helfte van die verskil in aanwas.

54 *Spinazze v Spinazze* 1985 3 SA 650 (A) 656D–658D. 'n Standaard of stereotipe huweliksvoorwaardekontrak (hvk) word notarieel verly en geregistreer om teenoor derdes te geld terwyl 'n onderhandse kontrak net *inter se* en teenoor universele erfgename werking het.

55 Van Loggerenberg 1987 *Obiter* 111 ev argumenteer dat 'n a 21(1)-hofbevel (Wet op Huweliksgoedere 1984) die enigste manier is waarop voormalige buitelanders die bestel nahuweliks kan wysig en dat die hof 'n diskresie geniet om die regskeusereël wat na die reg van die man se domisilie tydens huwelksluiting verwys, toe te pas. Die *lex fori* gee die deurslag en verandering van domisilie of private ooreenkoms speel geen rol nie. Sien in die algemeen die redenasie op die interne vlak in Sonnekus 1992 *TSAR* 683 ev.

Artikel 21(1) het 'n mate van buigsaamheid verleen ten opsigte van huwelike na 1984 gesluit. Daar bestaan nie langer 'n absolute verbod op nahuwelikse kontraktuele wysiging van die huweliksgoedere bestel nie. Die moontlikheid van *informele nahuwelikse* wysiging van die huweliksgoederebestel, terugwerkend en/of toekomstig, geniet nie alle Suid-Afrikaanse kommentatore se steun nie, en die 1984-wet het aan die aard van die besware min verander.[56] Daar kan geargumenteer word dat die beletsel teen nahuwelikse wysiging van die huweliksgoederebedeling as 'n selfstandige reël van die interne huweliksgoedereregbeskou moet word.[57] Onderhandse wysiging van 'n huweliksvoorwaardekontrak is selfs al beskryf as 'n "wesenlike indruising teen die aard van die huwelik en verbandhoudende ooreenkomste", en as ontoelaatbaar omdat dit lukraak sou wees.[58]

Volgens Douglas doen die *governing system* wat teenoor derdes geld nie afbreuk aan die effektiwiteit van 'n informele verandering van die huweliksbestel nie, mits die gades se handelingsbevoegdheid nie daardeur verander is nie.[59] Hy

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56 Hahlo (1985) 159 283 en Silberberg 1973 *CILSA* 358–359 meen dat 'n (geregistreerde) kontrak noodsaaklik is en dat die hvk net verander kan word deur 'n geregistreerde kontrak wat onderworpe is aan regterlike kontrole, aangesien dieselfde doel so bereik word as met die onveranderlikheidsleer. Vgl in die algemeen ook *Honey v Honey supra* 611–613 waar die hof die toelaatbaarheid van onderhandse nahuwelikse kontrakte in belang van derdes teenstaan.

57 Die argument lui dat die gemeenregtelike norme van skenkings tussen gades en die gemeenregtelike beletsel teen wysiging van die huweliksgoederebedeling (hvk of gemeenskap van goed) tydens die huwelik nie uitsluitlik van mekaar afhang nie. Die herroeping van die verbod op skenkings (a 22 Wet op Huweliksgoedere 1984) beteken nie in sigself dat die beletsel teen nahuwelikse kontrakte (en die *ratio* vir onveranderlikheid) verval het nie. Onder die gemeenregtelike skrywers wat die verbod voorgehou het as rede vir die onveranderlikheid tel Groenewegen *De Leg Abr* 4 29 11; Van Leeuwen *Het Rooms-Hollands regt* 4 24 12. Vgl die standpunte van Silberberg 1973 *CILSA* 338 355 362 wat meen dat die verandering *ex tunc* is na herroeping van die verbod op donasies; Hahlo (1975) 631 vn 463; Douglas 1991 *De Rebus* 206–207 211. Daar is oortuigende redes waarom die verandering van 'n huweliksgoederebestel van buite gemeenskap na binne gemeenskap van goed (of andersom) selfs nie destyds as 'n donasie aangemerk kon word nie al word daar aanvaar dat donasies wat gemaak is tussen persone wat buite gemeenskap getroud was voor 1984, en wat vernietigbaar was, na die wetswysiging geldig en afdwingbaar geword het (*Union Government v Larkan supra* 231; Barnard *et al* 234–235; Silberberg 1973 *CILSA* 360–362). Bodenstein 1917 *SALJ* 11 beskou die afwysing van 'n voordeel wat nog nie bekom is nie, nie as 'n skenking nie. Van Rensburg 1991 *De Rebus* 289 se siening is dat 'n informele verdelingsooreenkoms tussen 'n egpaar wat voor 1984 buite gemeenskap van goedere getroud is, vernietigbaar en onafdwingbaar is totdat verdeling plaasgevind het. Sonnekus 1992 *TSAR* 685 verwys na die onbestendigheid van skenkings tussen egliede wat oa deur die dood van die skenker bestendig kon word. Douglas 1991 *De Rebus* 209 ev ontken dat daar voor ontbinding van die huwelik 'n vorderingsreg op aanwasdeling bestaan wat geskenk kan word. Die potensiële nadeel vir skuldeisers (Bijnkershoek *Obs Tum* 2 obs 1604; 4 obs 3156) werk mee om veranderlikheid op interne vlak te inhibeer (Sonnekus 1992 *TSAR* 687; Silberberg 1973 *CILSA* 364).

58 Sonnekus 1992 *TSAR* 685. Hy steun oa op die beginsel van *pacta sunt servanda* en beginsels van goeie trou en redelikheid (688–689).

59 Douglas 1991 *De Rebus* 206–207 209 ev meen dat die Suid-Afrikaanse reg dit aan 'n kontrak oorlaat om die vermoënsregtelike gevolge van die huwelik vas te stel, totdat 'n

vervolg op volgende bladsy

beskou wedersydse toestemming (afgesproke of onderlinge wysiging) voldoende om die huweliksgoederebestel te wysig van 'n bestel wat gemeenskap en aanwas (*stante matrimonio*) uitsluit tot 'n bestel wat aanwasdeling (by ontbinding) insluit.

Volgens Douglas se perspektief sou 'n mens soos volg kon redeneer: Die *common law* sisteem laat herverdeling in bepaalde omstandighede by ontbinding van die huwelik toe, terwyl die Suid-Afrikaanse aanwasbedeling in alle omstandighede meebring dat boedelaanwas by ontbinding gedeel word. 'n Oorskakeling (ingevolge 'n onderlinge ooreenkoms of net in die sin van migrasie vir sover dit geag kan word 'n stilswyende ooreenkoms daar te stel) laat die handelingsbevoegdheid van die partye onaangeraak sodat derdes nie benadeel word nie en bevestig die bestaan van 'n *prima facie* reg om die aanwasbedeling aan te neem sonder registrasie van 'n kontrak of die hof se toestemming ingevolge artikel 21 Wet 88 van 1984.[60] Hulle sou slegs met mekaar hoef af te spreek om in mekaar se boedelaanwas te deel. Suid-Afrikaanse regspraak stel in ieder geval nie die vraag of die potensieel toepaslike *lex causae* nahuwelikse wysiging toelaat nie. Teen hierdie agtergrond gesien, herinner artikel 7(9) aan die Arizona-hof se beslissing in 1967 voordat die veranderlikheidsleerstuk aangepas is om gevestigde regte na behore te respekteer (die artikel sluit immers nie ontwikkeling van 'n leerstuk van gedeeltelike verandering uit nie). Indien effektief voorsiening gemaak word vir die beskerming van skuldeisers wat geen kennis van die nuwe bedeling ontvang het nie, deur aan hul eise voorrang te verleen, bly daar nie veel oor wat teen veranderlikheid aangevoer kan word nie.

Wat Suid-Afrikaanse regspraak in internasionale sake betref (en min het sedert April 1992 verander), is daar nie veel oor die onveranderlikheidsleerstuk uitgewei nie. In sake soos *Milbourn v Milbourn*[61] en *Bell v Bell*[62] was die egpare in Engeland gedomisilieer ten tyde van huweliksluiting. In beide gevalle eis die eiseresse oordrag van gedeeltes van hul gades se bates. In geen een van die twee gewysdes is die verdeling aan die reg van die nuut verkreë domisilie (Suid-Afrika) oorgelaat nie. Die onveranderlikheidsleerstuk word in *Milbourn* se saak bloot geïmpliseer, en omdat Engelse wetgewing nooit gepleit is nie, word geen erkenning daaraan verleen nie. In die beslissing *Bell v Bell* word uitdruklik daarna verwys.[63] In die geval van *Lagesse v Lagesse*[64] is die partye getroud terwyl die man in Mauritius gedomisilieerd was, sonder om 'n formele voor- of nahuwelikse kontrak te sluit voor 'n notaris of andersins. In die kantlyn

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nuwe kontrak na die huwelik opgetrek word. Partye geniet 'n groot mate van party-outonomie in die beskrywing van watter bates eiegoed sal bly en die omvang van die aandele waarin hulle sal deel. Die belang wat 'n egpaar daarin het om hulle vermoënsregte *inter se* te bepaal en 'n belofte van 'n donasie van bepaalde omvang op 'n vaste datum aan mekaar te maak, benadeel nie onkundige en misleide skuldeisers teenoor wie die *governing system* geld meer as enige ander soort donasie nie.

60 Sien in die algemeen Douglas 1991 *De Rebus* 208–209.

61 1987 3 SA 62 (W).

62 1991 4 SA 195 (W).

63 Vgl die aanhaling uit die *Sperling*-saak *supra* 197C 220A.

64 1992 1 SA 173 (D).

van die huweliksertifikaat is bloot verwys na die Mauritiusse Ordonnansie wat gemeenskap van goed uitsluit. Artikel 7(3) se kontraksvereiste word geag bevredig te wees en die herverdeling van bates word oorgelaat aan die reg van die nuut gevestigde domisilie (Suid-Afrika). Die reg van Mauritius, as die reg van die plek waar die egpaar aanvanklik gedomisilieerd was, maak voorsiening daarvoor dat gemeenskap van goedere geld in afwesigheid van 'n kontrak of 'n verklaring ingevolge die Status of Married Women Ordinance 50 van 1949. Die klassifikasie van eiendom in die Suid-Afrikaanse en Mauritiusse reg kom dus ooreen ('n bedeling van gemeenskap van goedere geld van regsweë). Daar word na die reg van Mauritius verwys om die huweliksgoederebedeling aan te dui (Mauritius se reg is in relevante opsigte deur Franse reg beïnvloed sodat dit 'n ware hibriede stelsel is). 'n *Forum*-benadering word egter ten aansien van die verdeling gevolg. Steun vir die veranderlikheidsleerstuk kan nie sonder meer hieruit afgelei word nie omdat 'n veel nouer verwantskap bestaan tussen die regsinstellings in Suid-Afrika en dié van Mauritius, as met suiwer *common law* stelsels.

In die lig van al die voorgaande kan dus gesê word dat die onveranderlikheidsleerstuk as riglyn[65] op internasionale vlak in Suid-Afrika aanvaar behoort te word terwyl die *kwalifikasies daarop* in gedagte gehou moet word. Die moontlikheid bestaan dat die partye lank reeds alle kontak met hulle eerste domisiliêre reg en met die sosiale milieu van die eerste domisilie verloor het. Wanneer die bestaande verbindingsfaktor deur ander kontakpunte verdring word, is dit tyd dat belange hergeëvalueer word. Dit is egter duidelik uit die voorgaande dat die veranderlikheidsleerstuk en die leerstuk van skeiding ineengestrengel is. Savigny het gemeen dat daar nie redelikerwys aangeneem kan word dat die gades bedoel om hulle eiendomsreëlings afhanklik te stel van die toevallige toedrag van sake dat 'n deel van die boedel bestaan uit onroerende goed in die buiteland nie. Hy sê sy steun aan die eenheidsbeginsel toe in belang van sekerheid.[66] In Suid-Afrika word die eenheidsbeginsel nie ernstig bevraagteken nie[67] en die *lex situs* se rol ten opsigte van vreemde onroerende huweliksgoedere is beperk (hoewel 'n kontraktuele keuse van 'n bestel wat nie deur die *lex situs* toegelaat word nie, ongeldig sal wees). Die splitsingsleerstuk vergemaklik geensins die verdeling van huweliksgoedere nie. Of die teoretiese basis van die eenheidsleerstuk 'n gesonder een is, soos Symeonides al te kenne gegee het,[68] kan nie in die bestek van hierdie ondersoek uitgeklaar word nie.

3 REGSKEUSEREËLS VIR ONDERHOUD

Regskeusereëls vir onderhoud kom nie noodwendig ooreen met die regskeusereëls vir vermoënsregtelike gevolge nie. Die reg van meer as een staat kan

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65 Kruger 1992 *THRHR* 496 verwys na die "beginsel" om die aansprake van die partye op huweliksgoedere te klassifiseer as vermoënsregtelike gevolge van die huwelik.

66 Vgl Savigny 292 par 379.

67 In *Union Government (Minister of Finance) v Larkan supra* word die vraag na die geldigheid van die nahuwelikse kontrak bepaal deur die *lex situs*. Daar word ook uitsprake gemaak wat onversoenbaar is met *Chiwell v Carlyon supra* 219.

68 1993 *Rabels* 487.

toegepas word op verskillende aspekte van dieselfde saak omdat verskillende regskringe belange in verskillende aspekte van 'n saak kan hê en omdat daar graadverskille kan wees in die belange wat hulle in verskillende aspekte het.

Engelse howe pas Engelse reg toe wanneer onderhoudsbevele oorweeg word, ongeag die domisilie van die partye of enige ander faktor wat op die toepassing van 'n ander regstelsel dui.[69] In die Australiese reg is die regskeusereël vir onderhoud ondubbelsinnig: die *lex fori* beheer onderhoud.[70] Die Family Law Amendment Act van 1987 skei onderhoudsaspekte van huweliksgoederebevele deurdat geskeides nou 'n lewenslange jurisdiksionele reg het om vir onderhoud aansoek te doen.[71]

Malawiese reg skenk nie by verdeling van huweliksgoedere aan toekomstige onderhoudsbehoeftes aandag nie. Onderhoudseise moet ingevolge die Egskeidingswet gebring word en word dus deur die *forum* bepaal.[72]

Die Hague Applicable Law Convention van 1973 bepaal dat die reg van die land waar die skuldeiser sy of haar vaste verblyf het, toepassing moet kry.

Ingevolge Suid-Afrikaanse reëls word egskeidingsaksies, die gronde vir egskeiding, die voorwaardes tot verlening van 'n egskeidingsbevel en die eise bykomend hiertoe of verbandhoudend daarmee ingevolge die hof se eie reg beslis (*qua lex fori* of *lex domicilii*). Aangesien onderhoud (soos eise om toesig en beheer) 'n eis bykomend tot egskeiding is, is dit nog altyd beheer deur die *lex fori*[73] waar die Suid-Afrikaanse hof jurisdiksie het. Die hof mag 'n bevel ingevolge artikel 7(1) of 7(2) uitvaardig, ongeag die eggenoot se domisilie ten tyde van huweliksluiting. Of artikel 7(9) hierdie tradisionele stand van sake gekwalifiseer het, sal weldra duidelik word.

4 REGTERLIKE DISKRESIE EN STATUTÊRE HUWELIKSGOEDEREBEDELINGS

Die verlening van statutêre magtiging aan regsbeamptes om hulle diskresie te gebruik binne die grense van 'n statuut is 'n histories bekende verskynsel.[74] Die regterlike diskresie is daardie mag wat die reg aan die houer daarvan verleen om een moontlikheid te kies uit verskillende skakerings moontlike regmatige

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69 Cheshire en North 714. Die enigste uitsondering is wette wat op wederkerigheid steun.

70 Nygh 389.

71 Vgl Bates "Reforming Australian matrimonial property law" 1988 *Anglo American LR* 46 ev; Kovacs *Family property proceedings in Australia* (1992); Wade "New impediments to achieving settlement of financial disputes under the Family Law Act" 1990 *Aust J Family L* 4.

72 *Cromar v Cromar* 440/86 MHC 4. Sien in die algemeen *Malinki v Malinki* 129/78 MCH; *Kayambo v Kayambo* 162/83 MCH; *Kayambo v Kayambo* 8/85 MSCA; *Nyangulu v Nyangulu* 108/82 MSCA.

73 Vgl die teks by en die verwysings in vn 7 *supra*.

74 Vgl oor die regterlike diskresie in *hard cases* Barak *Judicial discretion* (1989) 27 ev; Pound 1960 *NY Univ LR* 926; Cardozo *The nature of the judicial process* (1921); Hart *The concept of law* (1961); Dworkin "Natural law revisited" 1982 *U FLA LR* 168; Raz *The authority of law* (1979).

oplossings, en so 'n toedeling te maak binne die bestek van "aanvaarbare" bevele. Regterlike diskresie impliseer dat die regter nie meganies of arbitrêr mag optree nie maar moet weeg en toets. In die konteks van huweliksgoederebevele kan hy 'n bevel maak wat 'n algemene verduideliking van die toedeling van goed bevat, of een wat 'n matematiese formule bevat vir die berekening van aandele in kapitaalgoedere en onderhoud.[75]

Hoe versoenbaar is die *common law* huweliksgoederebestel met die konsep van die huweliksgoedereverhouding in die sisteem wat aan die vreemde huweliksgoederebestel erkenning wil verleen? Daar word in die algemeen vereis dat vreemde reg gedingsvatbaar moet wees alvorens die howe van die *forum* dit sal erken. Spiro sê:

> "A plaintiff seeking to enforce a foreign right can . . . demand only those remedies recognized by the forum, and the claim will not be defeated merely because those remedies are greater or less than those in the courts of the foreign country. But the remedies available must harmonize with the right according to its nature and extent as fixed by the foreign law: if the machinery by way of remedies available at the forum is so different to that in the foreign country as to make the right sought to be enforced a different right, that right will not be enforced by the court of the forum."[76]

Die konsep van 'n totale huweliksgoederebestel het nog nooit vat gekry op Anglo-Amerikaanse regsdenke nie. Die basiese beginsel van die ou Normandiërs het gebly: dat die huwelik op sigself geen invloed het op die gades se finansiële en sakeregtelike belange nie. Afsonderlike reëls word eerder ontwerp soos en wanneer politieke, sosiale en ekonomiese krisispunte dit noodsaak. Daar kan nietemin nie ontken word nie dat die huwelik wel gades se vermoënsregte beïnvloed, ook waar hulle nie gekontrakteer het nie, ofskoon dit eers by beëindiging van die huweliksverhouding manifesteer. Die regstelsels wat hier vergelyk word, het almal 'n belang daarby om die nie-verdienende eggenoot te beskerm teen die gevolge van beëindiging van die huweliksverhouding deur egskeiding of dood. Daar was nooit juis twyfel in die *common law* regstelsels dat die ongekwalifiseerde aanwending van die skeiding van goed onversoenbaar is met die regs- en sosiale instelling van die huwelik nie.[77] Die *common law* regstelsels het die beweging in die rigting van regterlike bevoegdheid tot aanpassing van huweliksgoedereregte goedgunstig bejeën. Op die een of ander wyse maak almal spesiaal voorsiening vir verdeling van huweliksgoedere en 'n vorm van winsdeling in hierdie goedere op die tydstip van egskeiding of dood, en sien toe dat langslewendes en voormalige eggenote wat finansieel of andersins tot die huwelik bygedra het in bepaalde omstandighede 'n aanspraak het op 'n gedeelte van die bates van 'n kapitale of inkomste-aard wat gedurende die bestaan van die huwelik verwerf is, en dat hulle in die algemeen versorg is. In *common law*

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75 *Wachtel v Wachtel* [1973] 1 All ER 829 836C–H beskryf die huweliksgoedere as bestaande uit die kapitale bates (bates van kapitaal-produserende aard soos 'n huis) en bates van 'n inkomste-aard.

76 *Conflict of laws* (1973) 51.

77 Vgl bv die verwysings in Van Schalkwyk *Aspekte van die onderhoudsaanspraak tussen eggenotes met spesifieke verwysing na egskeiding* (LLD-proefskrif UP 1987) 200.

regstelsels word die aanspraak wat een eggenoot op die ander se "aparte eiendom" kan maak wanneer die huweliksverhouding eindig (billike verdelingaanspraak), aanvaar as 'n komponent van die begrip "aparte eiendom". 'n Billike verdeling kan oordrag van meer as die helfte van die ander gade se eiendom beteken, asook oordrag van eiendom wat as eiegoed getipeer sou word in 'n regstelsel waar gemeenskap van goed die statutêre bedeling is.

Terwyl die gaping tussen reg en moderne sosiale omstandighede in die gemeenskap vroeër met behulp van regsfiksies oorbrug is, word dit nou deur *equity* en wetgewing aangespreek.[78]

4 1 Artikel 7(3)–(8) van die Egskeidingswet van 1979

Artikel 7(3) van die Wet op Egskeiding skep 'n meganisme vir geïndividualiseerde regstoepassing. Dit verleen aan die hof die bevoegdheid om saam met 'n egskeidingsbevel 'n billike oordrag van bates of 'n gedeelte van bates van een gade na die ander gade te gelas waar die huwelik voor 1 November 1984 gesluit is ingevolge 'n huweliksvoorwaardekontrak waardeur gemeenskap van goedere, gemeenskap van wins en verlies en aanwasdeling in enige vorm uitgesluit is. Die diskresie wat artikel 7(3)–(8) verleen, bevat ook substantiewe beperkings wat na billikheid verwys.

Artikel 7, soos artikel 2 van die Huweliksgoederewet, staan in die teken van gelyke regte. Die opvatting bestaan in geïndustrialiseerde gemeenskappe dat die party, gewoonlik die vrou, wie se boedel weinig of geen groei gedurende die huwelik toon terwyl haar gade se boedel wesenlik groei, haar in 'n potensieel onbillike situasie bevind wat regstelling kan vereis. "Gelyke" huweliksvennote behoort immers gelyke aandele te hou in wat die egpaar gedurende die huwelik verwerf of gespaar het. In die Suid-Afrikaanse reg is die meganisme van die artikel 7-regterlike bevoegdheid tot herverdeling gerig op beskerming van dié vroue wat voor 1984 sekuriteit vir status verruil het en wat met of sonder behoorlike regsadvies op die "ou koue" uitsluitingsisteem besluit het. In geval van 'n egpaar wat 'n domisilie in Suid-Afrika vestig, kon 'n aanspraak op deling in boedelgroei voorheen net gegrond word op gedrag wat 'n universele vennootskap in die lewe roep of op verryking. 'n Sosiale euwel moes geremedieer word en die ekonomiese mag van die gades gebalanseer word.[79]

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78 Maine *Ancient law* (red Pollock) (1972) 31.

79 Verduidelikende Memorandum Tweede Wetsontwerp op Huweliksgoedere 1984; oa *Beaumont v Beaumont* 1985 4 SA 177 (W) 179G; *Beaumont v Beaumont* 1987 1 SA 967 (A) 987I; *Kritzinger v Kritzinger* 1989 1 SA 67 (A) 88B; *Beira v Beira* 1990 3 SA 802 (W) 804I–805H. Vgl Boberg "Sharing matrimonial assets" 1987 *Businessman's Law* 80; Sinclair "Marriage: is it still a commitment for life entailing a lifelong duty of support?" 1983 *Acta Juridica* 78–79; Sinclair *An introduction to the Matrimonial Property Act 1984* (1984); Sonnekus "Egskeiding en kwantifisering van die bydrae tot die ander gade se boedel – artikel 7(3)–(5) van die Wet op Egskeiding 70 van 1979" 1986 *SALJ* 367; Thomashausen 1985 *De Rebus* 169 en in die algemeen ook Freedman *et al Property and marriage: an integrated approach* (1988) 18 ev.

Vaste formules en regsreëls met gedetailleerde uitsonderings wat omskrewe feitestelle in besonderheid reguleer, is nie geskik vir die verdeling van huweliksgoedere nie. In wese gee artikel 7 aan die hof die bevoegdheid om die huweliksvoorwaardes waartoe die partye tot die egskeiding voor huwelksluiting gekom het rakende hul onderskeie eiendom, te kwalifiseer wanneer hulle in gebreke bly om 'n bateverdelingsooreenkoms te bereik. Terme kan gewysig of geskrap word of 'n "matigende" betekenis kan daaraan toegeken word met verwysing na wat deur een van die huweliksvennote verwerf is deur sy of haar bydrae. Daar kan dus terugwerkend ingemeng word met sakeregtelike belange of gevestigde regte, wat een eggenoot miskien 'n geruime tyd gelede al in die kontrak beskerm het. So kan 'n gelyke verdeling gelas word waar partye se onderskeie boedels nie naastenby gelyk is nie of die bedeling self verontagsaam word. Hierdie beskerming bestaan naas die beskerming wat inherent is aan die statutêre gemeenskap van goedere en die kontraktuele aanwasbedeling. As meganisme tot die oorbrugging van die formele en substantiewe aspekte van vryheid en gelykheid het dit sekerlik genoeg aan probleme.[80]

Artikel 7 verleen geen algemene herverdelingsbevoegdheid nie maar wel 'n relatief wye diskresie. Verskeie alternatiewe en kombinasies van alternatiewe beslissings is moontlik tussen die uiterstes van 'n oordrag van bates aan die een of die ander. 'n Ander onderskeid het te make met die graad van die aanwysings en beperkings wat opgelê word op die vorm en inhoud van die keuse wat uitgeoefen moet word. Regterlike diskresie is altyd beperk, onder meer deur die regsbeginsels wat die aanknopingspunt vir 'n beredeneerde beslissing is. Selfs sonder enige riglyne vir beslissing speel goeie trou, die afwesigheid van kwade motiewe en sekere prosedures met onpartydigheid tot inhoud 'n rol. Die uitoefening van die regterlike diskresie verg 'n waarde-oordeel oor die rol en aard van die huwelik, en die ekonomiese gevolge van egskeiding. Hierdie oorwegings is moeilik in wetgewing vaspenbaar.

4 2 Die regterlike diskresie in die Anglo-Amerikaanse regsfamilie

Aan die begin van hierdie eeu het regstoepassings geïndividualiseerd geraak. Anglo-Amerikaanse reg het ontwikkel uit die aktiwiteite van die *English royal courts*. Die prominente plek wat aan regterlike beslissings toegeken word in die sisteem weerspieël die wese van die Anglo-Amerikaanse regsfamilie. Die *courts of equity* (oorspronklik die *Court of Chancery*) het van regsvoorskrifte algemene

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80 Die transformasie wat oor die jare plaasgevind het in die inhoud en funksie van die kontrak beïnvloed ook die huweliksreg. Hierdie transformasie is deels te verklaar deur die radikale uitbreiding van welsyns- en sosiale dienstefunksies van die staat. Aanmoediging van privaatskikking maak self-aktualisering moontlik. Vereenvoudiging van die reëls wat die huweliksgoederebestel bepaal en beskikbaarmaking van die besonderhede daarvan behoort teoreties uiteindelik tot herroeping van die regterlike diskresie te lei. Aan die ander kant is die beleidsoogmerk gerig op beskerming van die ekonomies swakker party. As 'n meganisme wat gevolg gee aan die huweliksverhouding as 'n verhouding tussen gelykes, is die diskresie wat kontrakteervryheid nou kwalifiseer, aanvaarbaar, selfs vir diegene met 'n meer markgeoriënteerde perspektief wat gekant is teen die terugwerkende inmenging met gevestigde belange.

riglyne gemaak in die soeke na regverdigheid in elke besondere saak. Hoewel die beginsel van gelykheid voor die reg (wat regsekerheid ten opsigte van eiendomsverkryging veronderstel) nie altyd maklik versoenbaar is met "versagtende uitleg van streng regsreëls" nie, is aanvaar dat 'n regverdige en wyse diskresie, as effektiewe individualiserende meganisme, nooit ten volle geëlimineer kan word in die strewe na regsekerheid nie.[81]

Alle remedies wat oorspronklik deur die *Court of Chancery* ontwikkel is, is *equity*. 'n Beroep op *equitable jurisdiction* beteken nie eenvoudig 'n beroep op billikheid of geregtigheid nie. In werklikheid is dit 'n beroep op die reëls van billikheid en geregtigheid soos ontwikkel deur die *Court of Chancery* met die oog op die toepassing daarvan in gevalle waar die reëls van die *common law* onvoldoende was. Die primêre doel van die groot regshervormings van die negentiende eeu en spesifiek die Judicature Act van 1873 was om *equity* en *common law* saam te snoer sodat alle howe enige reël kon toepas en enige toepaslike remedie kon gee. So is *strict law* (as deel van die eerste fase van historiese regsontwikkeling wat as vertrekpunt dien en nie gefokus is op toepassing in bepaalde omstandighede nie) naderhand aangevul deur die beginsels vir die uitoefening van die regterlike diskresie. Gaandeweg het dit duidelik geword dat die beskerming wat die 1882 Married Women's (Property) Act moes verleen aan vroue wat die *benefit of marriage settlements* geniet het of eiendom geërf het wat vir hul uitsluitlike gebruik bestem was,[82] nie langer 'n oplossing kon wees vir gevalle waar vroue aktief tot boedelgroei bygedra het nie. Die huweliksgoedereregs is aangevul deur middels tot geregtigheid wat die belang van sakereg en huweliksgoedereregs in tradisionele sin afgewater het.[83] Die diskresie moes nou die tekortkoming van 'n sisteem van vaste reëls oorbrug deur op spesifieke omstandighede ag te slaan.[84]

Alhoewel die huweliksverhouding toenemend deur die meer onseker konsepte van billikheid en redelikheid beheer word, was 'n *equitable division* nooit 'n verdeling wat minder verantwoordbaar was aan regsbeginsels as 'n verdeling

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81 Pound 1960 *NY Univ LR* 926.

82 Kahn-Freund "Recent legislation on matrimonial property" 1970 *Mod LR* 601 605.

83 Tav *common law* huwelike is daar gewoonlik 'n diskresionêre statutêre bevoegdheid wat die howe in staat stel om 'n billike resultaat te bereik. Daar kan gevalle wees waar die presiese eiendomsbelange van die egliede belangrik is vir skuldeisers se aansprake of vir belastingdoeleindes en waar dit nodig kan wees om terug te val op tradisionele middels soos trusts. 'n Gade mag sy eis op die billikheidsleerstukke (*resulting, implied, constructive, remedial constructive trusts*) baseer indien dit in die omstandighede teen die hof se oortuiging sou indruis om die eienaar op sterkte van die titeldokumentasie te eien. Vgl Hayton "Constructive trusts: is the remedying of unjust enrichment a satisfactory approach?" in Youdan (red) *Equity, fiduciaries and trusts* (1989) 226 ev.

84 Die rigiditeit van die beginsel van skeiding van goed is versag. Uitdrukking is gegee aan die feitelike gemeenskap van gebruik en genot van eiendom in wette soos die Married Women's Property Act, 1964 en die Matrimonial Homes Act, 1967 wat bewoningsregte reguleer en beskerm. Die Matrimonial Proceedings and Property Act, 1970 verleen vir die eerste maal aan die Engelse hof diskresionêre bevoegdhede.

wat op sakeregbeginsels gebaseer was nie.[85] 'n Beroep op *equity* beteken eerder groter aan-bande-legging deur etiese beginsels as minder aan-bande-legging deur regsbeginsels. Regstoepassing is nie gebaseer óf op die tegniese element (identifiseerbare regsreël met 'n identifiseerbare gevolg) óf op die diskresionêre element (buite die regsreël of regsorde) nie.[86]

4 2 1 Engeland, Australië en Ontario

Daar is reeds verduidelik dat benewens die bepalings rakende die status van vroue – wat dateer uit die einde van die negentiende eeu – die *common law* regstelsels nie voortdurend-toepaslike bepalings ontwerp het wat die statutêre huweliksgoederebestel en die gades se onderskeie regte op huwelikgoedere omskryf nie.[87] Juis die feit dat daar geen uitdruklike bepaling in die Engelse reg is wat 'n vorm van winsdeling tussen gades moontlik maak nie, het dit vir die howe makliker gemaak om beginsels te ontwikkel wat die vermoënsregte en batebesit van die familie reël. Vandag is bevele dat bates van een gade aan die ander oorgemaak moet word of die waarde daarvan gedeel moet word algemeen deel van 'n relatief informele en buigsame egskeidingsprosedure. Artikels 23–25 van die Matrimonial Causes Act van 1973 (soos gewysig deur die Matrimonial and Family Proceedings Act van 1984) verskaf 'n algemene diskresionêre uitsondering op die skeidingsnorm in die interne verhouding. *Financial provision orders* sluit in skikkings ten bate van 'n eggenoot of die kinders uit die huwelik gebore, soos onderhoud hangende die geding, periodieke betalings en betaling van 'n lompsom. *Patrimonial adjustment orders* sluit die moontlikheid in om 'n bestaande huwelikskontrak te wysig of die verkoop van spesifieke eiendom te beveel. 'n Kombinasie van al die beskikbare magte maak 'n resultaat moontlik wat as billik, regverdig en redelik beskou kan word.[88]

In Australië het die staatlike en federale howe wye diskresionêre magte in verrigtinge aangaande die eiendom van die partye tot 'n huwelik of van een van hulle. Die vermoënsregtelike bepalings soos vervat in artikels 72–75 en artikel 79 van die Family Law Act van 1975 (wat die federale wet op huweliksgoedere

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85 Inteendeel, *equity* was reg en regstegniek. Dit blyk uit Kahn-Freund 1970 *Mod LR* 605 se stelling ivm 19de eeuse Engelse reg. Hy het 'n ernstige pleidooi vir wetgewing gelewer na uitsprake soos *Pettitt v Pettitt* [1970] AC 777 omdat hy 'n agteruitgang vanaf *equity* na regsfiksie daarin bespeur het (630). Vgl in die algemeen Cardozo 116–117.

86 Pound 1960 *NY Univ LR* 929–930 onderskei ook sake wat in ooreenstemming met die reël in 'n strenge sin beslis moet word; deur te redeneer vanaf "beheersende" aanknopingspunte dmv 'n gemagtigde tegniek soos gerig deur gemagtigde ideale; deur die uitoefening van *regterlike* diskresie; en deur uitoefening van die persoonlike diskresie van die regterlike beampte sonder enige riglyne vir beslissing.

87 Engelse statute soos die Married Women's (Property) Act, 1882; a 7 van die Law of Property Act, 1925; Law Reform (Married Women and Tortfeasors) Act, 1935; Married Women (Restraint upon Anticipation) Act, 1949; Law Reform (Husband and Wife) Act, 1962; Theft Act, 1968.

88 *Hanlon v The Law Society* [1981] AC 124 146; sien in die algemeen Cretney *Elements of family law* (1992); Goldrein en De Haas *Property distribution on divorce* (1985); Duckworth *Matrimonial property and finance* (1987).

is) stel die hof in staat om die bates van die partye te herverdeel in ooreenstemming met wat billik en regverdig is, sonder om te veel ag te slaan op wie titelhouer is.

Die Family Law Act van 1990 in Ontario is deur 'n aanloop van hervormings in die sewentiger- en tagtigerjare voorafgegaan. Aan die einde van die ekonomiese vennootskap tussen die partye is elk geregtig op 'n gelyke verdeling van die finansiële groei wat tydens die bestaan van die vennootskap plaasgevind het, in erkenning van die veronderstelling dat kindersorg, bestuur van die huishouding en finansiële voorsiening die gesamentlike verantwoordelikheid van beide vennote is. Waar vroeëre wetgewing nie die verhouding tussen hierdie statutêre reg en die sakereg soos die regterlike reg op die gebied van *remedial constructive trust* uitgeklaar het nie, bevat artikel 14 nou vermoedens van sogenaamde *joint tenancy*.[89] Die gelykmakingsaanspraak of *equalization claim* maak die gelyke aandele in familiebates (bates wat tydens die vennootskap se bestaan bekom is) konkreet. Die party met die kleinste "netto gesinseiendom" mag die helfte van die verskil in netto waardes eis. Die hof mag ingevolge artikel 5(6) van die gelyke verdeling afwyk indien 'n gelyke verdeling as onbillik (*unconscionable*) beskou sou word. Die partye mag dieselfde doen in 'n ooreenkoms wat eiendomsbelange op 'n permanente basis reël.[90] Hierdie ooreenkomste (genoem *domestic contracts*) mag deur die hof tersyde gestel word óf in geval van gebrekkige openbaarmaking van wesenlike feite, selfs al het die applikant van die reg afstand gedoen; óf indien die aard en gevolge van die kontrak nie ten volle ingesien is nie; óf in ooreenstemming met die algemene beginsels van die kontraktereg.[91]

'n Aantal *common law* sisteme sien die oplossing in 'n gelyke verdeling tensy omstandighede 'n afwyking hiervan regverdig. Die Skotse huweliksbestel, ook genoem "gemeenskap by afsterwe", is 'n voorbeeld hiervan, en so ook die reg van Malawi.

4 2 2 "[S]uch order . . . as he thinks fit"

'n Bepaling wat onder meer gemeenskaplik is aan die Engelse, Australiese, Ontariose en Malawiese reg lui:

> "[I]n any question between husband and wife as to the title to or the possession of property, either party may apply to any judge . . . [who] may make such order with respect to the property in dispute and as to the costs of and consequent on the application, as he thinks fit . . ."

In Engeland was hierdie verklarende bevele die enigste uitsonderings op die algehele skeiding van goed, totdat die 1973-wet die funksie van artikel 17 van die Married Women's Property Act van 1882 gerelegeer tot die uitreiking van 'n verklarende bevel wat die regte van saamwoners bepaal en verklaar, waar die egpaar nie 'n egskeidingsbevel wil hê of kan kry nie of waar die ondersteunende

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89 Hovius en Yodan *The law of family property* (1991) veral hfst 11; Bissett-Johnson en Holland *Matrimonial property law in Canada* (1980) vol II SO–14.

90 A 7 saamgelees met a 9. Vgl Hovius en Yodan 204–205.

91 A 56(4)(a) FLA 1986 & 1990.

remedie of verligting van die 1973-wet om die een of ander rede nie beskikbaar is nie. Waar een van die egliede insolvent verklaar word, sal 'n artikel 17-bevel die kurator verhinder om op die ander eggenoot se eiendom beslag te lê.[92] In Australië bestaan daar steeds twyfel oor die funksie en trefwydte van hierdie artikel. Tot onlangs nog was die heersende mening dat dit geen onafhanklike rol vertolk nie maar eerder 'n artikel 79-aansoek voorafgaan.[93] In Malawi vind artikel 17 aanwending.[94] 'n Billike verdeling is een wat kennis neem van konkrete bydraes vir sover vasgestel kan word wie die bydrae gemaak het. As daar enige onduidelikheid is oor wie eienaar is of oor die presiese bedrag van elk se bydrae tot die koopprys van 'n artikel en die aandele waarin hulle bates hou nie erken kan word nie, geld die stelreël *equality is equity*.[95]

Dit is duidelik dat die Anglo-Amerikaanse regterlike diskresie vandag 'n matigende interpretasie gee aan vaste omskrewe regsreëls. Die *common law* diskresie word ook in Afrika vertroetel,[96] al is dit nie altyd as algemene herverdelingsbevoegdheid wat in alle opsigte met die Engelse of Australiese howe s'n ooreenstem nie.

(*Word vervolg*)

> *I might add that, in general, Judges are rather more vulnerable than their fellows. They are public figures and, as I have indicated, they are accountable to the public for the proper discharge of their duties in regard to the administration of justice. The public have the right to criticise them and the manner in which they discharge their duties. But they suffer under the disability (not pertaining to other public figures) of not normally being in a position to defend themselves publicly, to answer back* (per Corbett CJ in *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 2 SA 1(A) 28).

92 Vgl in die algemeen Kahn-Freund 1970 *MLR* 601 628 ev.
93 Kovacs 19–20.
94 Sien a 4 Divorce Act 25:04.
95 *Cromar v Cromar supra*; *Abeles v Abeles* 606/86 MCH.
96 *Nyali Ltd v Attorney-General* 1951 All ER 646.

Epilepsy, causation and future damage[1]

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OPSOMMING

Epilepsie, kousaliteit en toekomstige skade

'n Persoon wat epilepsie ontwikkel na 'n ongeluk moet bewys dat die ongeluk die oorsaak van die epilepsie is voordat 'n aksie om skadevergoeding in beginsel toegestaan kan word. Aangesien die epilepsie eers 'n geruime tyd na die ongeluk sy verskyning kan maak, ontstaan daar 'n probleem aangesien die persoon wat reeds skadevergoeding geëis het kort na die ongeluk, nie toegelaat word om weer te eis nie. In die Verenigde State van Amerika staan die howe in die algemeen skadevergoeding toe na die aanhoor van getuienis van 'n mediese spesialis dat epilepsie na alle waarskynlikheid in die toekoms kan ontstaan. Die Supreme Court mag egter wel aanvanklik skadevergoeding toeken vir skade wat in daardie stadium reeds gely is, en sou daar later verdere skade (byvoorbeeld epilepsie) ontstaan, mag verdere skadevergoeding toegestaan word. In Engeland moet die applikant 'n eis instel vir skade wat ontstaan het uit een eisoorsaak, eens en vir altyd, selfs al het die skade wat die onderwerp is van 'n tweede eis (wat epilepsie kan insluit) nog nie gemanifesteer nie. In Nederland mag die howe die vasstelling van toekomstige skade, wat die latere ontstaan van epilepsie na 'n ongeluk insluit, uitstel. In Suid-Afrika moet die howe ook, soos in Engeland, by die eis om skadevergoeding skade eens en vir altyd toeken, hoewel epilepsie eers in 'n latere stadium kan ontstaan. 'n Uitsondering hierop is 'n eis ingevolge die Multilaterale Motorvoertuigongelukkefondswet waar 'n hof die vasstelling van toekomstige skade na 'n motorongeluk mag uitstel totdat die epilepsie ontwikkel het. Daar word aan die hand gedoen dat die howe in alle gevalle waar 'n persoon later epilepsie opdoen (en nie slegs by motorongelukke nie) by die ontstaan van die verdere skade skadevergoeding moet toestaan waarvoor daar nie vroeër geëis is nie.

1 INTRODUCTION

Among the special problems that have arisen when a person develops epilepsy after an incident, are first of all, the determination whether the epilepsy developed as a result of the incident and secondly, proof of future damage.

The longer the interval between the first epileptic seizure and the injury, the more difficult it becomes to establish causation. It has to be proved that there were no seizures prior to the injury at issue; that the seizures had their clinical onset at some period after the injury; that they are of the symptomatic type rather than idiopathic epilepsy (a problem arising more often in children than in

1 This article is taken from the author's doctoral thesis *Epilepsy – Legal problems* (Unisa 1994).

adults); and that the injury was of such a nature that it could have resulted in the kind of damage to brain tissue which would produce seizures.[2]

The presence of a brain lesion can usually only be deducted from relevant facts in the patient's history, neurological examinations and diagnostic tests.[3] In a small number of instances, an injured plaintiff sustains a head injury, and having suffered seizures at some time previously, may now suffer either a recurrence of seizures or an aggravation of their frequency or severity. One then first has to establish what kind of epilepsy the plaintiff had before the injury, and the history of the epilepsy.[4]

Sometimes post-injury seizures are attributed to a pre-existing epilepsy rather than to the injury itself. It is, however, often forgotten that there is no reason why a well-controlled case of idiopathic epilepsy cannot sustain a severe head injury with development of epileptogenic foci leading to focal seizures unrelated to the previous idiopathic epilepsy.[5]

Sometimes a person does not develop epilepsy immediately after an accident, but the doctors predict that he or she may develop it in the future. This brings to the fore the question whether future damages may be awarded for the probable development of epilepsy. These problems are investigated with reference to the United States of America, England, the Netherlands and South Africa.

2 THE UNITED STATES OF AMERICA

2 1 Causation

One of the requirements for delictual liability in the USA is that there must be a reasonably close causal connection between the conduct and the resulting injury. A person who develops epilepsy after an injury will therefore have to prove such a causal connection.[6]

Causation may be categorised into a proximate cause (legal cause) and a cause in fact.[7] A legal cause may be used to exclude a defendant's liability when the court decides that it would be unjust under the circumstances to hold him liable, even though his tortious conduct was a cause in fact of the injured person's (plaintiff's) injury. A cause in fact requires that the injury would not have occurred but for the defendant's conduct (the *sine qua non* rule), and that the defendant's conduct was a material element or a substantial factor in bringing about the injury.[8]

In *Maturin v Scotty Brick Co*,[9] the plaintiff was involved in an accident involving two motor cars and a truck. He suffered a serious head injury, and testified

2 Gray *Attorney's textbook of medicine* (1985) 92–36.
3 *Idem* 92–37.
4 *Idem* 92–37 to 92–38.
5 *Idem* 92–38 to 92–39.
6 Prosser *Handbook of the law of torts* (1971) 143.
7 Kionka *Torts* (1988) 30 175.
8 Kionka 175 ff; Keeton *Prosser and Keeton on the law of torts* (1984) 263 ff.
9 (1974) 292 So 2d 859 as referred to in Gray 92–95 to 92–96.

that he had been thrown about in the car when the driver applied the brakes. The plaintiff received treatment in a hospital over a period of 25 days. The doctor testified that throughout the time he saw the plaintiff he observed nothing to suggest that the plaintiff suffered a trauma to the head or a lesion that might lead to epilepsy, nor did the plaintiff complain of an epileptic seizure.[10]

Approximately a year and eight months later, the plaintiff informed the doctor that he had been placed on anticonvulsant medication owing to seizures which he had been experiencing. Nine months later the plaintiff was examined by a medical consultant who was of the opinion that the plaintiff was suffering from an organic brain disorder. The final visit to the consultant took place some four years after the accident. Inasmuch as muscle spasm was still present, the doctor was of the opinion that the plaintiff had experienced a significant cervical strain, but his opinion was that this was due, not so much to the neck injury, as to the brain syndrome. As to whether the plaintiff's post-traumatic convulsive problem was the result of this particular accident, the doctor stated there would have to be some conjecture.[11]

The trial judge rejected the plaintiff's claim based on epilepsy, since he had not suffered injuries sufficiently severe to cause scarring of the brain, and also because he was not treated for epilepsy until 14 months after the accident.[12]

2 2 Future damage

What legal remedy is available in the USA if a person develops epilepsy only a few months or even a few years after an accident?

The prescription period for actions for future damages ("statutes of limitations" in American terminology) may differ from state to state and also depending on the cause of action relied upon. Prescription usually begins to run from the date of the accident (the alleged causing event) or from the date that the victim (the plaintiff) discovers that (a) he has been injured; and (b) the injury is the result of someone's tortious conduct.[13]

It is difficult to predict with any reasonable medical certainty that future seizures will develop after a head injury, when they have not yet made their appearance clinically. Lawsuits cannot be delayed awaiting the development of traumatic epilepsy, since the latent period before onset of the first seizure may be up to 20 years or beyond. The majority of seizures (approximately 70 per cent) start within the first two years. The problem is that a claim, once disposed of by way of settlement and/or judgment, cannot be re-opened later.

In *Dayton Walther Corp v Caldwell*,[14] the plaintiff brought an action to recover damages for injuries sustained in a collision between a trailer and a motor car. As a result of the accident, she sustained severe injuries to the front of

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10 Gray 92–95.
11 *Ibid.*
12 *Ibid.*
13 Kionka 27–28 165–167.
14 (1980) 402 NE 2d 1252.

her face and to her skull. It was necessary to remove 40 to 50 grams of brain tissue which had been damaged and which contained blood and bone fragments. Because of these injuries, the doctor felt that there was a greater than normal risk that the plaintiff would experience epileptic seizures in future. He therefore prescribed medication to prevent the onset of such seizures. The plaintiff subsequently had one episode of meningitis which was associated with the injury. Because of her injuries, the plaintiff suffered loss of sight, smell and taste. At the time of the trial, the plaintiff was 21 years old and had a life expectancy of 60,13 years. The jury awarded her $800 000, which was confirmed on appeal in the state supreme court.

In *Bourgeois v State, Through Department of Highways*,[15] action was brought by a father individually and on behalf of his 2-year-old son for injuries sustained whilst he was a passenger in a motor car driven by his mother, in an intersectional collision. The neurosurgeon testified that the child "had a frightening injury of the right side of his head . . . because brain and brain fluid were seen to be visibly exposed through the wound in the right forehead". The right side of the forehead and part of the temple had been flattened out. Prognosis was that the child would be likely to suffer post-traumatic epilepsy and a personality change. Upon a review of prior similar cases, $75 000 was awarded by the trial court to compensate the child for the known injuries and for future injuries that could manifest themselves as he matured.

3 ENGLAND

3 1 Causation

Should a person develop epilepsy after an injury inflicted by the defendant, he will, in England, as in the USA, have to prove a causal link between the act of the defendant and the epilepsy. Should a person not develop epilepsy after the accident, but it is clear that he may develop it in future, it could be a problem to prove a causal link between the activity of the defendant and the development of epilepsy in the future. It may, however, be proved by expert medical evidence.

In England too, a distinction is made between cause in fact and cause in law. With regard to cause in fact, lawyers use the "but for" test.[16] If harm to the plaintiff with epilepsy would not have occurred but for the defendant's negligence, then the negligence is a cause of the harm. With regard to cause in law, once the court has eliminated irrelevant factual causes by use of the "but for" test, it is still faced with the task of selecting which factual cause is to be regarded as the cause in law of the plaintiff's damage.[17]

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15 (1972) 255 So 2d 861 as cited in Gray 92–94 to 92–95.

16 Tyas, Pannett and Willett *Law of torts* (1989) 63–64 67 265; Tiernan *Tort in a nutshell* (1990) 33–35; Baker *Tort* (1986) 125–129.

17 *Ibid.*

3 2 Future damage

No limitation period ("prescription" in South African terminology) existed at common law. At present, with a few exceptions, the Limitations Act[18] imposes a time limit within which the plaintiff's action must be brought. A three-year limitation period in personal injury and death claims runs either from the time when the cause of action occurred or when the plaintiff became aware of certain material facts, whichever is the later.[19]

This includes cases where damage has been done but a person was unaware of or mistaken about the consequences of the damage, for instance, pneumoconiosis, where serious injury to the lungs may be suffered, but only discovered later.[20] This could also include epilepsy that only manifests itself later.

If a person to whom a right of action accrues is, at the date of the accrual under a disability, of unsound mind[21] for instance, the action may be brought within six years from the day when he ceases to be under the disability or dies, whichever occurs first.[22] Where a person was under a disability at the time when he acquired knowledge for the purposes of the latent damage limitation period laid down in section 14A(4)(b) of the Limitations Act,[23] but was not under a disability when the cause of action occurred, an action may be instituted within three years from the time when he ceased to be under disability or died, whichever occurs first.[24]

Section 38(3) as amended by the Mental Health Act[25] contains a broad definition of unsoundness of mind:

> "[A] person is of unsound mind if he is a person who, by reason of mental disorder within the meaning of the *Mental Health Act* 1983 is incapable of managing and administering his property and affairs."

Epilepsy may accompany the mental disorder of a person, causing him to be incapable of managing and administering his property and affairs.

The plaintiff must have knowledge *inter alia* that the injury in question is significant.[26] The injury could be a head injury resulting in epilepsy. In terms of section 14(2), an injury is significant if the day on which the person became aware of the injury is in question, but the person would reasonably have considered the injury sufficiently serious to justify instituting proceedings for damages

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18 1980; Burrows "Discharge of torts" in Dias (ed) *The common law library no 3 Clerk and Lindsell on torts* (1989) 388–389; Percy *Charlesworth and Percy on negligence* (1990) 247 ff; Tyas, Pannett and Willett 247 ff.

19 S 11 and 12; s 11A was introduced by the Consumer Protection Act of 1987 sched i ch 1; Burrows in Dias (ed) 392; Weller "The statute of time limitation in post-traumatic epilepsy" 1986 *New LJ* 411; Percy 265–266; Tyas, Pannett and Willett 248.

20 Weller 411.

21 S 38(2); Burrows in Dias (ed) 398; Percy 258–259.

22 S 28(1); Burrows in Dias (ed) 398; Percy 258; Tyas, Pannett and Willett 248.

23 1980.

24 S 28A(1) inserted by s 2(1) of the Latent Damage Act of 1986; Weller 411; Burrows in Dias (ed) 398.

25 1983 sched iv par 55; Burrows in Dias (ed) 398; Percy 260.

26 S 14(1)(a); Weller 411; Tyas, Pannett and Willett 248.

against a defendant who did not dispute liability and was able to satisfy a judgment. This provision is directed at the nature of the injury as known to the plaintiff at the material time.[27] In *Bristow v Grout*[28] it was held that once the plaintiff has knowledge of one injury that is significant, time begins to run in respect of another injury sustained in the same accident even though he does not then know that the injury is significant. Time may therefore also start to run against a person who has sustained a head injury but does not realise that epilepsy may develop in future.

In terms of section 14(3) a person's knowledge includes knowledge that he might reasonably have been expected to acquire from (a) facts observable or ascertainable by him, or (b) facts ascertainable by him with the help of medical or other appropriate expert advice which is reasonable for him to seek, but excludes knowledge of a fact ascertainable only with the help of expert advice as long as the person took all reasonable steps to obtain (and where appropriate, to act on) the advice.[29]

Damage resulting from one and the same cause of action must be assessed and recovered once and for all, even though the damage that is the subject of the second action has not yet occurred or is unknown to the plaintiff.[30] The once-and-for-all rule creates serious difficulties in actions for future damage flowing from personal injuries such as epilepsy, since the judge has to base his award of damages on an estimate of future uncertainties and, in particular, upon an uncertain prognosis of the plaintiff's medical future.[31] The reasonable foreseeability test as a test of remoteness has no application in the case of personal injuries as an unforeseeable extent of damage.[32]

The problems experienced by judges in quantifying damages for the risk of epilepsy are very onerous. Should the time for appeal have lapsed, the injured person, if he develops epilepsy later, will not be able to make an additional claim on this ground.[33] In *Hawkins v New Mendip Engineering Ltd*[34] there was a risk that the plaintiff might develop major epilepsy at some future date. It was impossible to tell until about five years after the accident whether it would develop. The damages, however, had to be assessed once and for all at the trial.

In *Herbert v Greater London Council*,[35] Waller LJ stated that the court had been referred to various cases where varying amounts had been awarded for the risk of epilepsy. No two of these cases were similar. In *Jones v Griffiths*[36] Sachs

27 Weller 411; Burrows in Dias (ed) 407; Tyas, Pannett and Willett 249.
28 *The Times* 1986-11-03; confirmed on a different point: *The Times* 1987-11-09 as referred to in Burrows in Dias (ed) 407.
29 Burrows in Dias (ed) 408–409; Tyas, Pannett and Willett 249.
30 Burrows in Dias (ed) 377; Percy 307.
31 Burrows in Dias (ed) 378; Weller 411.
32 Percy 300.
33 Weller 412.
34 [1966] 1 WLR 1341; also see Burrows in Dias (ed) 378–379.
35 1981 CA no UB 280 Oct 21 as referred to in Weller 412.
36 [1969] 1 WLR 795 798; also see Weller 412.

LJ stated that the task of a judge was essentially to guess rather than to work with any firm base, because any amount awarded would inevitably be wrong in the long run: if epilepsy were to occur, it would be too little, and if it did not, too much.

In terms of the Supreme Court Act[37] the High Court may make a provisional assessment of damages where there is a chance that, at some time in the future, the injured person will, as the result of the act or the omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition. In such a case the court would initially award the damages on the basis that the injured person will not develop the disease or suffer the deterioration, but would then award further damages at a future date if the risk should in fact materialise.[38] Should a plaintiff in the High Court be able to prove that he will develop epilepsy in future, the court may make a provisional assessment of damages and should the epilepsy indeed become manifest, the court may award the further damages.

Separate trials may also be ordered for determining liability and for damages whenever it is just and convenient to do so.[39]

4 THE NETHERLANDS

4 1 Causation

A person developing epilepsy after an injury he sustained or claiming future damages must prove that there was a causal link between the infliction of the injury and the epilepsy.[40] Article 6:98 of the *Nieuw Burgerlijk Wetboek (NBW)* states that the damage must be connected to the incident in such a way that it is regarded as a consequence of the incidence.[41]

4 2 Future damage

In article 6:162(1) it is stated that a person who commits an unlawful act against another person is obliged to compensate the other for the resulting damage suffered by him. The injured party must be placed in the position in which he or she would have been had no unlawful act been committed.[42] In terms of article 105 a judge may postpone the determination of future damage as a whole or partially, or may determine it after weighing up the factors. Should the judge order the culpable person to pay, the order may read that he must pay the whole amount at once or that he may make periodic payments.[43] Should a person be

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37 1981 s 32A(1) as inserted by the Administration of Justice Act of 1982 s 6(1) and the Rules of the Supreme Court Ord 37 r 8–10; Weller 412.

38 S 32A(2); Weller 412.

39 *Coenen v Payne* [1974] 1 WLR 984; Burrows in Dias (ed) 380.

40 Asser-Rutten-Hartkamp *Handleiding tot de beoefening van het Nederlands burgerlijk recht: Verbintenissenrecht* (1986) 73.

41 Van Zeben *Boeken 3, 5, 6 en Titels 7.1, 7.7, 7.9, 7.14 Nieuw Burgerlijk Wetboek* (1990) 93.

42 Asser-Rutten-Hartkamp 91.

43 Van Zeben 94.

unsure whether he will develop epilepsy in future, the judge may therefore order that the determination of future damage be postponed as a whole, until it is certain that epilepsy has indeed developed.

5 SOUTH AFRICA

5 1 Causation

Should a person develop epilepsy after a road accident, assault or other occurrence, the question may arise whether the person developed the epilepsy as a result of the incident.

One of the elements of a delict is the existence of a causal connection between the conduct (accident or other occurrence) and the damage (epilepsy) suffered. There is a difference between legal causation and factual causation. With legal causation one determines which of the damaging harmful consequences which flow from a person's wrongful culpable act, he should be liable for.[44]

In most cases the harm for which the wrongdoer is sought to be held liable, falls clearly within the limits of his liability, so that it is unnecessary to examine legal causation in express terms. It is only problematic where a whole chain of consecutive or remote consequences results from the wrongdoer's conduct, and where it is alleged that he should not be held legally responsible for all the consequences. The limits of liability should, however, in principle be determined in respect of every delictual claim.[45] The reasonable foreseeability criterion was preferred by the courts earlier,[46] but a more flexible approach is now accepted.[47]

Factual causation refers to the factual causal *nexus* between the act and its consequences. Although there is much criticism against it, the *conditio sine qua non* test is applied in South Africa to determine factual causation. This means that conduct is the cause of a consequence if the conduct cannot be "thought away" without the consequence also disappearing. The conduct must thus be the

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44 Neethling, Potgieter and Visser *Law of delict* (1994) 3 169 (hereinafter cited as Neethling *et al*).

45 Van Rensburg *Normatiewe voorsienbaarheid as aanspreeklikheidsbegrensingsmaatstaf in die privaatreg* (1972) 1–3 (hereinafter cited as *Normatiewe voorsienbaarheid*); Van Rensburg *Juridiese kousaliteit en aspekte van aanspreeklikheidsbegrensing by die onregmatige daad* (1970) 175 ff (hereinafter cited as *Juridiese kousaliteit*); also see Van der Merwe and Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 201 ff; Van Oosten "Oorsaaklikheid in die Suid-Afrikaanse strafreg – 'n prinsipiële ondersoek (vervolg)" 1982 *De Jure* 253–254; Van Oosten "Oorsaaklikheid in die Suid-Afrikaanse strafreg – 'n prinsipiële ondersoek (slot)" 1983 *De Jure* 36 ff; *Alston v Marine and Trade Insurance Co Ltd* 1964 4 SA 112 (W); *Mafesa v Parity Versekeringsmaatskappy Bpk* 1968 2 SA 603 (O); Neethling *et al* 169–170.

46 Van der Walt *Delict: Principles and cases* (1979) 98 102–103; Boberg *The law of delict 1 Aquilian liability* (1984) 445–447; Potgieter "Feitelike en juridiese kousaliteit" 1990 *THRHR* 273; Neethling *et al* 171–172.

47 *S v Mokgethi* 1990 1 SA 32 (A) 40–41; *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700–702; *Smit v Abrahams* 1994 4 SA 1 (A) 14 ff; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 764 ff.

conditio sine qua non for the consequence.[48] Several legal writers[49] and most judgments[50] approve of this test.

Applying this test to a person developing epilepsy after an injury, the act inflicting the injury will be the cause of the epilepsy if the conduct cannot be "thought away" without the epilepsy also "disappearing". The *conditio sine qua non* test may also be applied where it is necessary to test whether an omission has caused a certain consequence. Positive conduct is then "thought into" the place of the omission.[51]

Should a person with epilepsy for instance not be able to act because of the epilepsy, the failure to act will be causally linked to the damage if conduct is "thought into" the place of the failure, to determine whether the consequence would have occurred.

In *S v Mokgethi*[52] the Appellate Division applied the *conditio sine qua non* test to determine factual causation. The court decided that none of the existing legal causation tests was applicable to all circumstances. A more flexible approach should be used. The question is whether there is a sufficient causal link between the conduct and the consequence that the consequence can be imputed to the actor, taking into consideration equity principles based on reasonableness, equitability and fairness. The present legal causation tests can play a subsidiary role in the determination of legal causation, together with the flexible test. The court furthermore ruled that a *novus actus interveniens* of the victim may, in certain circumstances, break the legal causal chain between factual causation and the consequence.

Causation may also play a highly significant role with regard to the determination of future damage, for instance if a person develops epilepsy only some time after an accident. It will then be important to determine whether there is a causal link between the accident and the epilepsy.

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48 Neethling *et al* 161; Van der Merwe and Olivier 197; Joubert (ed) 6 *LAWSA* 27; Van der Walt 95.

49 Boberg 380 ff; Van der Walt 95; Van der Merwe and Olivier 197 ff; Van Oosten 1982 *De Jure* 239; Van Oosten 1983 *De Jure* 36; *contra* Neethling *et al* 161; Van Rensburg *Juridiese kousaliteit* 3–65; Snyman *Strafreg* (1992) 80–83.

50 *Minister of Police v Skosana* 1977 1 SA 31 (A); *S v Daniëls* 1983 3 SA 275 (A); *S v Van As* 1967 4 SA 594 (A); *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A) 914–918.

51 *S v Van As* 1967 4 SA 594 (A); *Minister van Polisie v Skosana* 1977 1 SA 31 (A); *Siman and Co (Pty) Ltd v Barclays Bank Ltd* 1984 2 SA 888 (A); *S v Chipinge Rural Council* 1989 2 SA 342 (Z) 347; Neethling *et al* 166–167; Van Oosten 1982 *De Jure* 257 who is of the opinion that one is in this instance not concerned with a *conditio sine qua non* but rather with *conditio cum qua non*; *contra* Van Rensburg *Juridiese kousaliteit* 51–55 64–65.

52 1990 1 SA 32 (A); see also the other cases referred to *supra* fn 47.

5 2 Future damage

The extent of pecuniary damage is generally determined via a comparison (sum formula, differential theory or *interesse* test). By this method it is determined whether someone has suffered patrimonial loss, and what its *quantum* is.[53]

To determine whether patrimonial loss has been suffered by the person suffering from epilepsy, the patrimonial position of the plaintiff before the commission of the delict must be compared with the position thereafter. If the latter is more to the disadvantage of the plaintiff than the former, patrimonial loss is at hand. The extent of the loss is determined by the quantitative difference (expressed in money) between the two patrimonial positions.[54] Before the commission of the delict the person did not have epilepsy, and afterwards he did.

It is possible, however, that future damage may not be satisfactorily determined in this manner. Should a person with epilepsy be injured in an accident, for example, he will be able to claim for future damage if he will not be able to earn the same income in future that he would have earned had he not been injured. Therefore, patrimonial loss should rather be defined as the difference between the position the plaintiff finds himself in after the commission of the delict and the position he would have been in had the delict not been committed.[55]

To determine the time when the damage is calculated, the general rule is that the date of the commission of the delict is decisive, and this also applies to the determination of future damage.[56] This is the earliest date on which all the requirements for delictual liability are present. As far as damage (and that could include epilepsy) is concerned, this does not mean that the damage should be present in its full extent. If the other requirements for liability are present, the date of the commission of a delict is the date when the first damage (for instance, a head injury before the epilepsy manifested itself) occurred.[57]

Where a wrongful and culpable act has not yet caused any damage, but damage (for instance, epilepsy) is only expected in future, there is no cause of

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53 Reynecke "Nabetragting oor die skadeleer en voordeeltoerekening" 1988 *De Jure* 224; Neethling *et al* 209–210; for criticism of the sum formula theory see Van der Walt *Die sommeskadeleer en die 'once and for all'-reël* (LLD thesis Unisa 1977) 283 ff (hereinafter cited as Van der Walt *Sommeskadeleer*); Visser and Potgieter *Law of damages* (1993) 60.

54 Van der Merwe and Olivier 180; Neethling *et al* 209–210; *Santam Insurance Co (Pty) Ltd v Byleveldt* 1973 2 SA 146 (A); *De Jager v Grunder* 1964 1 SA 446 (A) 449 456; *De Vos v SA Eagle Versekeringsmaatskappy Bpk* 1984 1 SA 724 (O) 727; Visser and Potgieter 62–63.

55 Van der Walt "Die voordeeltoerekeningsreël – knooppunt van uiteenlopende teorieë oor die oogmerk van skadevergoeding" 1980 *THRHR* 4 (hereinafter cited as Van der Walt (1980)); Neethling *et al* 209–210; *De Vos* case *supra*; *Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A) 917; Visser and Potgieter 76.

56 Neethling *et al* 210; Visser and Potgieter 76 127.

57 *Oslo Land Co Ltd v The Union Government* 1938 AD 584; Van der Merwe and Olivier 286; Neethling *et al* 210; Visser and Potgieter 127.

action.[58] According to Boberg,[59] an action would in fact lie for prospective damage alone.

A general rule in an action for damages is that all damage already sustained, as well as all damage expected in the future, must be claimed once only. This is known as the "once-and-for-all rule". Prescription begins to run as soon as the cause of action arises; in other words, all the elements of the delict should be present and (some) damage should have occurred. Prescription of claims, including a claim in terms of the Multilateral Motor Vehicle Accidents Fund Act,[60] as a rule takes place after three years.

It is extremely difficult to estimate future damage, for instance epilepsy, developing after an accident. Estimates are often based on speculation. Van der Walt[61] argues convincingly for the abolition of this rule, as he regards every new occurrence of damage as a separate cause of action, even if all manifestations of damage are caused by the same act. In general, compensation for future loss should therefore be recoverable only if and when such damage actually occurs. A person will then claim damages only when he develops epilepsy in actual fact.

Future damage may take on various forms, which include future medical expenses resulting from bodily injury,[62] and the loss of future income for the same reason.[63] Thus epilepsy may result in future medical expenses, as well as the loss of future income.

The once-and-for-all rule also means that a plaintiff who has (with or without success) already instituted an action for part of his damage, may not later claim for another part of such damage if both claims are based on the same cause of action.[64]

In *Brunsden v Humphrey*[65] the court held that damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action. The recovery in an action of compensation for damage to goods is thus no bar to an action subsequently brought for the injury. This was, however, rejected in *Green v Coetzer*[66] where the court held that damages claimable under the *lex Aquilia* as extended cannot be divided into two separate causes of action, one for damage to property and the other for bodily injury to the person.

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58 *Coetzee v SAR & H* 1933 CPD 565 576; *Jacobs v Cape Town Municipality* 1935 CPD 474 479; Neethling *et al* 213; Visser and Potgieter 127.

59 477 488; *Brunsden v Humphrey* (1884) 14 QBD 141.

60 93 of 1989 s 55; also see Neethling *et al* 213–214; Klopper *Derdepartyvergoedingsreg* (1993) 60.

61 *Sommeskadeleer* 366–367; Neethling *et al* 214–215; also see Boberg 483–484.

62 Neethling *et al* 212; *Swanepoel v Parity Insurance Co Ltd* 1963 3 SA 819 (W).

63 Neethling *et al* 212; also see *General Accident Insurance Co Ltd v Summers/Nhlumayo, Southern Versekerings Assosiasie Bpk v Carstens* 1987 3 SA 577 (A).

64 Neethling *et al* 214.

65 (1884) 14 QBD 141; also see Visser and Potgieter 132.

66 1958 2 SA 697 (W); also see Visser and Potgieter 132–133.

Should a person collide with another person's vehicle and claim damages for the repairs to his own vehicle, he will accordingly not be able to claim any damage should he later develop epilepsy as a result of the accident, as such a claim would be based on the same cause of action as that for damage to the motor vehicle. Both claims fall within a single cause of action.

In *Evins v Shield Insurance Co Ltd*[67] the court held that claims constitute a single cause of action when their success depends upon proof of the same material facts (*facta probanda*). According to Boberg[68] this suggested criterion offers no logical solution, as the answer depends on how specifically one defines the *facta probanda* of each claim. The court, however, held that a wife's claim for loss of support after the death of her husband (the breadwinner), does not depend on the same cause of action as her claim for personal injuries, although both the breadwinner's death and her injuries were caused by the same accident. In *Cassely v Minister of Defence*,[69] the Appellate Division held that claims for pain and suffering and pecuniary loss as a result of bodily injury, indeed constitute a single cause of action under common law.

According to Van der Walt[70] the "two causes" approach (the *Brunsden* case) is to be preferred to the "single cause" approach in the *Green* case, because a wrongful act causing both personal injury and damage to property infringes two different rights of the plaintiff. Since the infringement of a right is one of the *facta probanda* to establish a cause of action, it follows that infringements of different rights give rise to different causes of action. Furthermore, the claim for property damage entails proving damage, whereas the claim for pain and suffering does not. According to Festenstein,[71] damages for personal injuries include a *solatium* for pain and suffering, which is not a patrimonial loss. It is therefore arguable that damages for patrimonial loss and compensation for personal injury are in reality not the same thing. Visser and Potgieter[72] are of the opinion that the *Green* case was correctly decided, as the nature of the wrongfulness or the type of damage should not be used in application of the *facta probanda* test in order to identify more than one cause of action.

A practical qualification of the once-and-for-all rule that is of importance to a person with epilepsy is to be found in third party claims where the Multilateral Motor Vehicle Accidents Fund (MMF) or its agent may pay compensation for future medical expenses only after these have been incurred, or may pay for future loss of support or income in instalments.[73] A person developing epilepsy some time after the incident may therefore claim compensation only once the

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67 1980 2 SA 814 (A); also see Visser and Potgieter 128–139; Van Aswegen *Die sameloop van eise om skadevergoeding uit kontrakbreuk en delik* (LLD thesis Unisa 1991) 459–461.

68 477; *contra* Visser and Potgieter 133.

69 1973 1 SA 630 (A) 642.

70 *Sommeskadeleer* 374–396; also see Van Aswegen 461.

71 "Law of Delict" 1985 *Annual Survey* 97.

72 133.

73 S 8(5) Act 84 of 1986; Neethling *et al* 214.

medical expenses for the epilepsy have been incurred. The schedule to the act contains an Agreement Establishing the Multilateral Motor Vehicle Accidents Fund[74] in terms of which an agreement may be entered into for the compensation to be paid in instalments. The court must determine and fix the detail of the payment of the instalments (including the amount) for incorporation into the undertaking. An undertaking by the insurer in which the amount of instalments is not fixed, is inadequate.[75] In the absence of such an agreement, the court has no power to order the payment in instalments, and has to make a lump sum award as to future loss or earnings.[76]

Section 40 of the Multilateral Motor Vehicle Accident Fund Act[77] provides for a claim against the MMF or its agent for damage or loss as the result of injury or death of a person caused by the (negligent) driving of a motor vehicle. A claim for loss based on damage to property (for example a motor car) falls outside the ambit of the cause of action in terms of section 40. Section 40 creates two causes of action, namely a claim for loss of support caused by the death of a breadwinner and a claim for personal injuries. One cause of action thus becomes two. However, there is only one cause of action in regard to pecuniary loss (loss of income and medical expenses) and non-pecuniary loss (pain and suffering) which flows from one incident falling within the ambit of section 40.[78]

Should a person develop epilepsy after a road accident, he would be able to claim damages for the epilepsy from the MMF or its agent once the epilepsy has manifested itself. Should a person be able to prove that he may develop epilepsy in future, after a road accident or other incident, the question arises how the damage must be quantified.

A speculative element is introduced into the quantification of damage by the prospective damages rule. This rule provides that a plaintiff must, in a single action, claim damages for all damage, accrued and prospective, flowing from a particular cause of action. Relevant events that may occur, or relevant conditions that may arise in future, which may include epilepsy, must accordingly also be considered. Even if it cannot be proved that it will occur or arise in future, a contingency allowance must be made for that possibility. A contingency includes any possible relevant future event that may influence the extent of the plaintiff's damage. The allowance is made by including in the damages a figure representing a percentage of that which would have been included if the contingency had been a certainty.[79]

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74 S 43(b).

75 *Motor Vehicle Accidents Fund v Andreano* 1993 3 SA 227 (T).

76 *Coetzee v Guardian National Insurance Company Ltd* 1993 3 SA 388 (W).

77 93 of 1989; Visser and Potgieter 1981 *THRHR* 136–137.

78 *Santam Versekeringsmaatskappy Bpk v Roux* 1978 2 SA 856 (A); *contra* Van der Walt "'n Aantekening by 'n stelling in *Roux v Santam* 1977 3 SA 261 (T)" 1978 *THRHR* 309; Van der Walt "'n Aantekening op 'n aantekening na aanleiding van *Santam v Roux* 1978 2 SA 856 (A)" 1979 *THRHR* 197; Boberg 485 516; Van der Merwe and Olivier 248–249.

79 Visser and Potgieter 112 114 115.

A flaw in the prospective damages rule is that a probability must be established that that which is alleged to lie in the future will happen (that there is a certain percentage chance of its happening), in the same way as it must be established that that which happened in the past indeed occurred.

In *Burger v Union National South British Insurance Co*[80] Colman J stated:

> "The contingency is allowed for by including in the damages a figure representing a percentage of that which would have been included if amputation had been a certainty. That is not a very satisfactory way of dealing with such difficulties, but no better way exists under our procedure."

According to Boberg,[81] the position is different where a claim is based solely on prospective loss, namely where no actual damage has been suffered by the time the action is brought. A probability that some damage will be sustained in future must then be established, otherwise the plaintiff will have failed to prove one of the elements of his cause of action, namely the requirement of *damnum*.[82]

6 CONCLUSION

In this article, two basic problems that may be encountered by a person with epilepsy in the law of delict were discussed. Should a person be involved in an accident and develop epilepsy as a result, or if he may still develop it in future, the question arises whether the epilepsy is causally linked to the accident, and whether he will be able to claim future damages.

In the USA, England, the Netherlands and South Africa, a person developing epilepsy after an injury will have to prove a causal link between the conduct and the resulting epilepsy.

In South Africa, the *conditio sine qua non* test is generally applied to determine factual causality. This means that an act is the cause of a consequence if the act cannot be "thought away" without the consequence also "disappearing". The act inflicting the injury will therefore be regarded as the cause of the epilepsy if the act cannot be "thought away" without the epilepsy also "disappearing". Although there is much criticism of this test, it is generally applied by our courts, also in criminal law.

Should a person not yet have developed epilepsy, but the prognosis is that he may develop it in future, the problem of claiming and calculating future damage arises. In America there are statutes of time limitation, and future damage must be claimed at the time of the trial. A claim may not be re-opened later.

In England, as in the USA, there is also a time limit in terms of the Limitations Act, within which the plaintiff's action must be brought. In respect of personal injury and death claims, there is a three years' limitation period which runs either from when the cause of action arose or from when the plaintiff had knowledge of certain material facts, whichever is the later. The plaintiff must have knowledge *inter alia* that the injury was significant, which refers to the nature of

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80 1975 4 SA 72 (W) 75F; also see Visser and Potgieter 113–115.

81 602–603.

82 This was confirmed in *Blyth v Van den Heever* 1980 1 SA 191 (A) 225–226.

the injury as known to the plaintiff at the material time. Once the plaintiff has knowledge of one injury that is significant, time begins to run in respect of another injury sustained in the same accident even though he does not then know that the injury is significant. As in the USA, the once-and-for-all rule also applies in England, namely that the damages must be assessed at the trial. This sometimes creates serious difficulties in actions for damages for personal injuries since the judge has to base his award of damages on an estimate of future uncertainties, including the possibility that the plaintiff will develop epilepsy. In actions for damages for personal injuries, where it is proved that at some definite time in future an injured person will develop epilepsy, the court may award further damages at a future date should the epilepsy indeed materialise. This may, however, be difficult to prove.

In the Netherlands, a judge has a choice whether to determine future damage at the time of the trial, or to postpone the determination of future damage until it materialises.

The once-and-for-all rule and prescription also exist in South Africa. Prescription commences at the origin of the cause of action, and generally runs for three years. It may be extremely difficult to calculate future damage at the time of the trial.

As far as the Multilateral Motor Vehicle Accident Fund Act is concerned, the position is satisfactory, as a person with epilepsy who only develops the epilepsy some time after the motor vehicle accident occurred, would be able to claim for future medical expenses after they have been incurred. A person with epilepsy who develops epilepsy a while after an incident (such as an assault) is, however, not in such a good position to claim for the epilepsy if it has not yet manifested at the time of the trial. As every new occurrence of damage is a separate cause of action, it is submitted that the courts in South Africa should be able to postpone the determination of future damage until it becomes manifest, as in the Netherlands. It will then not be necessary to work with a contingency rule. The extremely difficult task of a court to attach a percentage to the possibility of future damage, will be eliminated. A person with epilepsy will therefore be able to claim damages for whatever injuries he sustained during the incident, and, should he develop epilepsy later, he will be able to claim damages for that as well.

Die reg aan die Kaap tydens die inwerkingtreding van die Regsoktrooie*

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SUMMARY

The law at the Cape during the introduction of the Charters

One may get the impression that the Charter of Justice of 1827, which established the Supreme Court of Justice in the Cape Colony, introducing, at the same time, the English law into that colony – followed by the Charter of Justice of 1832 – wiped the Roman-Dutch law off the legal slate at the Cape. To appreciate the position of the substantive law at the Cape at the time of the introduction of the Charters, it is necessary to examine the law during the different stages that the settlement went through. In this article a brief survey is made of the law at the Cape during the periods 1652–1795, 1795–1803 (the First British Occupation), 1803–1806 (the Batavian Period), and the Second British Occupation leading up to the introduction of the Charters and, finally, the law at the time of the arrival of the Commissioners of Inquiry. For the purposes of this article a thorough study was made of the relevant volumes in the Cape Archives containing the decisions of the Court of Appeal and the Council of Justice, for civil as well as criminal cases.

Extensive reference is given to the findings made about the law that was applied, which comprised Roman-Dutch law, Dutch law, Roman law, the Statutes of India, the Crown Trial, English law and some references to German and French law. It becomes clear that the process of anglicisation of the law of the Cape Colony was not initiated by the Charters of Justice, but that a gradual "pre-reception" had already started earlier on. What also emerges very clearly, is that the 182 years at the Cape, from 1652 to 1834, had afforded the Roman-Dutch law citizenship status. This it still enjoys today.

INLEIDING

Die doel van hierdie bespreking is om die posisie van die materiële reg aan die Kaap tydens die inwerkingtreding van die Regsoktrooie van 1827[1] en 1832[2] aan

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* Hierdie artikel is 'n verwerking van 'n aantal hoofstukke van my LLD-proefskrif *Regsinstellings en die reg aan die Kaap van 1806 tot 1834* (UWK 1984). Die afkortings wat in hierdie artikel gebruik word, is: *CLJ – Cape Law Journal*; *CO* – Colonial Office Records; *CJ* – Council of Justice/Raad van Justisie; *GH* – Government House; *GPB* – Groot Placaet-Boek; en *VC* – Verbatim-kopieë.

1 Die Regsoktrooi van 1827 verskyn in die geheel in *SK* 1144 van 1829-12-11. Let daarop dat die reg wat voortaan toegepas sou word, sou wees "the Laws now in force within our said Colony, and all such other laws, as shall at any time hereafter be made and established". Sien egter die verwysings na die kommissarisse se aanbeveling vn 46 *infra*.

2 Die Regsoktrooi van 1852-05-04 is opgeneem in *CO* 52/6.

te dui. Om die stand van die reg met die instelling van die eerste hooggeregshof aan die Kaap[3] te begryp, is dit nodig om 'n oorsig te gee van die reg soos toegepas aan die Kaap vanaf 1652. Slegs dán maak die houvas wat die Romeins-Hollandse reg reeds in hierdie stadium van verengelsing aan die Kaap gehad het enige sin, en word dit duidelik dat nie die Regsoktrooie as sodanig die proses van verengelsing van die regswese aan die gang gesit het nie, maar dat 'n "pre-infiltrasie" van Engelse reg alreeds plaasgevind het. Wat egter duidelik blyk, is dat die voortbestaan van die Romeins-Hollandse reg reeds in hierdie vroeë stadium gewaarborg was.

1 DIE REG SOOS TOEGEPAS AAN DIE KAAP GEDURENDE 1652–1795

Aangesien die wettereg in die beginjare 'n baie belangrike rol gespeel het, word ietwat meer aandag daaraan gegee. Die ander periodes word grotendeels buite rekening gelaat.

Wat die wettereg betref, blyk dit dat die State-Generaal die enigste liggaam was wat wette vir die kolonies – en dus ook die Kaap – kon maak. Derhalwe het slegs wette wat spesifiek deur die State-Generaal vir die gebiede van die Oos-Indiese maatskappy gemaak is, *proprio vigore* aan die Kaap gegeld.[4]

So het nóg die Kompanjie[5] nóg die Politieke Raad[6] wetgewende bevoegdheid gehad, terwyl ook die Hoë Regering[7] nie die bevoegdheid gehad het om materiële reg voor te skryf nie. Alhoewel Jan van Riebeeck en sy Raad, asook latere kommandeurs en goewerneurs, verordeninge uitgevaardig het, het dit nie veel substantiewe regsbetekenis gehad nie daar dit hoofsaaklik bloot plaaslike maatreëls was.[8]

Nogtans is die plaaslike wette,[9] die verordeninge van die Hoë Regering[10] asook wetgewing van die State van Holland,[11] vir sover hulle nie slegs van 'n

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3 Sien die aanhef van die 1827 Regsoktrooi.

4 Sien De Wet en Swanepoel *Strafreg* (1975) 41. Verordeninge van Oos-Indië is deeglik aan die Kaap toegepas: beide die Statute van Batavia (1641) en die Nuwe Statute (1766) was hier bekend. Lg was egter net soos die Statute van Batavia nooit deur die State-Generaal goedgekeur nie en derhalwe *ultra vires*. Sien ook De Wet "Die resepsie van die Romeins-Hollandse reg in Suid-Afrika" 1958 *THRHR* 94 en Beyers *Die Echtreglement en die Suid-Afrikaanse reg* (1953) 154 vn 10: "Die Statuten van Batavia is insgelyks slegs deur die Here XVII goedgekeur en nie ook deur die State-Generaal nie . . ."

5 Sien *GPB* 1 536 a 35. Die Kompanjie het die bevoegdheid gehad om "Officiers van Justitie" aan te stel; dog daar is nie bepaal watter reg toegepas moet word nie.

6 Sien De Wet " 'Nederlandse' reg in Suid-Afrika tot 1886" 1958 *THRHR* 167; Van Zyl 1907 *SALJ* 132; De Wet en Swanepoel 41. Swanepoel "Oor die resepsie van die Romeins-Hollandse Reg in Suid-Afrika" 1958 *Acta Juridia* 14 neem skynbaar 'n ander houding in.

7 Sien De Wet 1958 *THRHR* 90; vgl De Wet en Swanepoel 29 30.

8 Sien *Kaapse Plakkaatboeke*, Kaapse Argiefstukke, vol I–IV, oorgeskryf en persgereed gemaak deur Jeffreys en Naudé 1944–1951.

9 Wat die materiële reg betref, is die Kaapse verordening van weinig belang en in elk geval *ultra vires* (sien vn 6 *supra*).

10 Vgl vn 4 *supra*.

11 Geen wetgewing – al was dit ook van die State-Generaal maar nie bedoel vir die gebiede van die Oos-Indiese Kompanjie nie, of wetgewing van enige Provinsiale State afkomstig – het

vervolg op volgende bladsy

plaaslike aard was nie, hier eerbiedig. Dit sou egter aan die Suid-Afrikaanse howe oorgelaat word om in 'n heelwat later stadium die geldingsvereistes vir die Hollandse wetgewing neer te lê.[12] Wat die wettereg betref, is dit egter duidelik dat die regstelsel aan die Kaap op gewoonte berus het.

Ook wat die gemenereg betref, blyk dit dat die reg van die provinsie Holland, net soos in Oos-Indië, aan die Kaap toegepas is.[13] Ongelukkig het die hof nie die gronde vir sy beslissings geopenbaar nie.[14] Dit laat 'n mens tot 'n groot hoogte in die duister wat betref die materiële reg wat deur die hof toegepas is. Daar word egter deurgaans na gesaghebbende skrywers in die prosesstukke verwys.[15]

Deur sy breedvoerige verwysing na die gesaghebbendes het die Raad van Justisie dus 'n belangrike rol gespeel in die vestiging van die Romeins-Hollandse reg aan die Kaap. Dit is verder ook duidelik dat daar aan die einde van hierdie periode, en dus reeds voor die Eerste Britse Besetting, 'n lewende Romeins-Hollandse regstelsel aan die Kaap was.

2 DIE REG SOOS TOEGEPAS AAN DIE KAAP TYDENS DIE EERSTE BRITSE BESETTING 1795–1803

Ingevolge algemene gebruik het die Britte by oorname die bestaande reg aan die Kaap toegelaat om te bly voortbestaan. Hierdie gebruik word in die volgende beginsel beliggaam:

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gelding *proprio vigore* geniet nie; ook nie dié van die provinsie Holland nie tensy dit deur gewoonte aanvaar is (vgl vn 12 *infra*). Tog is Hollandse wetgewing hier toegepas (sien *CJ* 453 *Kriminele prosesstukke* (1795) 37; vgl *CJ* 888 *Siviele regsrolle* (1792) 233).

12 Sien *R v Harrison and Dryburgh* 1922 AD 333. Wat die aanvaarding van reg deur gewoonte in die algemeen betref, vgl Van der Keessel *Dictata ad Grotium* 1 2 22; Voet *Commentarius* 1 3 27, 1 3 28–29, 1 3 36; De Groot *Inleidinge* 2 20 12 en 3 28 5; Huber *HR* 1 2 48–51 en 1 2 52; Van der Linden *Koopmans handboek* 1 1 7; De Blecourt-Fisher *Kort begrip van het oud-vaderlands burgerlijk recht* (1959) 20; Von Savigny *System des heutigen-römischen Rechts* 1 (1840) 66 ev. Vgl verder De Wet en Swanepoel 21, asook hul kommentaar 39–42 op die daar aangehaalde Suid-Afrikaanse beslissings. Vgl ook Hahlo en Kahn *The Union of South Africa, the development of its laws and constitution* (1960) 14–15 ivm die reëls betreffende die aanvaarding van Hollandse wetgewing in Suid-Afrika.

13 Sien Lee "What has become of Roman-Dutch Law?" 1930 *SALJ* 276; *Spies v Lombard* 1950 3 SA 482 (A); *Muller v Grobbelaar* 1946 OPD 277; Aquilius "Die opheffing van wet deur gewoonte" 1941 *THRHR* 19. Vgl ook *C* 717 312 en *C* 718 308.

14 Dit blyk duidelik uit die stukke van die Raad van Justisie. Vgl bv *CJ* 876 *Siviele regsrolle* 1782; *CJ* 877 *Siviele regsrolle* 1783; *CJ* 878 *Siviele regsrolle* 1784; *CJ* 789 *Siviele regsrolle* 1785; *CJ* 883 *Siviele regsrolle* 1789; *CJ* 887 *Siviele regsrolle* 1791; *CJ* 888 *Siviele regsrolle* 1792; *CJ* 889 *Siviele regsrolle* 1792; *CJ* 891 *Siviele regsrolle* 1792; *CJ* 58 *Kriminele regsrolle* 1776; *CJ* 63 *Kriminele regsrolle* 1781; *CJ* 76 *Kriminele regsrolle* 1794.

15 Mbt die reg van toepassing word daar gedurende die periode 1652–1795 verwysings na die volgende skrywers aangetref: Joost Damhouder, Antonius Matthaeus II, Pieter Bort, Simon van Leeuwen, Paulus Merula, Simon Groenewegen van der Made, Johannes Voet, Eduard van Zurck, Ulrich Huber, Cornelis van Bynkershoek en P Peckius (sien Visagie *Regsveranderinge aan die Kaap vanaf 1822 tot 1834* (ongepubliseerde MA-verhandeling) 69–76).

> "There can be no doubt of this general principle of English Common Law: that the inhabitants of territory acquired by cession or conquest are governed in their relations *inter se* by the municipal laws of such territory in force at the time of cession or conquest . . ."[16]

Hierdie opvatting is in ooreenstemming met dié uitgedruk in die bekende *Calvin*-saak:

> "[F]or if a King comes to a Christian kingdom by conquest, seeing that he hath *vitae et necis potestatem*, he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain."[17]

Daar bestaan egter meningsverskil oor die vraag of die kapitulasievoorwaardes die behoud van die bestaande reg ook waarborg.[18]

Die Raad van Justisie is op 11 Oktober 1795 heringestel en sou die reg soos voorheen toepas.[19] Macartney se instruksie van 30 Desember 1796 het die voortbestaan van die ou reg opnuut verseker,[20] terwyl die goewerneur se proklamasie van 24 Julie 1797 ook voorsiening gemaak het vir die voortbestaan van die regswese volgens die ou bestel, behalwe in soverre dit nie reeds deur die oorgawe verander is of verander sou word nie.[21]

Die skrywers oor die straf- en strafprosesreg wat tydens hierdie periode aangehaal is, stem ooreen met dié uit die Kompanjie-tydperk.[22] Soos in die geval

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16 Sien Baker *Halleck's international law* II (1893) (*C* 35.21). Sien verder Lawson en Bentley *Constitutional and administrative law* (1961) 365–366. In die Engelse reg word 'n onderskeid gemaak tussen "conquered or ceded colonies" en "settlements". Igv "settlements" geld die Engelse gemenereg, maar in "conquered or ceded colonies" leef die bestaande reg voort totdat dit deur die nuwe owerheid gewysig word (sien Verloren van Themaat *Staatsreg* (1967) 49 vn 7).

17 Sien *Calvin's case* 7 Coke 398. Sien verder *Campbell v Hall* (1774) 1 Cowper 204, 98 ER 1045 1047: "[T]he laws of a conquered country continue in force until they are altered by the conqueror."

18 A 8 van die kapitulasievoorwaardes van 1806 bepaal: "The burghers and inhabitants shall preserve all their rights and privileges which they have enjoyed hitherto." Die 1806-kapitulasievoorwaardes is te vinde in Harding *The Cape of Good Hope Government Proclamations from 1806 to 1825* (1838). Sien *BO* 88 *Voorslagen van capitulatie* van 1795-09-16. A 7: "Die Colonisten zullen alle haaren Rechten [in twee ander weergawes word gepraat van 'voorregten'] welke zij thans genieten blijven behouden zo wel als den Presenten Godsdienst zonder Eenige Verandering." Ivm die kapitulasievoorwaardes en veral a 8 van die 1806-kapitulasievoorwaardes, sien Sampson "Sources of Cape law" 1887 *CLJ* 110; Van Zyl 1907 *SALJ* 133–134; Bodenstein "English influences on the common law of South Africa" 1915 *SALJ* 338; Botha "The early influence of the English law upon the Roman-Dutch law in South Africa" 1923 *SALJ* 396–397; *R v Harrison and Dryburgh* 1922 AD 330. Sien hierteenoor Verloren van Themaat 59–60; De Wet en Swanepoel 34 vn 65. Sien in die algemeen Hahlo en Kahn *The Union of South Africa, the development of its laws and constitution* 17 170; De Wet 1958 *THRHR* 172; De Wet en Swanepoel 34.

19 Sien Eybers *Select constitutional documents illustrating South African history* (1918) 97.

20 Sien *VC* 58 "Instruction to Macartney" (1796-12-30) 6 a 4; vgl *idem* 19–20 a 12.

21 Sien *Kaapse Plakkaatboek* V 1795–1803 (1950) (1797-07-24/26) 95. Vgl in die algemeen *Halleck's international law* II (1893) 490; Burge *Commentaries on colonial and foreign laws* I (1838) xiv.

22 Sien vn 29 *infra*.

van die Kompanjie-tydperk, is ook na skrywers buite die grense van die Nederlande verwys.[23] Hierbenewens het die *Hollandsche Consultatien*, 'n adviesversameling, ook as gesag in die Kaap gegeld[24] en is daar in die strafreg ook na die Romeinse reg verwys.[25] Daar is verder bewyse dat die geresipieerde wettereg nagevolg is[26] en verwysings na onder andere die Groot Plakkaatboeke[27] kom voor.

Macartney se instruksie het verder 'n verandering gebring aan die wrede strawwe en die rol wat die pynbank in straftoemeting gespeel het.[28]

Die Romeins-Hollandse reg het tydens die Eerste Britse Besetting bly voortleef aan die Kaap.[29]

3 DIE REG SOOS TOEGEPAS AAN DIE KAAP TYDENS DIE BATAAFSE TYDPERK 1803–1806

Die reg wat tydens hierdie tydperk toegepas is, het ooreengestem met die reg gedurende die Eerste Britse Besetting. Volgens De Mist se instruksies het die materiële reg onveranderd gebly terwyl, wat die prosesreg betref, 'n "volledige Manier van Procedeeren" in die vooruitsig gestel is[30] en moes die Raad van Justisie ingevolge sy opdrag die bestaande prosedure aan die Kaap voortsit.[31]

Benewens die Kaapse plakkate wat toegepas is, blyk dit uit die krimenele en siviele stukke dat, wat die wettereg betref, ook Hollandse plakkate bekend was.[32] Ook die Statute van Indië is in die howe aangehaal.[33] Verwysings na die skrywers oor die Romeins-Hollandse reg word, net soos teen die einde van die vorige eeu, aangetref.[34]

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23 Sien Visagie 96.
24 Sien *CJ* 472 *Kriminele prosesstukke* 1798 107.
25 *Ibid* 149.
26 Sien *CJ* 78 *Kriminele regsrolle* 1796 164.
27 Sien *CJ* 480 *Kriminele prosesstukke* 1800 395.
28 Sien *VC* 58 "Instructions to Macartney" (1796-12-30) 8 a 5.
29 Die skrywers oor die straf- en strafprosesreg wat aangehaal is, stem bv ooreen met dié wat gedurende die periode 1652–1795 aangehaal is (sien Visagie 96). Ook in die siviele stukke kom verwysings voor na Hugo de Groot, Simon Groenewegen van der Made, Simon van Leeuwen, Johannes Voet en Cornelis van Bynkershoek (sien *idem* 97).
30 Sien "Provisioneele Instructie voor den Raad van Justisie" a 37.
31 *Ibid* a 38. Sien egter a 39 waar "de Raad voor het overige de vorige wyze van procedeeren, aan die Kaap in gebruik, zo wel in het crimineele als in het civile, gebreklyk, of voor de bevordering van goed en kort recht schaadlyk, of ook onzeker en twyffelagtig mogt virdeelen, zal dezelve by provizie volgen, en door Partyen, en Rechtbedienden doen volgen, de styl en practycq voor de Hove van Holland in gebruik zynde, en zulks tot dat hier in nader zal wezen voorzien".
32 Sien *CJ* 494 *Kriminele prosesstukke* 1805 115. Vgl *CJ* 1375 *Siviele prosesstukke* 1804 321. Vgl verder "Ordonnantie raakende het bestier der buiten-districten" a 54.
33 Sien *CJ* 494 *Kriminele prosesstukke* 1805 115.
34 In die kriminele stukke vind 'n mens verwysings na Matthaeus, JJ van Hasselt en Voet. In die siviele stukke word verwys na Hugo de Groot, Voet, Simon van Leeuwen, Van Bynkershoek, Van der Linden en vele ander gesaghebbendes (sien Visagie 112).

4 DIE REG AAN DIE KAAP TYDENS DIE AANVANGSJARE VAN DIE TWEEDE BRITSE BESETTING

In 'n brief van 13 Januarie 1806 aan burggraaf Castlereagh het die Britse opperbevelvoerder, sir David Baird, die tussentydse maatreëls verduidelik wat getref is om die bewind aan die Kaap van die Bataafse Republiek aan Brittanje oor te dra.[35] In hierdie stadium van die Tweede Britse Besetting is min grootskaalse veranderinge beoog.[36] Die administrasie aan die Kaap sou outokraties bly. Die goewerneur sou voortgaan, onderworpe alleen aan die beheer van die staatsekretaris, wat drie maande ver per skip in Londen was, om wette by wyse van proklamasie te maak, aanstellings te doen en, met uitsondering van die president van die Raad van Justisie,[37] amptenare te ontslaan.

Die goewerneur het derhalwe steeds oor uitgebreide magte beskik. Hy het kriminele appèlle saam met 'n assessor of assessore aangehoor,[38] terwyl hy ook, onderworpe aan 'n verdere appèl in sekere gevalle, saam met die luitenant-goewerneur as hof van siviele appèl gedien het.[39] Die Vise-Admiraliteitshof het ook in die goewerneur gesetel. In hierdie hof het hy die posisie van vise-admiraal beklee.[40]

Die waardevolste veranderings wat in hierdie tyd plaasgevind het, was ongetwyfeld die invoering van die Rondgaande Hof en die bepaling dat verhore met oop deure moet geskied. Dat die regswese gaandeweg 'n Engelse vooroordeel sou vertoon, was toe reeds duidelik.[41]

Die Britse regeerders was egter, veral aanvanklik, besonder traag om aan die materiële reg te verander.[42] Die Romeins-Hollandse reg was dus in hierdie stadium nog onaangeraak. Die Britte het trouens die Kaap gedurende die eerste paar jaar na 1806 bloot as 'n buitepos beskou waarvan die vernaamste doel was om die Britse belange in die Ooste te beskerm deur die bewaking van die seeroete.[43]

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35 Sien Theal *Records of the Cape Colony* V, Baird-Castlereagh 276–280. Wat die Tweede Britse Besetting in die algemeen betref, sien verder Walker *A history of Southern Africa* (1961) 137 ev; *Cambridge history of the British Empire* (1936) VIII 195 ev.

36 Sien Walker *A history of Southern Africa* 140.

37 *Ibid.*

38 Sien die Proklamasie van 1808-06-10, uitgevaardig deur Caledon in Theal *Records of the Cape Colony* VI 362–363.

39 Sien Theal *Proclamation by the Earl of Caledon* 115.

40 Sien register 1/46 Staatsargief Kaapstad iii. Tussen 1807 en 1861 het 12 goewerneurs as vise-admiraals opgetree (*ibid*).

41 Sien in die algemeen Girvin "The establishment of the supreme court of the Cape of Good Hope and its history under the chief justiceship of Sir John Wylde" 1992 *SALJ* 291 ev 652 ev. Girvin se bespreking raak die regswese aan die Kaap na die invoering van die twee regsoktrooie en dus die periode wat op hierdie bespreking volg.

42 Sien Van Zyl *Geskiedenis van die Romeins-Hollandse reg* (1979) 448.

43 *Ibid.*

5 DIE REG AAN DIE KAAP BY DIE KOMS VAN DIE KOMMISSARISSE VAN ONDERSOEK

Die eerste aanduiding van 'n kommissie word in 'n Britse parlementêre debat van 25 Julie 1822 gevind. Die onderwerp is in die Laerhuis deur Wilmot Horton ingelei

> "(who) rose to move that a humble address be presented to his majesty to issue under the Great Seal to enquire into the settlements at the Cape of Good Hope, Ceylon and the Leeward Isles".[44]

Die kommissie sou van 'n baie algemene aard wees:[45]

> "The commissioners would be directed to enquire into the whole state of each colony, into its whole civil government, into the extent to which its offices might be diminished both in number and salaries, into the state of the laws; and also into the practice and administration of justice."[46]

Die kommissarisse, Colebrook en Bigge, het gevolglik op 12 Julie 1823 aan boord van die *Lady Campbell* in Tafelbaai aangekom.[47]

5 1 Die wettereg

Aangesien daar vir doeleindes van hierdie bespreking op die gemenereg gekonsentreer word, word die wettereg buite rekening gelaat.[48]

5 2 Die gemenereg

Oor die gemenereg aan die Kaap het die kommissarisse hul soos volg uitgelaat:

> "The Civil Codes by which the rights of individuals in this Colony are protected, consist of those which are better known to the world by the general term of Roman Law, explained by the Commentaries and annotations of the Dutch jurists, amongst the most celebrated of whom are here esteemed, Voet, Grotius, and in later times Van Leeuwen and Van der Linden."[49]

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44 Sien *Hansard* XII kol 1801 1822-06-25.

45 *Idem* kol 1801–1802.

46 *Ibid.* Die uiteindelike aanbevelings van die kommissie val buite die bestek van hierdie artikel. Hieronder word egter verwys na die kommissieverslae oor die geregshowe asook die strafreg en regsleer. Die kommissarisse het klaarblyklik genoeg verwysings na die Engelse reg aan die Kaap gekry om hulle te oortuig van die geskiktheid van daardie regstelsel vir die kolonie (sien *CO* 48/105 *Kommissieverslag oor die geregshowe*; Theal XXVIII *Kommissieverslag oor die geregshowe* 14).

47 Sien Edwards *The 1820 settlers in South Africa* (1934) 104–105. Vgl ook Wilmot *History of the Colony of the Cape of Good Hope from its discovery to the year 1819 (with annals by John Centlivres Chase)* (1869); Cory *The rise of Southern Africa* (1913) 157. Sien ook, ivm die aanvang van hulle ondersoek, *CO* 414/51 Bigge en Colebrook aan Hay 1829-10-29. 'n Derde lid, ene William Blair, is later aangestel. Blair het egter eers in Desember 1825 in die Kaap aangekom (sien Edwards 108).

48 Sien egter in die algemeen *CO* 48/120 *Kommissieverslag oor die strafreg en regsleer*; Theal XXVIII *Kommissieverslag oor die geregshowe* 12 ev. Vgl Visagie 3 ev. Sien ook Theal *op cit* XXXIII oor getuienis gelewer deur Truter HR (1826-09-30) 266. Sien verder Van Zyl 1907 *SALJ* 132 ev; Stock "The new Statutes of India at the Cape" 1915 *SALJ* 328; Roos "The Plakaat Books of the Cape" 1897 *CLJ* 6.

49 Sien *CO* 48/105; Theal XXVIII *Kommissieverslag oor die geregshowe* 12.

Die sakereg en erfreg was hoofsaaklik uit die siviele reg en die gewoontes van die provinsie Holland afkomstig.[50] Volgens die kommissarisse was die struktuur van die reg met betrekking tot eiendom en erfopvolging eenvoudig en nie onvanpas vir mense wat aan die landbou toegewy was en geen groter ideale vir hulle nageslag gekoester het as dieselfde omstandighede waaraan hulle gewoond was nie.[51] Dat die gemenereg van die provinsie Holland aan die Kaap toegepas is, blyk ook uit die getuienis van hoofregter Truter. Op 'n vraag van die kommissarisse oor watter reg deur die koloniale howe toegepas is, het hy geantwoord:

> "In the first place, I should add that we at present follow the dispositions of the local law, or statutes, made by the Government from time to time, next those that were sent either from the Mother Country or from Batavia for the express purpose of being made obligatory in the colony; next the Dutch Common Law and principally that of the Province of Holland, comprehending the Roman Law which is really incorporated with the Dutch Law but with some exceptions."[52]

In die praktyk het dit egter gaandeweg dikwels gebeur dat beide die regbank en die praktisyns op die Engelse reg teruggeval het ter ondersteuning van hulle uitsprake of pleidooie.[53]

6 BEVINDINGS OOR DIE REG WAT DEUR DIE APPÈLHOF EN DIE RAAD VAN JUSTISIE TOEGEPAS IS VOOR DIE INWERKINGTREDING VAN DIE REGSOKTROOIE

6 1 Inleiding

Vir doeleindes van hierdie artikel is 'n aantal argiefbundels nageslaan wat die stukke bevat van siviele en strafsake[54] wat voor die appèlhof en die Raad van Justisie gedien het.

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50 *Idem* 13.

51 *Ibid.* Vgl ook *CO* 49/6 278 ev, Bigge aan Truter HR (1822-02-09) ivm 'n beslissing van Lord Charles Somerset in die appèlhof oor die geldigheid van twee testamente in die saak van *De Witt en Scheuble v Durr* waarin die Hollandse reg nagevolg is. Sien ook Bird *The State of the Cape of Good Hope in 1822* (1823) 10 en verder Chase *The Cape of Good Hope and the Eastern Province of Algoa Bay* (1967) 128.

52 Sien Theal XXXIII, getuienis gelewer deur Truter HR (1825-09-30) 265–266. Sien ook *CO* 48/123 *Documents referred to in the Commissioners' Report*, Denyssen aan Bigge (1826-10-17), waarin die fiskaal oa te kenne gee dat "the common laws of Holland by which the courts in this Colony are generally guided in the absence of such other written laws". So is die periode vir verjaring van eise tov onroerende goed derhalwe 'n derde van 'n eeu. Vgl ook *CO* 49/6, *Letter Book no 3: Letters sent from 21st November 1825 to 17th June 1827*, brief van die kommissarisse aan Denyssen. Sien ook ivm laster wat as 'n misdaad beskou is, *CO* 48/68, *January–June 1825 Despatches*, regsopinie van John Truter HR 193. Die hoofregter verwys na Voet 47 10 10 en konkludeer dan: "This evidently shows that the nature of the crime of Libel, in the eye of the Colonial law, is very different from what it is in the English Law."

53 Sien Van Zyl *Geskiedenis van die Romeins-Hollandse reg* 454–455.

54 Vir doeleindes van hierdie bespreking sal die bevindings wat uit sowel die siviele as die kriminele stukke gemaak is, saam bespreek word. Dit is interessant om daarop te let dat daar na die Romeins-Hollandse gesaghebbende skrywers verwys word in sowel die siviele as die kriminele prosesstukke.

6 2 Besondere bevindings uit stukke voor die appèlhof[55]

6 2 1 Verwysings na gesaghebbende skrywers oor die Romeins-Hollandse reg

6 2 1 1 Johannes Voet

Uit die stukke wat voor die appèlhof gedien het, val dit op dat daar heel geredelik op gesaghebbende skrywers oor die Romeins-Hollandse reg gesteun is.[56] In die bundels wat geraadpleeg is, duik die naam Johannes Voet dikwels op.

Die verwysing is soms van 'n volledige bewysplaas voorsien. So word daar in *Cloete v Briers*[57] verwys na die "celebrated Dutch law commentator" se kommentaar op die Romeinse reg in *Lib 7, Tit 1, para 2*.[58] Hierin sou Voet daarop wys dat daar afsonderlike saaklike en persoonlike verbintenisse betreffende die gebruik van enige eiendom of reg bestaan.[59]

In *Van Aarde v Coetzee*[60] word opgemerk dat alle "Law Doctors" dit eens is dat onbeëdigde getuienis regtens niks kan bereik nie.[61] Daar word verder verwys[62] na Voet *Lib 22, Tit 5, para 15 ff, de testibus* aangaande die feit dat 'n koopkontrak deur *consensus* tot stand kom; dog, as die partye bepaal dat die kontrak op skrif moet wees, vorm die dokument die wese van die ooreenkoms;[63] en met betrekking tot die verkoop van 'n slaaf, word daar in *Heatley v Rowles*[64] breedvoerig na Voet se kommentaar op die Romeinse reg *ad Lib 21, Tit 1, de Aedilitio Edicto, para 10* verwys.[65]

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55 Aangesien die bevindings oor die appèlhof onder bepaalde *hoofde* bespreek word, sal die bespreking gevolglik *nie chronologies* vanaf die vroeëre tot latere tydperk plaasvind nie. Die argiefstukke van die appèlhof in die Staatsargief, Kaapstad, is oorgeplaas vanaf die argiefstukke van die Raad van Justisie na die argiefstukke van die goewerneur. Die verwysing is *GH* (Government House).

56 In siviele sake vind 'n mens verwysings na hierdie skrywers deur beide die advokaat vir die appellant en die advokaat vir die respondent. In kriminele sake het nie alleen die advokaat vir die verdediging nie, maar ook die fiskaal soms op 'n bepaalde Hollandse skrywer gesteun. Die *GH* 47-verwysings verwys na kriminele prosesstukke, terwyl die *GH* 48-verwysings op siviele prosesstukke dui.

57 1819 *GH* 48/2/41.

58 *Ibid* 52. Die verwysing word aangegee soos hulle in die betrokke dokument voorkom.

59 In hierdie bespreking sal daar so na as moontlik gehou word aan die woordgebruik wat deur die bepaalde regsverteenwoordiger voor die hof gevolg is. Die bewysplase word ook *verbatim* aangehaal soos dit in die betrokke dokumente voorkom. Die betrokke bewysplase is vir doeleindes van hierdie artikel nagegaan en daar is gevind dat die verwysings akkuraat is. In hierdie bepaalde bundel (293) verskyn daar 'n interessante opmerking van die hof *a quo*. Die hof verklaar dat die respondent se advokaat meer "explanatory lines form the celebrated Law commentator Johannes Voet on the Roman Digest" kon aangehaal het.

60 1819 *GH* 48/2/39.

61 *Idem* 425.

62 *Ibid.*

63 Sien 430: "However known and true the above Statement is, we shall however prove that this is no mere assertion which we have quoted, but that the principal Dutch Lawyers, and the quoted professor Voet have found it as an undeniable rule in the Roman Law, which is practised in our Jurisprudence."

64 1829 *GH* 48/2/39. Vgl ook vn 135 en 179 *infra*.

65 *Idem* 543–544.

In *Balston v Cloete, Agent of the East Indian Company*[66] word gesteun op die beginsel van die Romeinse en Hollandse reg dat die *actio damni ex lege Aquilia* beskikbaar is "in faciendo vel *omittendo*".[67] Hier word verwys na Voet se kommentaar op *Digesta, ad leg Aquiliam, para 2*.

Wat betref die krenking ("injury") wat voortvloei uit onregmatige ("false") inhegtenisneming, word in *Balston v Bird*[68] verwys na Voet se kommentaar op *Digesta, ad Legem Aquiliam, para 8*.[69]

Oor die menings van die Hollandse juriste aangaande die getuienis van medepligtiges word daar in *Anna Sauer v Landdros van Graaff-Reinet*[70] onder andere op Voet *Comment ad Lib 22, Tit 5, para 10* gesteun.[71]

In die saak *Halloran v Fiscal*,[72] waar Halloran in die hof *a quo* weens die belastering van generaal Grey tot transportasie gevonnis is,[73] wys fiskaal Truter daarop dat die aard van die misdaad waarvan die appellant aangekla is *arbitrio judicis* strafbaar is.[74] Bevestiging hiervoor word aangetref in sowel die reg wat in die kolonie van toepassing was as in Voet *Comment ad Pand Lib 47, Tit 10, para 15*.[75] In 'n ander lastersaak, *Rossouw v Brink*,[76] waar die appellant die respondent onder andere 'n leuenaar genoem het,[77] word uitgebreide verwysings na Voet aangetref.[78] In *Shortt v Fiscal*[79] was laster weer eens ter sprake. Die appellant is in die hof *a quo* gevonnis tot 50 riksdaalders en gevangenisstraf "op eie koste" totdat hy uit die kolonie getransporteer kon word.[80] Hierdie vonnis het gespruit uit lasterlike bewerings ten opsigte van die *ex officio*-vervolger.[81] Daar word op Voet se kommentaar gesteun vir die stelling dat dronkenskap 'n goeie grond vir strafversagting is.[82]

Ook in *Rabe v Jordaan*,[83] wat voortgespruit het uit 'n koopkontrak van grond, word na Voet verwys.[84] En met betrekking tot die stelling dat "a *bona fide*

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66 1823 *GH* 48/2/62. Vgl vn 102 *infra*.
67 *Idem* 168. Die volledige verwysing na Voet is hier 9 8. Die beklemtoning van "*omittendo*" kom in die betrokke dokument voor.
68 1824 *GH* 48/2/62. Vgl ook vn 163 *infra*.
69 *Idem* 577. Breedvoerige aanhalings uit Voet word op 577–580 gevind.
70 1822 *GH* 47/2/23. Vgl vn 119 *infra*.
71 *Idem* 475. Daar word ook verwys na Matthaeus *De crim* 48 15 2.
72 1810 *GH* 47/2/23.
73 Die beslissing van die Raad van Justisie is gedateer 1810-12-13.
74 Sien 164. Vgl vn 125 en 162 *infra*.
75 *Ibid*. Tit 10 handel *de injuriis et famosis libellis*.
76 1819 *GH* 48/2/39. Vgl vn 158 *infra*.
77 Op 27 word melding gemaak van die "Appellant's mind and intention . . . his *animus injuriandi*".
78 Sien 29 107–108.
79 1818 *GH* 47/2/21. Vgl vn 122 *infra*.
80 *Idem* 24.
81 *Idem* 23.
82 *Idem* 19. Sien ook *Gebhard v Landdros, Stellenbosch* 1822 *GH* 47/2/23 waar verwys (24) word na Voet se kommentaar op die *Digesta* mbt die Hollandse reg se benadering oor "Homicidium dolosum ie 'wilful Murder'".
83 1819 *GH* 48/2/39. Vgl vn 108 *infra*.
84 *Idem* 213.

possessor enjoys all the fruits without exception", is weer eens op Voet gesteun.[85]

Daar kom ook gevalle voor waar sonder 'n bewysplaas (of 'n duidelike bewysplaas) na Voet verwys is.

6 2 1 2 Van Leeuwen

Van Leeuwen is gereeld gedurende die Kompanjietydperk in die Kaap aangehaal.[86] Twee interessante verwysings na Van Leeuwen verdien besondere vermelding. In *Bootsman v Landdros, Worcester*[87] is die beskuldigdes in die hof *a quo* aan moord skuldig bevind. Volgens die advokaat wat namens die appellant opgetree het, was die getuienis van een van die getuies, 'n seun van die vermoorde, teenstrydig met sy vorige getuienis, en was die getuienis van die persone wat teenwoordig was by die ondersoek van die liggaam regtens ontoelaatbaar.[88] Daar word verwys na Van Leeuwen *Censura Forensis*[89]

> "who says that at least two witnesses are requisite . . . according to the Doctrine of the Roman Law: *unus testis, nullus testis* which Doctrine is also taken in the Dutch Law, according to Dr Van Leeuwen as before quoted".[90]

'n Heel kritiese mening oor Van Leeuwen is in *Ryneveld v Zorn* gehuldig.[91] In hierdie saak was die geskilpunt 'n aantal wissels wat deur die respondent aan die appellant se oorlede man teruggestuur is, met protes weens nie-akseptasie en niebetaling.[92] Namens appellant is betoog[93] dat daar geen raakpunt was tussen sy saak en die mening van Van Leeuwen waarop respondent in die hof *a quo* staatgemaak het nie.[94] In hierdie betoog word na Van Leeuwen verwys as iemand wie se professionele kennis daadwerklik ontken word deur Bijnkershoek, president van die hooggeregshof in Holland, asook die "geleerde" professor Voorda.[95]

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85 *Idem* 298.
86 Sien vn 15 *supra*.
87 1823 *GH* 47/2/26. Sien ook vn 147 *infra*.
88 *Idem* 11.
89 Deel II 1 6 1 hfst 29 no 23. Die verwysingsmetode is dié wat in die betrokke prosesstuk gevolg is.
90 Sien 12–13.
91 1819 *GH* 48/2/40. Alhoewel die indeksregister van die Raad van Justisie hierdie saak aangee as *Ryneveld v Zorp* lyk dit eerder of dit *Ryneveld v Zorn* moet lui.
92 Sien 528.
93 Sien 541.
94 Daar word geen aanduiding gegee op watter passasie uit Van Leeuwen gesteun is nie.
95 Hierdie persone sou dan "met respek" gewys het op Van Leeuwen se "total ignorance of the Law, and the errors committed by several other Law authors who copied or followed his commentaries in the same manner as the Cranes follow each other (these are about the own words of President Bijnkershoek)". Volgens Visagie *Regspleging en die reg aan die Kaap van 1652 tot 1806* (LLD-proefskrif UK 1969) 71 was Van Leeuwen ongetwyfeld die skrywer oor die straf- en strafprosesreg wat die meeste as outoriteit voor die Raad van Justisie aangehaal is tot 1795. Vgl vn 194 en 195 *infra*.

6 2 1 3 De Groot

Verwysings na De Groot word ook dikwels aangetref. Die betrokke prosesstukke verwys egter oorwegend spesifiek na "Grotius". In *Nonnemaker v Nonnemaker*[96] het 'n skeiding van tafel en bed deur ooreenkoms ter sprake gekom. In hierdie verband word Hugo Grotius se *Inleidinge tot de Hollandsche rechtsgeleerdheid* 1 5 18 en 20 vermeld.[97] Wat 'n erfregtelike aangeleentheid betref, word daar in *Laubscher v Orphan Chamber*[98] na Grotius 2 41 1 en 7 verwys.

In *Sampson v McDonald*[99] gaan dit oor 'n agent wat 'n saak vir minder verkoop het as waartoe hy gemagtig was. Daar word gesteun op Grotius *Inleidinge*[100] se mening dat die agent gebonde is om streng ooreenkomstig sy mandaat op te tree aangesien hy andersins aanspreeklikheid sal opdoen vir alle verliese insluitende winsverlies.[101]

In *Balston v Cloete, Agent of the East Indian Company*[102] word van die standpunt uitgegaan dat daar geen verskil bestaan nie tussen die geval waar 'n persoon self iemand anders belaster en die geval waar hy opdrag gegee het, beveel het of op die een of ander wyse belowe het dat dit gedoen sal word deur iemand anders.[103] Die persoon wat opdrag gegee het, is derhalwe net so aanspreeklik. Hierdie standpunt word dan toegelig met verwysing na Grotius se *Inleidinge* 3 36 2.[104]

6 2 1 4 Van der Linden

Verwysings na Van der Linden duik telkens op. In *Short and Berry v Thomson*[105] moes die hof oorweeg of 'n aksie binne 'n bepaalde tyd ingestel moet word.[106] Die hof vermeld Van der Linden *Form van Proc Lib 1, C 11, para 1*.[107]

In *Rabe v Jordaan*[108] word daar na Van der Linden se aantekeninge oor waarborg in siviele aksies en skadeloosstelling in persoonlike aksies verwys.[109] Hiervolgens moes daar dan 'n belofte of ooreenkoms bestaan het wat deur die respondent gemaak is, en dit moet bewys word deur die appellant op wie die *onus probandi* rus. In *Horne v Nesbit*[110] word gesteun op Van der Linden se

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96 1819 *GH* 48/2/38.
97 Die verwysing verskyn in die prosesstuk as *Book 1 Sect 5* en dan die paragraafnommers.
98 1819 *GH* 48/2/38.
99 1821 *GH* 48/2/41.
100 *Inleidinge* 3 12 8. Die verwysing in die prosesstuk is dieselfde as in vn 97 *supra*.
101 Sien 708.
102 1823 *GH* 48/2/62. Vgl vn 66 *supra*.
103 Sien 447.
104 *Ibid*. Vgl vn 101 *supra*.
105 1819 *GH* 48/2/38. Vgl vn 117 *infra*. Die verwysings word ook hier aangegee soos dit in die prosesstukke verskyn.
106 Die tydperk hier ter sprake was ses weke: "Whenever a person vaunts of having an action against an other, he may be compelled by law to institute it within a certain time."
107 Die verwysing word soos in die prosesstuk aangedui.
108 1819 *GH* 48/2/39. Vgl vn 83 *supra* en 180 *infra*.
109 Sien 203. Die verwysing is na Van der Linden se *Treatise on judicial practice* 2 249.
110 1824 *GH* 48/2/66.

mening dat selfs in die laer howe nuwe getuienis nie voorgelê mag word nadat die verrigtinge gesluit is nie, tensy verlof vooraf verkry en redes vir die aansoek aangevoer is.[111]

Volgens die prosesstukke in *Thomas v Dawes*[112] is dit 'n stelreël dat daar geen appèl is teen voorlopige vonnisse vir "betaling onder sekuriteit" soos *in casu* nie.[113] Daar word weer na Van der Linden verwys.[114]

Wat betref die verhoor van 'n misdaad deur 'n persoon onder militêre gesag jeens iemand anders onder militêre gesag, word Van der Linden aangehaal in *Tiel v Fiscal*.[115] Hiervolgens sou die hof met geskikte jurisdiksie 'n krygshof wees.[116]

6 2 1 5 Ander skrywers

In die prosesstukke in *Short and Berry v Thomson*[117] en *William Francis Viret v Charles Blair*[118] word na Merula verwys. Met betrekking tot die getuienis van medepligtiges word na Matthaeus verwys in *Anna Sauer v Landdros van Graaff-Reinet*.[119] 'n Verdere verwysing na Matthaeus kom in *Rebecca v Landdros van Graaff-Reinet* voor.[120]

6 2 2 Die Hollandse Reg

In verskeie stukke word daar eenvoudig na die Hollandse reg verwys sonder dat enige bewysplase verskaf word.[121] So word in *Shortt v Fiscal*[122] opgemerk: "The Dutch Laws are still observed in this Colony . . ."[123]

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111 Dieselfde werk van Van der Linden word aangehaal, hierdie keer as *Form van procederen* IV T 31 C 58.

112 1824 *GH* 48/2/66. Vgl vn 177 *infra*.

113 Sien 330. Hierdie saak het oor wissels gehandel. Vgl vn 174 *infra* wat wissels betref.

114 *Form of proceedings* B 11 C 24 par 2.

115 1817 *GH* 47/2/14. Vgl vn 126 *infra*.

116 Die verwysing na Van der Linden se *Form van procederen* is hier *1 Part II Chap 5 para*. Wat die siviele proses betref, word daar ook in *Short and Berry v Melvill and Johnson* 1811 *GH* 48/2/2 56 na dieselfde werk van Van der Linden verwys. Die verwysing hier is na Vol I Boek 2 Hfst 24 par 27 355.

117 1819 *GH* 48/2/38. Die verwysing is na Merula *Manier van Proc* L IV t 39 C 2–10, 11.

118 1812 *GH* 48/2/9. Die verwysing is hier na De Haas *ad Merulam* Lib 4 Chap 5 par 4. Die verwysings word aangedui soos dit in die betrokke prosesstukke voorkom.

119 1822 *GH* 47/2/43. Die verwysing is na Matthaeus *De crim* Lib 48 tit 15 Cap 2. Die verwysing kom op 222 voor.

120 1823 *GH* 47/2/26. Op 222 van die bundel word die stelling gemaak dat indien daar geen direkte bewys van die beskuldigde se "malice prepense" bestaan nie, dit nie igv kindermoord vermoed word nie maar dat dit, inteendeel, vermoed word 'n ongeluk te gewees het. Die verwysing is na Matthaeus *De crim* Lib 48 Tit 6 Cl no 6. Vgl ook vn 133 *infra*.

121 Daar word gewoonlik verwys na die "Laws of Holland" of "Dutch Laws".

122 1818 *GH* 47/2/21. Vgl vn 79 *supra*.

123 Sien 18. Deur blote verwysing in die prosesstukke na die Hollandse nuusblaaie blyk dit dat strawwe in die Nederlande vir laster nie so swaar was as die straf wat in die hof *a quo* mbt die appellant opgelê is nie (*ibid*).

In *Theron v Fiscal*[124] word van die veronderstelling uitgegaan dat in die Hollandse reg die straf vir laster aan die "arbitrasie" van die regter oorgelaat word.[125]

Namens die appellant word daar in *Tiel v Fiscal*[126] betoog dat die Hollandse reg van toepassing is:

> "Because the Dutch laws (. . . still continue in vigour in this Settlement as far as they are not counteracted by custom or abrogated by express proclamation) . . ."[127]

Die Hollandse reg en die Engelse reg is volgens die advokaat van die appellant in *Gebhard(t) v Landdros van Stellenbosch*[128] dieselfde op die punt dat die opset om te dood, wat nie opgevolg word deur die dood self nie, nie as moord strafbaar is nie.[129]

6 2 3 Die Romeinse reg

Ook die Romeinse reg word soms in die prossesstukke aangehaal ter ondersteuning van 'n bepaalde regspunt. So betoog advokaat Van den Berg in *Hartongh v Heyns*[130] dat sy kliënt nie afstand gedoen het van die voorreg ingevolge die *Senatusconsultum Velleianum* nie.[131] Ook die respondent soek steun in die Romeinse reg.[132] In *Rebecca v Landdros van Graaff-Reinet*[133] word op die Romeinse reg staatgemaak ter ondersteuning van die standpunt dat 'n vrou nie skuldig bevind kan word aan moord op haar baba nie;[134] en in *Heatley v*

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124 1812 *GH* 47/2/5.

125 Sien ook *Halloran v Fiscal* 1810 *GH* 47/2/1. Vgl vn 72 *supra* en 160 *infra*. In *Theron v Fiscal* word daar ook na die "Dutch Law proceedings" mbt renovasie verwys.

126 1817 *GH* 47/2/14. Vgl vn 115 *supra*.

127 Sien 23.

128 1822 *GH* 47/2/23. Johann Gebhard(t), seun van 'n Paarlse predikant, was die eerste witman wat ter dood veroordeel is vir die moord op 'n slaaf. Hy is op 1822-11-15 tereggestel vir die moord op sy slaaf Joris. Sien Pringle *Narrative of a residence in South Africa* (1966) 175; Streak *The Afrikaner as viewed by the English 1795–1854* (1974) 95; *The Times* Londen (1823-02-07).

129 Sien 15. Sien ook 16 waar die houding ingeneem word dat volgens die Hollandse reg, waar 'n aggressor nie die bedoeling gehad het om te dood nie maar slegs om te steek of te verwond, die misdaad nie as moord beskou word nie. Daar word na *Barels crimineele advyzen* verwys. Vgl verder 20 ev waar 'n duidelike onderskeid gemaak word tussen die Engelse reg en die Hollandse reg tov "wilful murder".

130 1816 *GH* 48/2/28.

131 Sien 229. Daar word na die *Senatus consultum vellejani* verwys. Die appellant maak in hierdie verband staat op 'n vroeëre beslissing in *Martheze v The Widow Melser*. Lg beslissing word nie verder toegelig nie. Vgl vn 221 *infra*.

132 Sien 294: "[S]o we find in the Law 131 of the pandects, *de diversis regulis juris antiqui – qui dolo desieret possidere pro possidente damnatur, quia pro possessione dolus est*, and by Law 155 – *eodem titulo, factum enique suum non adversario nocere debet*." Die aanhaling word *verbatim* weergegee.

133 1823 *GH* 47/2/24. Vgl ook vn 120 *supra*.

134 Mbt hierdie tipe misdaad word op 216 opgemerk dat "the great ancient legislator Solon thought it so enormous . . . [that] he believed it impossible that any body could be guilty of it, for which reason no punishment was acted against it". Daar word verwys na "Cic: pro Roscio Amerino Cap 13 para 22", wat gevolg sou gewees het deur "Romulus vide Plutarchus in Vita Romuli" (*ibid*). 'n Verdere verwysing na Cicero kom op 220 voor.

Rowles[135] wat handel oor die verkoop van 'n slaaf, kom breedvoerige verwysings na die Romeinse reg ook voor.[136]

6 2 4 Die Statute van Indië

In die steekproewe wat vir doeleindes van hierdie artikel gedoen is, is drie verwysings na die Statute van Indië gevind. So word daar in *Faure (Kurator van Fytjie) v Van Breda*,[137] met betrekking tot die verkoop van 'n slaaf, daarop gewys dat die verkoper verplig is om aan die koper 'n ontvangsbewys, 'n "venduebill" of 'n notariële oordragbewys te verskaf. Sodanige notariële oordrag kon nie deur die notaris gedoen word nie.[138] Daar word na artikel 30 van die Statute van Indië verwys.

Ook in *Gebhard v Landdros van Stellenbosch*[139] word na die Statute van Indië verwys. In verband met die reël in beide die Romeinse reg[140] en die Engelse reg[141] dat daar by afwesigheid van opset om te dood nie sprake van moord kan wees nie, word die Nuwe Statute van Indië van 1766 vermeld.[142]

In *Hussey v Backton*[143] maak die appellant daarop staat dat die respondent nie amptelik aangestel is as registrateur van die Vise-Admiraliteitshof nie maar dat hy bloot die registrateur se assistent is.[144] Respondent kan derhalwe nie vergelyk word met sekere amptenare in die kolonie wat nie vir arres vatbaar is nie. Met verwysing na die Statute van Indië word daar dan vermeld dat hierdie kategorie persone vroeër bekend gestaan het as amptenare van die Oos-Indiese Maatskappy.[145]

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135 1819 *GH* 48/2/39. Vgl ook vn 64 *supra*.

136 Sien 532 ev. Die nodige bewysplase ontbreek egter. Vgl ook vn 90 *supra* mbt die Romeinse reël *unus testis, nullus testis*; asook vn 63 *supra* tov die Romeinse reël dat by 'n geskrewe ooreenkoms die dokument die wesenlike gedeelte van die kontrak uitmaak.

137 1826 *GH* 48/2/70.

138 Sien 534. Wat slawe betref, is daar in die algemeen ook staatgemaak op gesag soos die Bataafse statute. Sien Theal XXXIII, getuienis van Truter HR 267; Theal XXVIII *Kommissieverslag oor die geregshowe* 12–13; *CO* 49/6, Bigge aan Truter HR (1827-05-16) 19.

139 1822 *GH* 47/2/23. Vgl vn 128 *supra*.

140 Sien 28.

141 Sien 29.

142 Sien 41. Hierdie sou ook 'n beginsel wees van die Mosaïse reg soos te vind in Eksodus 21: 20–21 (*ibid*).

143 1811 *GH* 48/2/2.

144 Sien 336.

145 *Ibid*.

6 2 5 Die Kroonverhoor[146]

In die beslissings na 1819 word ook verwysings na die Kroonverhoor aangetref. So word daar in *Bootsman v Landdrost, Worcester*[147] verwys na artikel 3 van die Kroonverhoor wat alle twyfel uit die weg sou geruim het betreffende die verhoor van misdade wat met die dood strafbaar is.[148]

In *Fiscal v Cooke and Thompson*[149] merk fiskaal Denyssen op dat die goewerneur se besluit om die strafregprosedure in hersiening te neem, 'n goeie en nuttige doel gedien het.[150] Hierdie ondersoek het gelei tot die Kroonverhoor waardeur strafverrigtinge aan die Kaap gereguleer is.[151] In *Gebhard v Landdros van Stellenbosch*[152] word na artikels 34 en 44 van die Kroonverhoor verwys.[153]

Dit is ook interessant om te let op 'n beslissing wat voor die inwerkingtreding van die Kroonverhoor afgehandel is en derhalwe ná laasgenoemde saak anders beslis sou gewees het. In *De Vos v Landdros van Stellenbosch*[154] is naamlik opgemerk dat oortredings wat strafbaar met verbanning was, nie onderworpe was aan kennisname deur die Raad van Justisie nie.[155] Artikel 5 van die Kroonverhoor het egter bepaal dat sodanige oortredings deur een van die kommissarisse van die Rondgaande Hof ondersoek moet word. Wanneer die ondersoek afgehandel is, sou die vervolging voor die Volle Raad van Justisie plaasvind.

6 2 6 Die Engelse reg

Verwysings na die Engelse reg kom meesal voor met betrekking tot een of ander aspek van die strafreg, waaronder laster ("libel") vir hierdie doel ressorteer. Ook wat wissels betref, is daar die een en ander oor die Engelse reg te vind, asook wat die reg aangaande onwettige handel betref.

'n Algemene verwysing na sir William Blackstone word aangetref in *Short and Berry v Herrer*[156] waar die appellant se advokaat die volgende stelling van

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146 Met hierdie proklamasie, waardeur 'n rondgaande hof oa ingestel is, is 'n poging aangewend om weg te doen met die ou prosedure in strafsake. Sien die proklamasie van 1819-12-2 (gepubliseer 4 Des); Theal XXV *Crown trial; or mode of proceeding in criminal cases at the Cape of Good Hope* 80–123. Die Kroonverhoor het 'n Britse kleur aan die bestaande strafprosedure verskaf en heelwat ter verbetering van die administrasie van die regswese bygedra. Sien Dugard *South African criminal law and procedure* IV "Introduction to criminal procedure" 23; Hahlo en Kahn *The South African legal system and its background* 576.

147 1824 *GH* 47/2/26. Vgl vn 87 *supra*.

148 Sien 41.

149 1823 *GH* 47/2/24.

150 Sien 164.

151 *Ibid*. In hierdie saak het dit gegaan oor a 20 van die Kroonverhoor.

152 1822 *GH* 47/2/23. Vgl vn 128 *supra*.

153 Sien 6 88.

154 1818 *GH* 47/2/21.

155 Sien 317.

156 1811 *GH* 48/2/2. In hierdie saak is die huidige respondent in die hof *a quo* tot 'n sekere bedrag gevonnis mbt skade wat die appellant sou gely het agv die beskadiging van gesoute beesvleis.

Blackstone aanhaal: "That Equity in its true and genuine meaning is the soul and spirit of all laws."[157]

In *Rossouw v Brink*,[158] 'n lastersaak, word daar afgesien van Voet ook na Blackstone verwys.[159] In *Halloran v Fiscal*[160] word daar ook op sowel Voet[161] as die Engelse reg gesteun. Advokaat Neethling voer namens die appellant aan dat die straf vir laster in die Engelse reg 'n boete of gevangenisstraf is. Verbanning is onbekend in die Engelse reg terwyl "transportasie" as straf slegs by die pleeg van 'n halsmisdaad opgelê word.[162] Ingelyks word daar in *Balson v Bird*[163] na Voet[164] en Blackstone in verband met onregmatige arrestasie verwys.[165]

Verwysings na die Engelse reg kom ook voor in *Zaaiman v Landdros van George*.[166] Namens die appellant word betoog dat daar 'n aantal sake voor die howe in Engeland gedien het waar persone, wat van die betrokke ernstige misdade aangekla is, vrygespreek is. Die vryspraak het geskied op grond van die erkende beginsel dat regters hulleself moet weerhou van alle private of persoonlike gevoelens of suspisies.[167] Ook die respondent het in hierdie saak op die Engelse reg gesteun. Volgens assistent-fiskaal Lind is dit 'n erkende beginsel van die Engelse reg dat 'n beskuldigde nie op sy bekentenis alleen gevonnis kan word nie. Volgens hom is daar gevalle in die Engelse reg waar die beskuldigde nieteenstaande sy eie bekentenis vrygelaat is omdat verdere bewyse vir die misdaad ontbreek het.[168] Wat strafaangeleenthede betref, word verder vele verwysings na Blackstone aangetref.[169]

In *Reynolds and Murray v His Majesty's Fiscal*[170] blyk dit uit 'n prosesstuk van die hof *a quo* wat voor die Raad van Justisie gedien het, dat die vervolging

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157 Sien 718. Die verwysing is na Blackstone se "inestimable treatise" III 429.

158 1819 *GH* 48/2/39. Vgl vn 76 *supra*.

159 Sien 29. Die verwysing is na Blackstone III C 8 126. Vgl ook die opmerking op 27, aangehaal in vn 77 *supra*.

160 1810 *GH* 47/2/1. Vgl vn 72 *supra*.

161 Sien vn 75 *supra*.

162 Sien 19. Geen spesifieke verwysing na die Engelse reg word gegee nie. Wat die oplê van die straf *arbitrio judicis* betref, word na Voet verwys. Sien vn 74 en 125 *supra*. In dié verband word ook verwys na die Engelse reg soos opgeneem in Hawkins *Pleas of the Crown 1st chapter 73 Sec 21* (sien 164).

163 1824 *GH* 48/2/62.

164 Sien vn 69 *supra*.

165 Sien 557. Die verwysing is na Blackstone III 127.

166 1820 *GH* 47/2/27.

167 Sien 37. Daar word nie na enige gesag verwys nie. Vgl, wat hierdie stelling betref, Potgieter AR se opmerkings in *Solomon v De Waal* 1972 1 SA 575 (A) 580G–H.

168 Sien 37 ev. Geen gesag word vermeld nie.

169 Sien *Gebhard v Landdros van Stellenbosch* 1822 *GH* 47/2/23 6. Die verwysings na Blackstone is bk 4 hfst 14 par 195; asook 14 201. Sien verder *Tiel v Fiscal* 1817 *GH* 47/2/14 32. Die verwysing is na Blackstone bk 4 hfst 29 352. Vgl, wat hierdie twee beslissings betref, vn 115 126 128 139 *supra*. Hieruit blyk dat daar soms, om een of ander regspunt te illustreer, na sowel die Hollandse as die Engelse reg verwys is. Vgl ook *Viret v Blair* 1812 *GH* 48/2/9. Hierin verwys die fiskaal na *Blackstone on the laws of England* bk 3 121. Vgl in hierdie verband ook vn 118 *supra*.

170 1813 *GH* 47/2/6.

op die Engelse reg staatgemaak het.[171] In hierdie saak het dit gegaan oor die onwettige invoer van goedere uit Oos-Indië. In verband met onwettige handeldryf steun die respondent in *Fiscal v Cooke and Thompson*[172] op Holt se verhandeling getiteld *System of shipping and navigation laws*.[173]

Wat wissels betref, word die volgende stelling van Chitty[174] in *Huntley v Horne* aangehaal:[175]

> "Bills of Exchange like every other contract are to be construed in such a way and manner as, if possible, to give effect to the intention of the contracting parties."[176]

'n Verwysing na Chitty kom ook in *Thomas v Dawes* voor.[177] *In casu* gaan dit oor die endossering en verhandeling van wissels.[178]

6 2 7 Ander bevindings

Uit die stukke wat geraadpleeg is, is gevind dat daar na gesag verwys is wat nie onder een van bogenoemde kategorieë tuishoort nie. So word daar in *Heatley v Rowles*[179] en *Rabe v Jordaan*[180] na die Fransman Pothier verwys; en in *Halloran v Fiscal*[181] word die Duitse strafreggeleerde Carpzovius vermeld.[182] Die appellant steun ook op Carpzovius in *Landdrost, Cape District v Stadler*.[183]

Wat adviesversamelings betref, word daar na Barels se *Crimineele Advyzen* verwys,[184] Moorman en Van Hasselt,[185] Moorman se verhandeling oor misdade[186] asook die werke van Bort,[187] Vromans[188] en Leyser.[189]

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171 Sien a 16 van die dokument op 173.
172 1823 *GH* 47/2/24.
173 Sien 109.
174 Die verwysing is na *Chitty in his treatise on bills of exchange* 108.
175 1824 *GH* 48/2/66.
176 Sien 424.
177 1824 *GH* 48/2/66. Vgl vn 112 *supra*.
178 Sien 330. Die verwysing is na Chitty hfst IV.
179 1819 *GH* 48/2/39 547 ev. Geen bewysplase word gegee nie. Vgl vn 64 *supra*.
180 1819 *GH* 48/2/39 209–210. Vgl vn 108 *supra*.
181 1810 *GH* 47/2/1. Vgl vn 72 *supra*.
182 Sien 8. Die verwysing is na Carpzovius 98 1. Sien ook 24. Uit hierdie verwysing, wat van geen spesifieke bewysplaas voorsien is nie, blyk dit dat daar verwys word na Van Hogendorp se vertaling van Carpzovius. Hierdie vertaling heet *Verhandeling der lijfstraffelijke misdaaden en haare berechtinge* (vgl 25).
183 1812 *GH* 47/2/5. Hierdie bundel bevat geen bladsynommers nie. Die verwysing na Carpzovius is klaarblyklik na sy *Practica nova imperialis Saxonica rerum criminalium*. Die bewysplaas word aangegee as *prima quaestione 27 para 34*.
184 Sien *Gebhard v Landdros, Stellenbosch* 1822 47/2/23 17. Vgl vn 129 *supra*.
185 Moorman en Van Hasselt 2 10 13. Sien *Halloran v Fiscal* 1810 *GH* 47/2/1 10. Die verwysing is klaarblyklik na hierdie skrywers se *Verhandeling over de misdaden en der selver straffen voor een groot gedeelte opgestelt by wylen Mr Johan Moorman, voorts vervolgt en ten einde gebragt door Mr Johan Jacob van Hasselt*. Hierdie werk is hoofsaaklik 'n swak navolging van Matthaeus se *De crim*. Sien Visagie *Regspleging en reg aan die Kaap van 1652 tot 1806* 71 vn 57.
186 Moorman 2 1 5 word aangehaal in *Landdros, Cape District v Stadler* 1812 *GH* 47/2/5. Geen bladsynommers verskyn in hierdie bundel nie.
187 'n Verwysing na Bort se kommentaar op die *Hoge en ambachts heerlijkheid* 2 67 kom voor in *Landdros, Cape District v Stadler supra*.

vervolg op volgende bladsy

6 3 Besondere bevindings uit stukke voor die Raad van Justisie

Wanneer 'n aantal bundels uit die argiefstukke van die Raad van Justisie bestudeer word, blyk dit dat dieselfde patroon gevolg is wat hierbo uit die appèlhofbeslissings afgelei is. So word daar verwysings na Voet aangetref in die *Mulder*-saak,[190] *Ernst Marais v Landdros van Tulbach*,[191] *Fiskaal v Candas(z)a*[192] en *Fiskaal v Cathryn*.[193] Simon van Leeuwen word aangehaal in *Ernst Marais v Landdros van Tulbach*[194] terwyl daar na sy *Roomsch-Hollandsche recht* verwys word in *Fiskaal v Eduard Harding*.[195] In *Louis Cauvin v Fiskaal*[196] en *Ernst Marais v Landdros van Tulbagh*[197] word verwysings na De Groot aangetref.[198]

Daar is talryke verwysings na een van die laaste skrywers oor die Romeins-Hollandse reg, Johannes van der Linden. So word na sy *Koopmans handboek* verwys in *Landdros van Stellenbosch v Van Blommenstein*.[199] Ook in *Louis Cauvin v Fiskaal*[200] en *Patrick McCarthy v Fiskaal*[201] word na die *Koopmans handboek* verwys.[202] Verdere verwysings na hierdie werk word in *Fiskaal v Philip Richardson Peck*[203] en *Fiskaal v Cathryn* aangetref.[204]

Daar word ook gereeld na Matthaeus se *De criminibus* verwys, byvoorbeeld in die *Mulder*-saak,[205] *Patrick McCarthy v Fiskaal*,[206] *Fiskaal v Eduard Harding*,[207]

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188 Vromans *De foro competenti* 1 III 9 en 11 ev. Sien *Landdros, Cape District v Stadler supra*.

189 Leyser *Meditationes ad pandectas* spec 552 1 en 2. Vgl vn 214 *infra*.

190 Die saakverwysing is ietwat onduidelik. Sien 1820 *CJ* 610 102. Geen bewysplaas word verstrek nie.

191 1820 *CJ* 610 436. Die verwysing hier is na Voet *ad Lex Cornelia de Sicariis*. Sien egter die verwysing na Voet op 445: "d.i. in tweyffel word noodweer ook gepraesumeer, tot dat die praesumtie of door bewyzen of door sterkere sporen van het tegendeel om verre geworpen word."

192 1822 *CJ* 620 169. Die verwysing is na Voet se "Commentarie" *ad tit D*.

193 1826 *CJ* 635 702. Die verwysing is na Voet *ad tit D, de incend* 5.

194 Sien vn 217 *infra*. Daar word slegs na die volgende stelling van Van Leeuwen verwys op 442: "dat men een nagtdief vryelik mag doodslaan". Op 437 word egter na *RH Regt* 4 Boek 34 verwys. Sien ook vn 95 *supra*.

195 1827 *CJ* 640 814. Die verwysing is na B 4 Cap 34.

196 1823 *CJ* 625.

197 Sien vn 194 *supra*.

198 In die *Cauvin*-saak 1169 word verwys na De Groot 3 48 7 terwyl daar in die *Marais*-saak 443 na De Groot *Inl* 3 33 9 verwys word.

199 1823 *CJ* 625. Op 535 word Van der Linden aangehaal mbt "toevallige doodslag" en op 563 mbt "direct of indirect oogmerk om te dooden". Die verwysing is na 241 en 240 van die *Handboek*.

200 Sien vn 196 *supra*.

201 1827 *CJ* 640.

202 Sien die *Cauvin*-saak 1168 en die *McCarthy*-saak 366. In lg saak word na Van der Linden se "manual" 2 8 6 272 verwys.

203 1827 *CJ* 640 637. Sien ook in dieselfde bundel die verwysing na Van der Linden *Handboek* in *Fiskaal v Harding* 815.

204 Sien vn 193 *supra*. Vgl 712–720 721. Die verwysings op hierdie bladsye is na Van der Linden 2 1 4 7; 2 8 3; en 1 17 3 182 asook 2 8 3.

205 Sien vn 190 *supra*. Vgl 101.

vervolg op volgende bladsy

Landdros van George v Bernardus Christiaan Zaayman[208] en *Fiskaal v Cathryn.*[209] Dat ook Groenewegen se *De legibus abrogatis* in hierdie hof bekend was, blyk uit *Fiskaal v Eduard Harding,*[210] *Fiskaal v Candas(z)a*[211] en *Fiskaal v W Stewart, C Logan en M Carey.*[212] Van Zurck se *Codex Batavus* word ook vermeld,[213] asook Merula se *Manier van procederen.*[214]

Daar word voorts in die Raad van Justisie-stukke oor die algemeen na die Nederlandse reg verwys.[215] Vele regspunte word aan die hand van die Romeinse reg toegelig. Die menings van beide Ulpianus en Huber oor die *Lex Aquilia* word aangehaal.[216] Daar kom selfs 'n verwysing na die *Twaalf Tafels* voor.[217] Die Romeinsregtelike benadering met betrekking tot sogenaamde "voluntarily contracted madness by drunkenness or intoxication" word ook vermeld.[218] Daar word verder gesteun op keisers Gratianus, Valentinianus en Theodosius se voorskrifte met betrekking tot publieke vervolgers.[219] 'n Verwysing na Hadrianus[220] en Justinianus[221] word aangetref. 'n Verdere verwysing na die Romeinse reg kom in *Fiskaal v Doherty*[222] voor.

Ook die Duitse strafreggeleerdes Carpzovius en Boehmer het hulle invloed laat geld. Verwysings na Carpzovius word vermeld in *Fiskaal v Peck,*[223]

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206 Sien vn 201 *supra*. Vgl 367 en 489.
207 1827 *CJ* 640 814.
208 1819 *CJ* 600 510 en 708.
209 Sien vn 183 *supra*. Vgl 702.
210 Sien vn 207 *supra*. Vgl 819.
211 Sien vn 192 *supra*. Vgl 169. Hier word bloot na die "Rechtsgeleerde schryveren" Sande en Groenew verwys.
212 1826 *CJ* 635 911.
213 Sien die *Harding*-saak 280 vn 195 *supra*.
214 Sien die *Cathryn*-saak 720 vn 193 *supra*. Die verwysing is na *Manier van Procederen* lib 4 tit 62. 'n Verwysing na Leyser *Medit ad Pand* kom in *Fiskaal v Candas(z)a* 1822 *CJ* 620 160 voor.
215 Sien *Fiskaal v Candas(z)a* 1822 *CJ* 620 159. Hier word ook na die Engelse en Franse reg verwys.
216 Sien *Landdros van Stellenbosch v Van Blommenstein* 1823 *CJ* 625. Vgl die verwysing op 559 na Ulpianus *ad leg Aquil* asook die verwysing op 560 na Huber *Prael ad ff ad leg Aquilliam, num 4 ad scholiam Thomasii.*
217 Sien *Marais v Landdros van Tulbach* 1820 *CJ* 610 435: "daarom zegt reeds de Wet der Twaalf tafelen dat men eenen nagtdief ongestraft om het leven mag bringen". Vgl vn 194 *supra*.
218 Sien *Fiskaal v Peck* 1827 *CJ* 640 817. Geen gesaghebbende word egter aangehaal nie.
219 Sien *Landdros van George v Zaayman* 1819 *CJ* 600 705.
220 Sien *Fiskaal v Candas(z)a* 1822 *CJ* 620 159. Die verwysing is na Hadrianus: *D de testibus.*
221 Sien *Fiskaal v Cathryn* 1826 *CJ* 635 655 waar verwys word na "Keyser Justinianus in Lege 22, Cod ad SC tum Vellejanum (IV29)", asook sy *Meditationes* 7e Deel spec 473 Med 7. Vgl vn 131 *supra*.
222 1826 *CJ* 635 819. Geen gesag word egter gemeld nie. Sien ook die verwysings na Cicero in *Marais v Landdros, Tulbach* 1820 *CJ* 610 439 en *Fiscus v W Noble, W Williams* 1827 *CJ* 640 517.
223 Sien vn 203 *supra*. Vgl 802.

Landdros van George v Zaayman,[224] *Landdros van Swellendam v Witbooi*[225] en *Fiskaal v Cathryn*.[226] Veelvoudige verwysings na Boehmer kom voor in onder andere *Van Breda v Fiskaal*,[227] *Marais v Landdros van Tulbagh*,[228] *Fiskaal v Peck*,[229] *Fiskaal v Candas(z)a*[230] en *Fiskaal v Cathryn*.[231] In *Leibbrand v Fiskaal*[232] word na Pothier verwys.

'n Duidelike standpunt oor die toepassing van die Statute van Indië word in *McCarthy v Fiskaal* ingeneem:[233]

> "Statutes of the Netherlands India, which by Resolution of the Gov in Council of the 12 February 1715 is declared to be the law of this Colony . . . relative to which we are now in this respect referred by the above Resolution to the Dutch and Roman Statute Laws. These are the Laws, if I do not mistake, by which the Judge in the Colony must be guided."

In *Fiscus v W Noble, W Williams*[234] is artikels 50 en 51 van die Kroonverhoor ook ter sprake.

Verwysings na die Engelse reg word geredelik aangetref. Die gewildste Engelse skrywers blyk Blackstone[235] en Russel[236] te wees, maar daar word ook na Chitty[237] en Peake[238] verwys.

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224 Sien vn 208 *supra*. Vgl 511.

225 1821 *CJ* 615. Op 97 word na sy *Practica criminalis* deel 1 quaest 11 par 26 verwys. Op 216 ev word verder na die *Practica criminalis* verwys.

226 Sien vn 193 *supra*. Op 653 word verwys na Carpzovius *In practica Tevium Crim* 121 41–49. Sien ook 712 waar verwys word na *Practica criminalis* 3 145 no 59.

227 1823 *CJ* 625. Op 959 word verwys na Boehmer *ad Constil: Carol art 64 initio*. Op 960 verskyn dieselfde verwysing, dog na a 61 *re* "aanbringers of delatores".

228 1820 *CJ* 610. Op 416 kom eenvoudig die verwysing voor na Boehmer L2 par 201 mbt die volgende: "Moord, dat met die dood zal gestraft worden, moet met argelist uit boosheid geschied." Die verwysing op 438 is na Boehmer L2 par 207.

229 1827 *CJ* 640 802. Vgl ook *Landdros van Swellendam v Witbooi* 1821 *CJ* 615 218. Hierdie verwysings is van geen spesifieke bewysplase voorsien nie. In lg saak word egter op 93 verwys na Boehmer *Crim* Sec 2 Cap 21 par 245.

230 1822 *CJ* 620. Die verwysing op 163 is na Boehmer *In elementis juris criminalis* L1 cap 6 132–134.

231 1826 *CJ* 635 653. Die verwysing is na Boehmer *In elementis Juris crim* 1 126.

232 1823 *CJ* 625 891 en 892. Geen duidelike bewysplase word aangegee nie.

233 1827 *CJ* 640 385.

234 1827 *CJ* 640 365. Vgl ook *McCarthy v Fiskaal* 81 vn 233 *supra*.

235 Sien *Fiskaal v Harding* 1827 *CJ* 640. Op 816 word verwys na Blackstone IV 2 p 23. In *Fiskaal v JPC Groenwald* 1826 *CJ* 635 word daar op 270 verwys na Blackstone vol 3 B 3 p 369. In 'n verdere beslissing, waarvan die naam onduidelik is, 1826 *CJ* 635, word op 1016 na Blackstone B 1 Ch 14 no 2 verwys. Die verwysings word aangedui soos dit in die onderskeie bundels voorkom.

236 So word daar na *Russel on Crimes* L 1 pag 618 verwys in *Fiskaal v Candas(z)a* 1822 *CJ* 620 160; en *idem* 169 na *Russel on crimes* vol 1 Book 3 Chap 1 6. Die verwysings word aangegee soos dit in die bundel verskyn.

237 Chitty *Treatise of the criminal law* vol 1 ch 1 p 2. Sien *Landdros van Stellenbosch v Van Blommenstein* 1823 *CJ* 625 783.

238 Peake "in zijn compendium" oor die *Law of evidence* 140.

6 4 Gevolgtrekking

Dit wil voorkom of die reg wat deur die hoër howe aan die Kaap vanaf 1807 tot met die koms van die kommissarisse en selfs tot voor die inwerkingtreding van die eerste Regsoktrooi toegepas is, nie wesenlik afgewyk het van die patroon wat reeds in daardie stadium gevestig was nie.

Oorvloedige verwysings na die gesaghebbende skrywers oor die Romeins-Hollandse reg word steeds aangetref. In vele beslissings is die reg van die provinsie Holland steeds as die toepaslike reg van die Kaapkolonie beskou. Daar is ook voortgegaan om die Romeinse reg aan te haal.

Dit is egter interessant om daarop te let dat daar ook byna vanselfsprekend op die Engelse reg gesteun is. Daar word nie geskroom om na gesaghebbende Romeins-Hollandse en Engelse skrywers oor dieselfde onderwerp te verwys nie. So word daar maklik na Voet en Blackstone in dieselfde verband verwys. Waar geen verwysing na die Romeins-Hollandse reg gemaak is nie, word bloot na Engelse gesag verwys.

Dit is derhalwe nie te vergesog nie om te konkludeer dat daar reeds gedurende hierdie periode 'n geleidelike invoering van die Engelse reg aan die Kaap, waar die Romeinse-Hollandse reg steeds gegeld het, plaasgevind het. 'n Mens kan moontlik sê dat 'n stadige "pre-resepsie", dit wil sê reeds voor die 1827-Regsoktrooi, besig was om plaas te vind.

7 DIE VOORTBESTAAN VAN DIE ROMEINS-HOLLANDSE REG

Dit is opmerklik dat die Kaapse howe gedurende die begin van die negentiende eeu steeds onbevange na die Romeins-Hollandse reg verwys het, en dat die verslae van die kommissarisse en die daaropvolgende twee Regsoktrooie van 1827 en 1832 klaarblyklik nie die posisie van die Romeins-Hollandse reg uitermate bedreig het nie. Wat wel gebeur het, was dat die Engelse reg meer geredelik as gevolg van die veranderde omstandighede deur die howe geraadpleeg is.[239]

Dit is duidelik uit die beslissings van die Raad van Justisie, die appèlhof en die hooggeregshof[240] dat daar gedurende die negentiende eeu deurlopend verwys

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239 So sou De Villiers HR jare later in *Colonial Government v Edenborough* (1886) 4 SC 290 294–295 opmerk: "The greatest assistance is continually derived by our Courts from English cases which decide questions relating to the law of evidence, or the construction of statutes, or general questions not foreseen by writers on our law or which are applicable by reason of natural growth and development of our commercial practices, and of our criminal jurisprudence in the direction of English usage." Vgl verder Hahlo en Kahn *The South African legal system and its background* 575 ev; *The Union of South Africa, the development of its laws and constitution* 17 ev.

240 Wanneer die uitsprake van die hooggeregshof geraadpleeg word, wat deur die 1827-regsoktrooi in die lewe geroep is, merk 'n mens op dat die welbekende Lord Henry de Villiers as hoofregter – waarskynlik meer as enigeen – bygedra het tot die handhawing van die Romeins-Hollandse reg gedurende die tweede helfte van die 19de eeu. Sien oa *Roux v Executors of Roos* (1847) 1 M 89; *Putman v Redfield* (1874) Buch 79; *Oak v Lumsden* (1884) 3 SC 144; *Greenshields v Chisholm* (1884) 3 SC 220 veral 227; *Hare v Heath's Trustee* (1884) 3 SC 32; *Steward's Assignee v Wall's Trustee* (1885) 3 SC 243; *Colonial Government v Edenborough* (1886) 4 SC 290 veral 294–295; *The Cape of*

vervolg op volgende bladsy

is na en gesteun is op die Romeins-Hollandse reg. Waar hierdie verwysings voorkom, neem die hof eenvoudig die houding in dat die Romeins-Hollandse reg nog altyd die gemenereg van die Kaapkolonie was. Dit was die benadering van die howe ten spyte van die Britse regering se vroeëre bedoeling om die reg aan die Kaap geleidelik deur die Engelse reg te vervang, insluitende die algehele verengelsing van die regsproses.

Waarteen gewaak moet word, is 'n oorreaksie op die invloed wat die Engelse reg gedurende die negentiende eeu, en veral na die inwerkingtreding van die Regsoktrooie, op die voortbestaan van die Romeins-Hollandse reg gehad het. Daar word nie ontken dat die toekoms van die Romeins-Hollandse reg gedurende die twintigerjare van die negentiende eeu betreklik duister daar uitgesien het nie. Eweneens word dit nie ontken nie dat na die inwerkingtreding van die twee Regsoktrooie die invloed van die Engelse reg sterk was, veral ook op wetgewende gebied. Wat belangrik is, is dat die Romeins-Hollandse reg nie deur Engelse beïnvloeding weggevee is om weer in die twintigste eeu 'n verskyning te maak nie.

Die Romeins-Hollandse reg was reeds teen die einde van die Bataafse bewind te stewig in die Kaap gevestig om as't ware te verdwyn. Dieselfde geld die posisie van die Romeins-Hollandse reg tydens die Tweede Britse Besetting. Tog het veranderde omstandighede aan die Kaap en in Brittanje tot gevolg gehad dat die reg en regspraak aan die Kaap onder die vergrootglas gekom het. Die gevolg hiervan was die Regsoktrooie. Enersyds het die Oktrooie die deur verder oopgemaak vir beïnvloeding deur die Engelse reg; andersyds het dit die voortbestaan van die Romeins-Hollandse reg in 'n sekere sin verseker.

Die voortbestaan van die Romeins-Hollandse reg na die Oktrooie saam met die Engelse reg het natuurlik die gevaar ingehou dat die suiwerheid van beginsels gaandeweg vertroebel kon word. Met die verloop van jare het die bestaan van dergelike onsuiwerhede in die Romeins-Hollandse reg steeds die aandag van die Suid-Afrikaanse howe geniet, en het die Romeins-Hollandse reg gegroei tot die unieke regstelsel waaroor Suid-Afrika vandag beskik. Die 182 jaar aan die Kaap, van 1652 tot 1834, het aan die Romeins-Hollandse reg die status van burgerskap verleen wat dit vandag steeds geniet.

Good Hope Bank v Fisher (1886) 4 SC 368 veral 376; *Seaville v Colley* (1891) 9 SC 39 veral 44; *De Villiers v Cape Divisional Council* (1895) Buch 64, goedgekeur deur die Geheime Raad 2 AC 57; *Botha's Executors v Du Plooy* (1897) 14 SC 414 veral 421. Walker *Lord De Villiers and his times, South Africa 1842–1914* 74 som hoofregter De Villiers se bydrae tot die regsontwikkeling aan die Kaap soos volg op: "It was de Villiers' supreme achievement, in his own Colony directly and then, in so far as the Colonial example could influence other Courts, in all South Africa, to fuse into a single system most of what was good in the Roman–Dutch law with much of what was good in the English."

AANTEKENINGE

DRAFT NEGOTIATING DOCUMENT ON LABOUR RELATIONS IN BILL FORM: SOME THOUGHTS

1 Introduction

The general feeling amongst a great number of the key players in the labour law and industrial relations fields over the last few years has been that the Labour Relations Act 28 of 1956 (hereafter the LRA) has been patched and amended once too often. It was felt that the time was right for a new Labour Relations Act, which would not only be in accordance with current international labour standards, but would also reflect the prevailing objectives and philosophies in South Africa.

After intensive debate and deliberations, a ministerial legal task team was appointed in July 1994 to prepare a Labour Relations Bill (hereafter the bill). The task team did not have *carte blanche* but were given certain parameters within which to draft the bill. The bill had, *inter alia*, to give effect to the government's Reconstruction and Development Programme (hereafter the RDP), as well as some of the International Labour Organisation's conventions and had to comply with the Constitution of the Republic of South Africa Act 200 of 1993 (hereafter the interim Constitution). The bill was published for commentary in the *Government Gazette* on 10 February 1995.

The main emphasis of the bill is on collective bargaining. It entrenches the right to freedom of association (s 4) as well as various organisational rights (s 10–17). It also introduces the right to strike (s 47) as well as the right to picket (s 52) and to take part in protest action to promote and defend the socio-economic interests of workers (s 54). An important innovation is the introduction of the concept of worker participation in shopfloor matters through workplace forums (s 55–74).

The only aspect of individual labour law which is dealt with in the bill is unfair dismissal (see ch VI and the Code of Good Practice: Dismissal for Misconduct or Incapacity – hereafter the Code – in schedule 4 to the bill). It codifies the body of unfair dismissal law developed by the courts from the unfair labour practice definition in the LRA (see the Code as well as s 81 of the bill). Other unfair individual labour practices, such as unfair promotion, suspension and other disciplinary action short of dismissal, are covered by a residual unfair labour practice definition contained in schedule 3 to the bill. This definition is an

interim measure pending the introduction of more comprehensive legislation regulating equal opportunity in employment.

The bill also regulates dispute resolution (see ch VIII). The emphasis is on solving disputes through methods other than court proceedings such as conciliation, mediation and arbitration. Furthermore, it makes provision for a labour court which unlike the present industrial court, has the status of a court of law (s 150).

One of the main problems experienced in our labour law is the multiplicity of labour relations laws, each governing different sections of the labour sector. To address this problem, the bill includes most employees within its ambit (s 1). Those still falling outside its ambit are members of the National Defence Force, Intelligence Service and the Police. It is of importance that employees who were previously excluded from labour relations legislation, such as domestic workers in private households and university lecturers, are now also included within the jurisdiction of the bill.

Length constraints have made it necessary for us to restrict our discussion of the bill to those aspects which we consider to be of particular importance and relevance. Where applicable, some possible constitutional implications of these aspects have also been considered.

2 Industrial action

Section 27(4) and (5) of the interim Constitution recognises the right of every employee to strike and of every employer to have recourse to lock-out for the purpose of collective bargaining. These rights are effectively recognised by the bill (s 47).

In keeping with the principle that no right can ever be absolute, the bill places certain limitations on the right to strike and the right to have recourse to a lock-out. Although the bill places an absolute limitation on these rights, in a few specified circumstances (see the discussion below), the limitations are, in essence, of a procedural nature. Depending on whether there has been compliance with the prescribed procedural requirements, the bill then distinguishes between strikes (and lock-outs) which are in conformity with the proposed act and those which are not. Only the former are afforded protection by the bill (see s 49 of the bill and the discussion below).

A salient fact is that, compared to the statutory procedures contained in section 65 of the present LRA which have to be followed in order for a strike to be "legal", the proposed prescribed statutory procedures in terms of the bill are fairly simple and there is less potential for them to be interpreted in a formalistic way. All that is required prior to embarking on strike action (or a lock-out) is that the dispute which gave rise to the strike must have been referred either to a bargaining council (if there is one) or to the Commission for Conciliation, Mediation and Arbitration (the Commission – see s 47(a)(i)(aa)–(bb) of the bill). Parties will be entitled to resort to strike action (or a lock-out) only once one of the aforementioned bodies has issued a certificate, stating that the dispute remains unresolved or where a period of 30 days (or such further period or periods as may be agreed between the parties, whichever event occurs first), has lapsed

(s 47(1)(ii)). In addition, at least 48 hours' notice must be given to the other party before the commencement of such strike action or lock-out (s 47(c)(i) & (ii)).

Where the dispute concerns a refusal to bargain, an advisory award must first have been made by the Commission (s 47(1)(b)). Only after such an award has been obtained, may the employees resort to strike action, again provided that the aforementioned 48 hours' notice has been given.

Limiting the right to strike to so-called "procedural strikes" or, put differently, to strikes in conformity with an act such as the proposed Labour Relations Act, ensures that an attempt is first made to conciliate the dispute which gave rise to the strike. This is in keeping with the principle which is well established, not only in our law, but in most countries worldwide, that collective bargaining remains the preferred method of resolving labour disputes. Placing such limitations on the right to strike (and the right to have recourse to a lock-out) will, however, be legitimate only if it passes the test of being reasonable, justifiable in a democratic and open society; does not negate the essential content of the right; and, with regard to certain specified rights (not including the right to strike and the right to have recourse to the lock-out), is also necessary (s 33(1) of the general limitations clause contained in the interim Constitution). It is submitted that the procedural requirements of the bill only ensure that the dispute is subjected to conciliatory mechanisms and therefore do not negate the essential content of the right to strike – that is, it is in keeping with one of the "tests" contained in the general limitations clause (s 33(1)) and as such is quite acceptable (see Basson "Labour law and the Constitution" 1994 *THRHR* 509).

Even an absolute limitation of the right to strike (or to have recourse to a lock-out) is generally regarded as acceptable worldwide in certain instances, for example, where essential services are involved. Such a limitation would meet the requirements of section 33(1) of the interim Constitution. The bill does, however, provide that disputes arising in essential services must be referred to compulsory arbitration. In addition, strikes (and lock-outs) are totally forbidden where the issue in dispute is regulated by a collective agreement or a wage determination which is binding on the parties to the dispute and which prohibits any strike (or lock-out) in respect of the issue in dispute; where a provision in a collective agreement prohibits a strike over the issue in dispute; where provision is made in an agreement to refer the dispute to arbitration; or where the issue of the strike action concerns a dispute of right.

Conspicuously absent from the statutory prescribed procedures for a protected strike are balloting procedures similar to those contained in section 65(2)(b) of the LRA. Two of the most important factors which prompted the scrapping of the balloting procedures are the following: first, in the report published by the Fact Finding and Conciliation Commission on Freedom of Association (International Labour Office Geneva 1992 – hereafter FFCC) after an indepth investigation of, *inter alia*, the existing statutory requirements for a legal strike, it was concluded that the requirement that the majority of the members of the union in good standing in the area and the industry concerned must have voted by secret ballot in favour of such action, is too strict. Secondly, a formalistic

interpretation of the present balloting requirements has resulted in many functional strikes being branded illegal purely on the basis of a strict and technical interpretation of the balloting provision contained in the LRA (see, *inter alia*, *Sasol Industries (Pty) Ltd v SACWU* 1990 *ILJ* 1010 (LAC) 1037D).

Although section 14 of the bill "entitles" members of a representative and registered trade union to vote in any election or ballot contemplated by the union's constitution (and subject to reasonable conditions as to time and place – see s 14(2) and 96(3)), s 47 of the bill, in stark contrast to the present position, does not require that a pre-strike ballot be held as a procedural requirement for a protected strike. Employers will therefore no longer be able to attack the "legality" of the strike solely because of noncompliance with the balloting requirements. Should the constitution of a representative and registered trade union require that a ballot be held prior to embarking upon strike action as a mechanism to ascertain the degree of support for the proposed action (s 96(3)), the responsibility for holding such a ballot will fall completely within the discretion of the union. Members of such trade union are, however, afforded the right to hold such ballot at the employer's premises subject to certain provisos relating to the safeguarding of such employer's property and the prevention of undue disruption of work (s 14(3)). Although the union's constitution may require a pre-strike ballot, it appears that there is no obligation on the union to communicate the results to the employer. An employer therefore has no means of determining how many of his or her workers support the proposed strike action save where the trade union decides to communicate such information to him or her. For this reason alone, it is envisaged that the scrapping of the ballot requirement will be one of the issues which will be vigorously debated by employers at the National Economic Development and Labour Council (hereafter referred to as NEDLAC).

None of the aforementioned procedural requirements for a protected strike will apply where the parties to the dispute are parties to the bargaining council and the constitution of such council requires certain prescribed procedures to be followed before a strike or a lock-out is resorted to; where the strike (or lock-out) is instituted in response to a "procedural" lock-out (or strike) as the case may be; and, lastly, where the strike is in response to persistent unilateral changes to existing terms and conditions of employment, despite a request to refrain from maintaining or restoring such changes.

In keeping with the brief issued to the drafters to decriminalize labour legislation, no criminal consequences will flow from strike action (or a lock-out) instituted in contravention of the proposed act. Industrial action which is not in conformity of the bill may, however, be interdicted or restrained by an order of the labour court (see s 50(1)). In addition the labour court, having regard for certain specified factors, may grant an order for the payment of compensation which it considers to be just and equitable in respect of any loss attributable to a strike (or lock-out) which is not in conformity with the proposed act. These factors include, *inter alia*, whether the (unprocedural) strike (or lock-out) was premeditated and, whether such (unprocedural) strike (or lock-out) was in response to any unjustified conduct by the other party to the dispute. Under the

present dispensation, the latter factor has, interestingly enough, served as a very persuasive factor in many cases in favour of granting an order reinstating strikers dismissed as a result of their participation in an illegal strike (see, *inter alia*, *Kolatsoeu v Afro-Sun Investments (Pty) Ltd t/a Releke Zezame Supermarket* 1990 *ILJ* 754 (IC)). Other factors to be considered are the financial position of the employer, trade union or employees, respectively, and the duration of the strike or lock-out. Participation in strike action which is not in conformity with the bill may, in addition, also constitute a fair reason for dismissal with due regard to the Code (see the discussion in par 4 below).

Strikes (or lock-outs) in conformity with the bill will not constitute a delict, nor will they amount to a breach of contract, thus effectively neutralising an important common law consequence of breach of contract (see s 49(1)). The result is that the contract of service is suspended for the duration of the strike, making it impossible for the employer to rely on the breach of contract in order to dismiss the strikers (see also the discussion below on the statutory prohibition in regard to the dismissal of strikers). This important consequence is in accordance with the strike law of a number of countries (see, eg, the strike law of France as discussed by Basson 1994 *THRHR* 508–509).

An employer's obligation to remunerate such employees on strike, is likewise suspended for the duration of such protected strike (which is actually a confirmation of common law principles regarding breach of contract). This suspension is, however, not a total suspension: where the employee's remunerations consists, in addition to normal pay, of payment in kind, such as accommodation, the provision of food and other basic amenities of life, the employer must, at the request of the employee, not discontinue such payment in kind for the duration of strike action (s 49(2)). An employer providing the latter during strike action may, however, recover the monetary value of such payment in kind from the employee by way of civil proceedings instituted in the labour court after the termination of strike action.

The need to include some measure of protection against eviction for strikers who take part in a procedural strike, should be seen against the background of an enforced system of migrant labour which necessitated (and will continue to do so in the foreseeable future) that thousands of workers stay in accommodation such as hostels at the mines. Employees exercising their labour muscle have, in the past, faced the threat of eviction from the accommodation provided by the employer as an effective retaliation mechanism against strike action. Although trade unions have, in many instances, been successful in obtaining interdicts prohibiting such eviction, many employees, especially those in remote rural areas, have felt the harsh effects of eviction. For these reasons alone, the proposal regarding eviction is to be welcomed.

The rationale underlying the proposal allowing for civil action to be instituted against employees to recover the monetary value of any payment in kind granted during strike action is sound. However, experience in our labour law has shown that instituting civil action against employees to recover any damages suffered as a result of strike action may be futile. First of all, workers in South Africa are generally poor. Instituting civil action against the proverbial men and women of

straw may prove to be pointless. Secondly, labour relations, already scarred by strike action, may well receive the death blow by the institution of such legal proceedings.

Protest action

The recognition of protest action which promotes or defends the socio-economic interests of workers may come as a surprise to many employers who may have thought that the era of protest action in support of issues falling outside the immediate employment relationship has finally come to an end with the introduction of South Africa's first democratically elected government.

In giving effect to one of the points of criticism expressed in the FFCC report to the effect that limiting strike action to matters suitable for collective bargaining constitutes a breach of the right to freedom of association, the bill proposes to grant some protection to workers participating in protest action aimed at promoting or defending workers' socio-economic interests (s 54). In an apparent attempt to soften the potentially harsh effects which such protest action may have on the economy, the bill sets out to limit such action to those instances where it has been authorized by a registered trade union and where notice has been served on NEDLAC at least 14 days before the start of the action. Workers rendering essential services are completely barred from embarking on such protest action. To regulate such protest action further, the labour court is also granted sole jurisdiction to grant an interdict or any order restraining persons from participating in protest action not in conformity with the bill (s 54(3)).

Again, it is envisaged that much debate will follow from the measure of protection conferred on protest action in the bill, albeit only in very restricted circumstances. It is suggested that in deciding whether to afford protection to protest action in the final act, a fine balance will have to be struck between the following:

(a) The argument in favour of recognising the right to protest action is that completely outlawing protest action in the bill may be branded unconstitutional in the light of some of the fundamental rights entrenched in the interim Constitution. It is argued that the right of workers to take part in protest action is a logical extension of both the right to freedom of expression and the right to assemble and demonstrate with others peacefully and unarmed (entrenched in s 15 and 16 of the Bill of Rights). It is also a fact that the right to freedom of speech and the right to assemble are regarded as essential cornerstones of a liberal democratic society, not only in terms of our interim Constitution, but also in most Western societies (*ibid*). The voice of the people plays a vital role not only in ensuring legitimate political decisions, but, more importantly, in maintaining a democratic system. It is submitted that this argument certainly has merit. But it needs to be pointed out that, in keeping with the principle that no right is ever absolute, not all forms of the right to freedom of speech and assembly can be protected as a matter of course. Consequently, it may also be argued that restricting workers from taking part in protest action will not necessarily fall foul of the test in terms of which a limitation on the right contained in the Bill of Rights must pass the test of being justifiable in a democratic and open society

(s 33(1)). Many legal systems protect industrial action only in so far as such action is aimed at furthering the economic, social and occupational interests of workers. Where industrial action is politically motivated, it will generally fall outside the realms of protection associated with that right.

(b) Although the important role played by the trade union movement in bringing about a democratic dispensation must be acknowledged, the counter argument is that, in the light of political and constitutional developments, the time has come for South Africa's trade unions to redefine their role as a political pressure group to one which is principally aimed at protecting the rights and interests of workers within the confines of the employer-employee relationship. It is further argued that the arguments in favour of outlawing protest action far outweigh counter arguments, in view of the severe economic losses which may potentially be suffered by employers and the economy as a whole, should such action be allowed. Proponents of this view submit that this argument becomes even more relevant in a country which is in the process of implementing a massive reconstruction and development programme aimed at the upliftment of millions of people. It is argued that the effects of protest action can potentially destroy the very aims of the RDP. In addition, it may also be argued that, since employers are not in a position effectively to bargain over socio-economic issues which generally fall outside the immediate employment relationship, the potential harm which may be caused if the right of workers to take part in protest action is recognised, should be minimised as far as possible. It is suggested that in order to minimise the potential economic harm to employers, a compromise would be to limit protest action to lunch hours and after hours.

In weighing up the arguments for and against the protection of socio-economic interests, we submit that, in the light of the protection accorded to the right of assembly, demonstration and petition in the Bill of Rights, such right ought to receive some measure of protection, provided that one should consider whether the proposed protective measures contained in the bill are sufficient to minimise the potential economic losses which may be suffered by an employer as a result of such protest action.

Picketing

The inclusion of the right of a registered trade union to authorise a picket by its members and supporters is to be welcomed, but comes as no surprise in the light of the entrenched right to freedom of expression contained in section 15 of the Bill of Rights.

Section 52 of the proposed act specifically recognises the right to picket and provides that a picket may be set up in any place to which the public has access, provided that such picket takes place outside the premises of the employer (or inside the premises, with the permission of the employer) and that the picket is peaceful and in support of any strike which is in conformity with the bill or in opposition to any lock-out. In the absence of any agreement regulating the right to picket, the Commission will be called upon to determine the rules. Such rules may, however, be varied by agreement between the trade union and the employer (s 52(3)(a)). Apart from the requirement that the picket must be outside

the premises of the employer and be peaceful, no provision is made for further statutory limitation on the right to picket, (for example as regards the number of persons who may participate in the picket) except by mutual agreement between the parties or by the rules laid down by the Commission.

It should be borne in mind that, once the bill finally becomes law, the proposed Labour Relations Act will no longer be insulated against constitutional challenge (see s 33(5)(a) of the interim Constitution) and will have to stand the test of constitutional scrutiny. Any provision or part of the Labour Relations Act (as amended or replaced) will have to stand this test, bearing in mind that no right is ever absolute and that a balancing process in terms of the general limitation clause will be required in order to place legitimate and lawful limitations upon the the fundamental rights of both workers and employers (see s 33(1) of the interim Constitution). In this regard two aspects should be noted:

(a) A case may be brought to the constitutional court by an employer challenging the constitutionality of the recognition of the right to picket in legislation such as the (proposed) Labour Relations Act. Such an employer may, for example, argue that recognising and exercising the right to picket infringes upon the right of every person freely to engage in economic activity and to pursue a livelihood (s 26 of the Bill of Rights). Although this argument may seem trivial at first glance, it needs to be pointed out that even though the recognition of the right to picket as a logical extension of the right to freedom of expression has been the subject of years of litigation in America, it appears that the question is still not settled. It is submitted here that our constitutional court should accept that the recognition of the right of workers to picket is a legitimate extension of the right to freedom of expression entrenched in the interim Constitution. It may undoubtedly be argued that there is an element of freedom of expression present when workers picket, thus bringing it safely within the ambit of a recognised fundamental right. As was pointed out in one American case: peaceful picketing is "the working man's means of communication" (see *Milk Wagon Drivers' Union of Chicago v Meadowmoor Dairies, Inc* 312 US 237 (1941)). A similar argument was accepted by the Canadian court in *RWDSU, Dolphin Delivery Ltd* (1986) 2 SCR 573 855). Moreover, we submit that it may also be cogently argued that the right to assemble and demonstrate with others peacefully and unarmed (see s 16 of the interim Constitution) is likewise implicit in the right to freedom of expression, which has as its rationale the maintenance of the democratic process (see Basson 1994 *THRHR* 510–512).

When determining the boundaries of the right to picket, two competing interests will have to be weighed up: on the one hand, the individual worker's right to freedom of speech and expression which (it is argued here) includes the right to picket and, on the other hand, the employer's right freely to engage in economic activity (also entrenched in the interim Constitution) which may arguably also include the employer's right to pursue its lawful business interests, the right to preserve and protect its normal business operation and other rights pertaining to the managerial prerogative of the employer. Moreover, it may also be argued that other interests such as the preservation of industrial peace and property rights should also be involved in this weighing-up process.

(b) The bill allows for the right to picket but, apart from the stipulations in section 52 (1), is silent on the manner in which it should be conducted. An infringement of the aforesaid stipulations may be referred by the employer to the Commission for conciliation. The Commission must then attempt to secure an agreement between the employer and the trade union to regulate the conduct of the picket (s 52(2)). If no such agreement is concluded, the Commission must determine the rules regulating the right to picket for the duration of the strike or lock-out, which rules will be binding on the trade union, its members and supporters participating in the picket (s 52(3)). The Commission, as an administrative organ, must draft the rules with due regard to the rights entrenched in section 15 (freedom of expression); section 16 (right to assemble and demonstrate with others peacefully); and section 26 (the right freely to engage in economic activity), as well as the provisions of the limitation clause contained in section 33 of the Bill of Rights. If, for example, a trade union takes the view that the prescribed rules infringe unfairly upon its members' right to picket, it may, in accordance with the provisions of section 24 of the Bill of Rights (pertaining to administrative justice) demand that reasons be furnished in writing for its decision (unless these reasons have been made public already). Should it still not be satisfied with the reasons furnished, it may challenge the constitutionality of the rules before the constitutional court. The constitutional court may then be called upon to adjudge the competing interests with due regard to the provisions contained in the limitation clause. However, it should be noted that restricting the right to picket to a certain number of people and within a certain radius of the business may, in appropriate instances, be regarded as justifiable in a democratic and open society, provided that the essential content of the right is not negated.

Finally, one further point: limiting the right to picket to members of a registered and representative trade union only, may create the impression of bias against unorganised workers and workers in small businesses. It is submitted that it would be more in line with democratic principles to allow all workers, regardless of their degree of organisation, the opportunity to raise their grievances in the open.

3 Workplace forums

The bill makes a clear distinction between two levels of collective bargaining – one at sectoral level and one at shopfloor level. Once implemented, this two-tier bargaining dispensation will result in the channelling of economic disputes such as wage disputes, to sectoral level whilst other issues and disputes which have a more direct bearing on the workplace, will be channelled to the shopfloor.

To discourage a system of adversarialism and to encourage a system of joint problem solving, communication and general cooperation between management and labour, the bill provides for the establishment of workplace forums (s 56–57). It is envisaged that this forum will be assigned to deal with nonwage matters and production-related matters. Once such a forum has been established, it is envisaged that it will represent the entire workforce and not only union members (s 56(a)).

Employee

For the purposes of workplace forums, the bill provides for a separate definition of the term "employee". Essentially, employee means any person who is employed in the workplace; however, it does not include senior managerial employees who, *inter alia,* represent the employer in dealing with the workplace forum (s 55(a)(iii)). This exclusion is understandable as a conflict of interests may arise should managerial employees be allowed to represent co-workers at such a forum. This is also in accordance with the view held by the industrial court decisions in *Keshwar v SANCA* 1991 *ILJ* 816 (IC) 819A–I and *SA Society of Bank Officials v Standard Bank of SA Ltd* 1994 *ILJ* 332 (IC) 342B–345I.

Workplace

A "workplace" is defined by the bill as the place or places where the employees of an employer work (s 183). Where the employer carries on operations which are independent by reason of their size, function and organisation, each such operation is regarded as a separate workplace (*ibid*). We envisage that the determination of whether different operations operate independently, and consequently constitute a separate workplace as defined (especially in larger concerns consisting of various operations), may be problematic as there may be a degree of overlapping between the various operations within one concern.

Establishment of workplace forums

The establishment of a workplace forum may be triggered only by a representative trade union (s 57(1)). This limitation effectively excludes smaller unions from initiating such a forum. Moreover, such a forum may only be established in a workplace where more than 100 employees are employed, thus similarly restricting the workplace forum to the bigger employers (s 57(1)).

Once established, such a forum will be composed of employees elected to the forum by co-workers. The statutory term of office of members who are thus elected is two years. These elected members may, however, be removed from office on certain specified grounds (s 59). A member of a workplace forum will be entitled to take reasonable time off with pay during working hours for the purpose of performing his or her functions and duties as a member (s 71). The bill also provides for full-time members of workplace forums in the case of large employers (s 72(1)). Such full-time members receive the same salary as they earned immediately prior to their election (s 72(2)(a)).

Of interest to employers is the fact that the bill requires them to provide (at their own cost) the facilities and materials necessary for the conduct of the election of the workplace forum as well as administrative and secretarial facilities which will enable the members of the workplace forum to perform their functions and duties (s 73(1)). These facilities include a room in which the members may meet as well as access to a telephone (s 73(3)).

Once the forum has been established, the employer must meet with the members on a monthly basis and present a report on the financial and employment situation. In addition, the employer will be required to report on the performance since the last report and its anticipated performance in the short and long term.

The employer must also consult with the forum on any matters arising from these reports which may affect the employees (s 62).

The workplace forum will essentially fulfil two functions. First of all, an employer will be required to *consult* with the workplace forum on certain matters with a view to reaching consensus (s 63–65). Secondly, the employer will be required *jointly to decide* certain matters with the workplace forum (s 66). The issues on which the employer will have to bargain and reach a joint decision have yet to be determined by NEDLAC. It must be pointed out that a distinction must be made between consultation and joint decision making. Consultation does not require the employer and the trade union to reach agreement on the issues. However, in the case of joint decision making, a decision must be reached. Where no such decision can be reached, the issues must be referred to the Commission for possible conciliation and where conciliation proves to be impossible, a commissioner must resolve it by way of arbitration (s 66(4) and (5)).

It is envisaged that the issues for conciliation and joint decision making will include matters which have traditionally fallen exclusively within the employer's discretion, such as the restructuring of the workplace (which may include the introduction of new technologies or new work methods), investment decisions, proposed corporate structures, education and training as well as affirmative action programmes (see also the task team's comments on s 63 and 64 of the bill). Should a dispute arise about the interpretation or application of any of the provisions regarding workplace forums it may be referred to the Commission which will first attempt to resolve the dispute by way of conciliation (s 74(1)–(3)). Should the dispute remain unresolved, the commissioner must resolve it by way of arbitration (s 74(4)).

One of the most contentious duties placed upon the employer is the disclosure of information when consulting or endeavouring to reach a joint decision with the workplace forum (s 67). Whether the workplace forum will be entitled to information will depend on whether such information is relevant (s 67(1)). We suggest that the criterion for determining relevance should be whether such information is necessary for effective consultation or joint decisionmaking (see the judgment of the Appellate Division in *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 *ILJ* 1247 (A)).

4 Unfair dismissals

The bill and the code deal not only with the substantive aspects of dismissal law but also with the procedural aspects, such as the dispute resolution procedure (s 83–85 and 87), the question of *onus* (s 86) and the remedies which may be obtained in unfair dismissal cases (s 88–90). Our discussion is focused mainly on the substantive aspects of dismissal law.

Employee

Although the bill defines "employee" in its general definition section (s 185), it gives another definition of "employee" for purposes of unfair dismissal (s 76). In terms of this definition, "employee" includes a person who disputes the fairness

of his or her employer's failure or refusal to reinstate or re-employ him or her. This is in line with the Appellate Division's decision in *National Automobile & Allied Workers Union (now known as National Union of Metalworkers of SA) v Borg-Warner SA (Pty) Ltd* 1994 *ILJ* 509 (A) where it held that the termination of a contract of employment does not automatically terminate the employment relationship. Consequently, a person who accepts the fairness of his or her dismissal, may still attack the fairness of the selective re-employment or reinstatement of other ex-employees.

Dismissal

The bill defines dismissal in section 77 in very wide terms and includes certain actions and omissions which do not amount to actual dismissal, such as constructive dismissal (s 77 (c)). This is, however, a restricted form of constructive dismissal, since the employee's resignation must follow upon the continued employment being made "intolerable". Where, for example, an employer sexually harasses an employee and he or she resigns, it would probably constitute a dismissal for purposes of the bill, because the employer's conduct made the continued employment relationship "intolerable". However, a part-time employee who resigns after having been informed by his or her employer that he or she will have to work a full day in future, will probably have greater difficulty in proving that the employer's conduct made continued employment "intolerable". Where he or she can, however, prove that the relationship became "intolerable", the possibility still exists for the employer to dispute the alleged unfairness of the (constructive) dismissal on the ground of operational requirements. Where the ex-employee cannot prove that the continued employment became intolerable and consequently that the employer's actions amounted to constructive dismissal, the ex-employee will have to make use of the transitional provisions contained in schedule 3 of the bill. In short, these entail that the Commission will have to attempt to resolve the alleged unfair labour practice dispute. However, should the matter remain unresolved, the ex-employee will not be entitled to refer the matter to arbitration or to the labour court, since section 187 makes no provision for further adjudication of unresolved disputes which fall under the general clause of section 186(1) of schedule 3. This is apparently an oversight, and it is recommended that section 187(4) be amended to include those disputes which fall under the general clause of section 186(1).

Valid and invalid reasons for dismissal

The bill departs from the courts' primary distinction between the internationally accepted three categories of reasons for dismissal, namely misconduct, incapacity and operational requirements. Its primary distinction is between *invalid* and *valid* reasons for dismissal. In section 80 it categorises the *invalid* reasons for dismissal. Where an employee is dismissed for any one of these reasons, his or her dismissal will be unfair *per se* (s 79(1)(a)). However, where an employee is dismissed for any one of the internationally accepted categories of reasons for dismissal, the reason is *valid* and whether the dismissal is fair will depend on the fairness of the reason and the procedure followed prior to dismissal (s 79(1)(b)).

The majority of the invalid reasons for dismissal stipulated in section 80, have their origin in international labour law and/or the interim Constitution. An employer may not, for example, dismiss an employee on the ground of his or her trade union activities (s 80(1)(a) read with s 4 and 5 of the bill; Convention 87 of 1948 of the ILO as well as s 17, 27(2) and (3) of the interim Constitution). Furthermore, an employee may not be dismissed on an arbitrary ground or his or her dismissal may not amount to discrimination (see s 80(1)(c) read with s 8(2), 14(1) and 21 of the interim Constitution). There are, however, circumstances where apparently "arbitrary" reasons are in fact *valid* reasons. The bill provides that an employer may dismiss for a reason based "on the inherent requirements of the particular position" (s 80(2)). This exception relates to the situation where the employee was originally suitable for the position but subsequent circumstances caused him or her to become unsuitable. It is imperative that the unsuitability and the requirements of the position be linked. If no such link exists, the dismissal will be arbitrary. An example will illustrate the point. Employee A is employed as a messenger. She is involved in a serious motor vehicle accident which leaves her a quadriplegic. Her employer dismisses her. The reason for her dismissal is not her disability as such, but the fact that her disability makes her unable to do the job. She has, in other words, become incapable of doing her job, which constitutes a *valid* reason for dismissal. Under such circumstances, the employer must ensure that he or she complies with the requirements for a fair dismissal for incapability, set out in the Code.

An employer may not dismiss strikers whose strike complies with the provisions of the bill (s 80(1)(g) read with s 49(3)). This does not mean, however, that an employer can never dismiss such strikers. In terms of section 49(4) of the bill, an employer may dismiss such strikers for misconduct during the strike and for economic reasons. It could be argued that dismissal for economic reasons is in accordance with the interim Constitution, which provides people with the right to freely engage in economic activity (s 26(1)). Economic harm is an inevitable result of strike action and the employer will therefore have to prove something more: he or she will have to prove that the economic harm suffered has exceeded the acceptable level of harm which he or she can be expected to suffer through strike action. It is submitted that the aforegoing is also in accordance with the labour appeal court's views as set out in *Black Allied Workers Union v Prestige Hotels CC t/a Blue Waters Hotel* 1993 14 *ILJ* 963 (LAC). What the bill does not deal with, is the acceptable levels of economic harm an employer can be expected to suffer. The courts have also not provided any guidelines in this regard, except for the statement in the *Blue Waters Hotel* case 972F–J that the harm must not pose a "threat of extinction" or a "threat of irreparable harm". It clearly remains a matter for the new labour court to resolve.

Picketers who picket in furtherance of a strike and in accordance with the bill's provisions, may also not be dismissed (s 80(1)(g) and 49(3) of the bill). As in the case of strikers, they may, however, be dismissed for misconduct during the picket or for economic reasons (s 49(4)). In addition, employees participating in stayaways in order to force local and central government to comply with their social and economic demands, may not be dismissed if their protest action

complies with the provisions of the bill (s 54). They may, however, also be dismissed for misconduct and economic reasons (s 81(g) and 54(2) read with schedule 49).

The bill clearly distinguishes between the three internationally accepted categories of *valid* reasons for dismissal (s 79(1)(b)(i)–(iii)). The substantive aspects of dismissal for operational requirements are dealt with in the bill itself (s 81), whereas dismissal for misconduct and incapacity has been codified in a separate document (see the Code) and appended to the bill (see schedule 4).

It has been possible to codify the law in respect of misconduct and incapacity, because the body of law developed by the courts is fairly comprehensive, and only a few matters remain controversial. In addition, the law so developed is in compliance with international standards, as the courts have drawn heavily upon the ILO Conventions. This code will be of particular value to small businesses which have never formally adopted disciplinary rules and codes of conduct.

The code, however, does not cover every aspect of dismissal, and deals only with "some of the key aspects" (s 205). It therefore provides nothing more than a framework of minimum guidelines for a fair dismissal. As they are merely guidelines and not hard-and-fast rules, departures from them may be justified (*ibid*). This is in line with the labour appeal court's decision in *Seven Abel CC t/a The Crest Hotel v Hotel & Restaurant Workers Union* 1990 *ILJ* 504 (LAC) 507H–I, where the court held that the courts developed mere guidelines and that parties could depart from them under appropriate circumstances.

Although the code will go a long way towards dispelling uncertainty and inconsistency, it will definitely not eradicate it. In fact, we foresee that the Commission will be kept fairly busy judging disputes about the fairness of dismissals based on the alleged noncompliance with the Code.

A few aspects of the Code may be highlighted. It specifically provides that a disciplinary enquiry need not take the form of a formal enquiry (s 207(7)). This is laudable, as disciplinary enquiries have become too formalistic and legalised which has made them both time-consuming and expensive. The primary consideration of the Code is that there must be compliance with the *audi alteram partem* rule – the employee must be given a fair opportunity to state his or her case. The Code makes no mention of the calling of witnesses and cross-examination. It is suggested that this does not mean that an employee will never be entitled to call witnesses or to cross-examine. Whether he or she will be entitled to do so, will depend on the facts of the matter.

The Code also makes no mention of a right of appeal. All that an employer needs to do, is to remind the employee of his or her rights to refer the matter to the Commission or, where there is a collective agreement which provides further recourse, to remind him or her of that dispute resolution process (s 207(8)). This is in line with the bill's objectives to avoid lengthy and costly enquiries. Smaller enterprises, particularly those which have only one level of management, will benefit from this, since it refutes the argument that such employers should get outsiders to preside over appeal proceedings (see eg *Burton v HWV & Associates (Pty) Ltd* unpublished industrial court case no NH13/2/5299).

The Code labels strike action which does not conform to the requirements of the bill as misconduct (s 207(10)). It sets out a number of factors which the employer should take into consideration when he or she decides on the appropriate sanction. The employer should, *inter alia,* consider the seriousness of the breach of the provisions of the bill, attempts to act in conformity with the bill, and whether the strike was in response to unjustified conduct by the employer. All these factors have their origin in court decisions about the legitimacy of strike action (see eg *Perskorporasie van SA Bpk v Media Workers Association of SA* 1993 *ILJ* 938 (LAC) 949E). The labour appeal court in the *Perskorporasie* case distinguished between legal and legitimate strikes: a strike was deemed legitimate where it was functional to collective bargaining. In accordance with this distinction, it was possible for a strike to be legitimate even where it was illegal in terms of section 65 of the LRA. This distinction resulted in illegal strikers not being automatically dismissed on the ground of misconduct – the legitimacy of their strike could protect them against dismissal. It is submitted that this provision of the bill and the *Perskor* decision are in accordance with the constitutional right to strike. In terms of the interim Constitution, employees have a right to strike *for the purpose of collective bargaining* (s 27(4)). Therefore, where the strikers' strike is for the purpose of collective bargaining – that is, where their strike is legitimate – dismissal is not necessarily the appropriate sanction.

An interesting question which arises is whether an employer would be entitled to dismiss such strikers for economic reasons – particularly where their misconduct is tempered by the aforegoing factors, so that dismissal would not be the appropriate sanction. It is suggested that the employer should be able to dismiss them provided that he or she complies with the provisions of section 81, which set out the requirements for a fair dismissal for operational reasons (see the discussion below).

As indicated above, the task team did not include the law governing dismissals for operational requirements in the Code, but deemed it more appropriate to deal with this category of dismissals in the bill itself (s 81). The reason for this is that they regard dismissal for operational reasons as more "complex" than dismissal for misconduct and incapacity. This is in fact the case, since the "operational requirements of a business" as a reason for dismissal are very wide and ambiguous and determining the validity and fairness of such a reason is often fraught with difficulties – particularly in view of the serious consequences of no-fault dismissals. Furthermore, the law governing dismissals for operational reasons (apart from retrenchments) is not yet sufficiently developed for codification, and there are still many aspects clothed in controversy.

There are presently two main areas of contention, namely the prior consultation requirements and the question whether an employer is obliged to pay severance pay. The bill deals with these two aspects comprehensively.

As regards the prior consultation requirement, the bill clearly stipulates that the employer must consult with the trade union at the stage when it "contemplates" dismissal (s 81(2)). In other words, at the consultation stage, the employer must only foresee the possibility of dismissal. He or she must not

already have made up his or her mind to dismiss. This provision is in accordance with the Appellate Division's decision in *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of South Africa supra*, and concludes the debate about whether an employer may only contemplate dismissal or whether he or she may confront the union with his or her final decision at the consultation stage (see eg *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* 1992 *ILJ* 405 (IC) and the labour appeal court's decision in *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* 1993 *ILJ* 642 (LAC)).

The bill uses the word "consultation". The industrial court has maintained that "consultation" must be distinguished from "negotiation" and "bargain", since the latter two concepts mean much more than the mere seeking of advice, as is the case with consultation. According to the industrial court, to "negotiate" or "bargain" means to "haggle or wrangle so as to arrive at some kind of agreement on terms of give and take" (see *Metal & Allied Workers Union v Hart Ltd* 1985 *ILJ* 478 (IC) 493H–I). It is submitted that the Appellate Division in the *Atlantis Diesel* case gave a wider interpretation to "consult" by holding that it could, where circumstances permit, be geared to solve problems jointly. The task team also gave a wider meaning to "consult" by requiring that an employer must "consult . . . with a view to reaching consensus" (s 81(2)). This wider interpretation actually equates "consultation" with "negotiation". The employer no longer merely seeks advice from the union – he or she must now endeavour to reach agreement with the union on measures to avoid dismissals, selection criteria, the amount of severance pay to be paid to the selected employees and measures to mitigate the adverse effects of the dismissals (s 81(2)(i)–(iv)).

At first glance, this appears to constitute a serious curtailment of an employer's prerogative to dismiss for operational requirements. It is, however, our submission that this is not the case, since the bill does not require the employer to reach consensus on the contemplated dismissal. The issues on which consensus is required are those which only come into play once the need to retrench has been established. The actual decision whether to retrench or not therefore remains the employer's. In addition, the bill also does not state that consensus must be reached on the listed aspects. The fact that the bill provides for the employer to respond where it does not agree with trade union's representations about the matters in question (s 81(4)), is further proof that actual consensus is not required.

The bill requires that the employer must disclose in writing "all relevant information" during the consultation stage. This is in accordance with the decisions of the labour appeal court and the Appellate Division in the *Atlantis Diesel* case. Although the bill does not define "relevant information", it does provide a list of information which the employer must make available (s 81(5)). It is suggested that where a dispute arises about the relevance of information, the criterion developed by the Appellate Division in the *Atlantis Diesel* case, namely whether the information is necessary for effective consultation, must be applied.

The debate about whether an employer is obliged to pay severance pay and, if so, on what grounds and how much, has been raging for a number of years (for a discussion of the different views, see Strydom "Severance benefits: their rationale

and calculation" 1994 *SA Merc LJ* 97; Strydom and Van der Linde "Severance packages: a labour law and income tax perspective" 1994 *ILJ* 447). This debate was resolved by the task team *via* section 82 of the bill, which stipulates that severance pay must indeed be paid. This provision gives effect to a great number of industrial court decisions as well as to the labour appeal court decision in *Imperial Cold Storage & Supply Co Ltd v Field* 1993 *ILJ* 1221 (LAC), where it was held that fairness determines that an employee who loses his or her job through no fault of his or her own, must be compensated for such loss. Section 82, however, goes further than the labour appeal court in the *Field* case – it does not exempt employers from this duty where fairness dictates it.

We submit that section 82 does not fully reflect the realities surrounding dismissal for operational requirements. Often, employers who dismiss for operational requirements do so because of financial problems. It is suggested that section 82 should make provision for exceptions to this duty where circumstances necessitate it. Such an amendment would probably bring the section more into line with the interim Constitution. As the provision stands, an employer could possibly argue that it infringes upon his or her constitutional right to free economic activity. The fact that he or she must pay severance pay could have the effect of forcing closure of the business rather than of retrenching only a few people with the aim of saving the business. In addition, the fact that severance pay must be paid could result in the employer retrenching fewer people than is actually needed for the survival of the business.

Transfer of a business

In conclusion, section 92 neutralises the common law principle that, in the case of a transfer of a business as a going concern, each and every employee's existing contract of employment must be cancelled and that new contracts must be concluded with the transferee or the purchaser (see also *Ntuli v Hazelmore Group t/a Musgrave Nursing Home* 1988 *ILJ* 709 713A). Provision is made for the automatic transfer of contracts of employment to the transferee, provided the employees consent to the transfer (s 92(1) and (2)). This provides a measure of job security for employees in that the transferee is now legally obliged to take them over. They can no longer simply be replaced by people of the transferee's choice.

5 Conclusion

In our view, the task team has, to a large extent, succeeded in drafting a bill which fits into the predetermined parameters. It is well structured and written in straightforward and simple language. However, the reaction from employers and trade unions to the bill has been mixed. This is not surprising, bearing in mind that labour and management represent diverse interests.

One of the most contentious issues appears to be the fact that the bill subscribes to majoritarianism as far as some of the organisational rights and the establishment of workplace forums are concerned. This criticism has some merit. Although majoritarianism does have its advantages, institutionalising it may have a detrimental effect on smaller trade unions, as they will be unable to

initiate workplace forums (s 55(b)). They will furthermore also be unable to have trade union representatives in a workplace (s 13) and will not be able to demand the disclosure of all relevant information to allow them to engage effectively in consultation and collective bargaining (s 16(2)). In addition, it may be argued that majoritarianism could be unconstitutional in that it infringes upon workers' right to bargain collectively (s 27(1) of the interim Constitution). It could, however, also be argued that this right must be weighed up against the constitutional right to fair labour practices (s 26(2) of the interim Constitution). In terms of this right, requiring an employer to bargain with every trade union which represent some of his or her employees, may infringe upon his or her right to fair labour practices. Where, however, representativeness is fairly balanced between two trade unions, it may be argued that the right to collective bargaining outweighs the right to fair labour practices.

The introduction by the bill of workplace forums has also triggered a great deal of criticism – particularly from employers. Through the workplace forums, employees will be able to participate actively in shopfloor matters. Employers may regard this as a serious threat to their prerogative to run their businesses according to their perceptions of good management and sound economic principles. The fact that they will have to negotiate with people with different values, aspirations and perceptions about how a business should be run, may also prove to be frustrating and time consuming.

Criticism against workplace forums has also come from trade unions. Smaller unions probably feel aggrieved by the fact that they will not be able to initiate forums. Larger unions probably also have reservations about these forums, since they may seriously curtail their influence on the shopfloor.

We support the introduction of a system of work participation or cooperation as opposed to a system of adversarialism. A more democratic shopfloor will, it is hoped, lead to an increase in profits and in overseas investments. We have, however, some reservations about the short-term workability of such forums, although it is conceded that such forums may achieve better workplace relationships in the long term. This will, however, require much patience, training and a general change of attitude.

Another point of criticism is that the bill caters only for the larger employers. Although this appears to be the case at first glance, the bill does contain a number of advantages for smaller enterprises. The fact that dismissal law has been codified, to a large extent, will definitely be to the advantage of smaller enterprises – particularly those which do not have formal codes of conduct or the finances to obtain the services of experts to assist in the drafting of such codes. The fact that smaller employers do not have to establish workplace forums, also has financial advantages for them – they will not have to incur the expense involved in setting up such forums. In addition, their decision-making powers in shop-floor matters will be infringed to a much smaller extent than in the case of bigger enterprises, as they will not be compelled to consult and bargain with workers over such matters.

Some critics also expressed their reservations about the desirability of codifying the unfair dismissal jurisprudence developed by the courts. Their reservations are

not unfounded: although codification contributes to certainty, which in turn leads to consistency, it may also lead to rigidity. This is particularly dangerous in the industrial relations field where diverse interests and perceptions necessitate flexibility and adaptability.

The fact that the bill provides for a commission and a labour court, each with its own jurisdiction in dismissal disputes, can also be questioned. We are not convinced that such a distinction is necessary, and submit that one body, comprising competent and experienced people who can resolve all types of dispute may be a better system. One dispute resolution body will also avoid possible litigation over the proper forum for a particular dispute and would be more cost-effective.

A further point of criticism which may be expressed, is that the bill creates a vast number of rights. It is argued that this may lead to an increase in litigation, either to enforce these rights, or to obtain clarity regarding their content. Although this argument has some merit, it should be borne in mind that the creation of some of these rights was necessitated by those fundamental rights pertaining to labour relations entrenched in section 27 of the interim Constitution. Moreover, we submit that the recognition of certain labour rights is essential for the creation of a modern and democratised labour relations system.

Lastly, the fact that the bill was drafted by a few persons on instruction from the state may be criticised. In the past, this unilateral method of drafting the amendments to the LRA led to its legitimacy being questioned. Ideally speaking, a new labour dispensation should have been negotiated by the parties directly involved in industrial relations. Time constraints have apparently made this preferred method of drafting impossible. However, in order to ensure that the proposed bill is accepted by all the players in the labour field, the state has granted both labour and management an opportunity to study the bill and to make suggestions and recommendations before its final implementation. It is hoped that all interested parties will seize this opportunity to play a part in the shaping of a new labour dispensation – one which is founded upon internationally accepted labour standards and the interim Constitution which subscribes to human rights, democracy, peaceful coexistence and development opportunities for all South Africans, regardless of colour, race, class, belief or sex.

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FAMILY COURTS IN SOUTH AFRICA AND THE IMPLICATION FOR DIVORCE MEDIATION*

The motivation for this note arose out of my experiences as a divorce and family mediator. I am a member of the South African Association of Mediators, as well as serving on its Executive Committee. I have facilitated several divorce mediations, both under the auspices of the Family Life Centre of South Africa (FAMSA), as well as privately. I hesitate to say that these mediations were *successfully* completed, as one cannot measure success by the simple fact of having reached the stage of drafting and signing of a divorce agreement (or Memorandum of Understanding, as it is known in mediation terms).

Clearly, what is needed is an evaluation and assessment of the mediated settlement, both in the short and long term, by parties who have opted for this form of divorce dispute resolution. There is, at present, no compelling empirical evidence in this country about the effectiveness and long-term outcome of mediation. This is hardly surprising, however, when one bears in mind that family mediation is still in its infancy here.

In addition, there has been much written in an attempt to refute the grandiose claims, (usually made by mediators themselves), that mediation is a far better and more equitable alternative. I shall enumerate some of the criticisms later.

Be that as it may, my hypothesis is in favour of mediation. It is my belief that the potential advantages far outweigh the possible disadvantages. The Magistrates' Courts Amendment Act 120 of 1993 (to date not yet in operation), proposes the introduction of family courts. I wish to advocate the increased use of mediation services as an option available to all divorcing parties. It is my contention that this should form part of the model of the family court that is incorporated into our judicial hierarchy.

In December 1993, a Consultation Paper (or Green Paper as it is commonly called) was presented to Parliament in the United Kingdom, by the Lord Chancellor's Department. The title of the paper is "Looking to the future – mediation and the grounds for divorce". It is my contention that this paper supports the views expressed here, and I will deal with it at length further on.

Historical background

The advent of the no-fault divorce era, both abroad and in South Africa, has traditionally been held up as the cause of the decline of state intervention into the arena of divorce. The emphasis shifted from retribution to resolution, and the private ordering of the life of the family. *De facto* consensual divorces were clothed in the guise of irretrievable breakdown of the marriage relationship

* A note on "Looking to the future – mediation and the grounds for divorce" – a Consultation Paper (United Kingdom) of December 1993.

(Scott-Macnab "The legal profession's declining image: is there a better way?" 1987 *De Rebus* 29).

With this turn of events came an ever-increasing dissatisfaction with the adversarial court system. It is submitted that the latter was quite correctly regarded as, *inter alia*, too formal, costly and traumatic. Commissions of enquiry were set up in many countries to investigate this issue, as well as how to improve the divorce process. Most come to the conclusion that divorce disputes are nowadays largely concerned with custody and maintenance issues. As a result, it was believed that a cheaper, more informal and less intimidatory process needed to be introduced. In the United States, the answer at that stage was perceived to be the extension of arbitration to matrimonial disputes, and before long, mediation in divorce dispute resolution became the order of the day there. In the United Kingdom, the Finer Committee Report on One-Parent Families (Cmnd 5629 HMSO (1974)) recommended the introduction of mediation services, and these soon mushroomed.

Against this background, the Hoexter Commission investigated the desirability of the establishment of a family court in South Africa in 1983 (Hoexter Commission Report – the fifth and final report, part A of the Commission of Inquiry into the Structure and Functioning of the Courts (RP 78/1983) Part VII (The desirability or otherwise of the establishment of a family court)).

It is necessary for me to go into some detail in respect of the findings of the commission to develop my own recommendations in terms of the family courts. The Commission made several recommendations about, *inter alia*, the abolition of special courts for Blacks, and the desirability of establishing a family court as a special forum in the existing hierarchy of courts. The Commission (487) concluded that the adjudication of family matters in South Africa is inefficient, and that the question whether the marriage has irretrievably broken down is rarely considered properly. In the supreme court, an undefended divorce action is usually dispensed with in a few minutes and hence superficially, because of the overloaded court rolls. The Hoexter Commission (487–490) said that this haste damages the image of administration of justice and the institution of marriage. Furthermore, it held (490), in relation to the adversarial system of litigation that the opponent spouses

> "are impelled into a confrontation with each other as soon as the plaintiff consults an attorney. For neither party is this conflict situation conducive either to reconciliation or to a satisfactory settlement flexible enough to stand the test of time. Where the plaintiff's action is contested by the defendant the adversary system further prolongs the pre-trial proceedings and greatly increases the cost of litigation".

The Hoexter Commission believed that although the no-fault divorce system may have somewhat reduced the acrimony in divorce proceedings, divorces in which the issues of custody, maintenance and division of assets are involved (which is the majority of cases, as stated above), are still fraught with bitterness and implacability. Then too, unsatisfactory settlements result in social welfare agencies being presented with a family problem. This the Commission viewed as an uneconomic use of sparse manpower.

In addition, the Commission (491–492) considered that the cost of litigation in the supreme court is prohibitive – it puts legal representation beyond the reach of many, and is financially crippling even to the affluent. It behoves me to state, at this juncture, that this observation is no less apposite today. I telephonically consulted three practising attorneys involved in matrimonial work. I asked each of them what the cost of a defended divorce would be, with a custody dispute over two children. The consensus was that it obviously depended on the amount of time involved. However, they concurred that if the matter went to court for a day, and then was settled, perhaps on the instruction of the judge, as is wont to occur, that total costs in respect of each party would be in the region of R120 000.

The Hoexter Commission went on to report extensively on the structure and functioning of family courts worldwide, which differed so substantially that a comprehensive and workable definition of a family court could hardly be formulated. It believed that South Africa was in need of one, which in the judicial hierarchy, should sit below the supreme court, probably at the regional court level. It considered that the establishment of a family court with jurisdiction to entertain all matters affecting family life would lead to more efficient adjudication upon family issues. This would probably reduce the cost of litigation, although it might not speed matters up (498).

The recommendation of the Hoexter Commission (498 ff) which is of the most relevance to this note, was that the family court should have a conciliation component and a court component complementing each other, but with very different functions; that the judicial officers in the court component should be independent of the public service; and that each family court should have at its disposal a family court counselling service. The latter should be responsible for the performance of, first of all, the reception process, secondly, the conciliation process (understood to mean *mediation* rather than reconciliation – see 504 par 8 8 3) and, finally, the counselling process. The Commission came out strongly in favour of adopting a more inquisitorial model of procedure in family matters, as it recognised, correctly, that the

> "adversary system heightens the tension and widens the communication gap between the parties . . . for all divorce litigants, the adversary stance multiplies misunderstanding, promotes bitterness, and propels the participants towards the point of no return" (506 par 8 9 4: 1959 *NPPA Journal* 189).

The recommendations of the Hoexter Commission were accepted and largely incorporated into the Family Court Bill 62 of 1985. This bill, however, was rejected by a parliamentary subcommittee, because it was felt that an infrastructure of the kind envisaged would require too much manpower, and not be cost effective. In fact, it has been noted that in England, "the most widely stated official reason for not establishing family courts is the problem of cost" (see Schäfer "Alternative divorce procedures in the interests of children: some comparative aspects" 1988 *THRHR* 305).

This regrettable turn of events was somewhat ameliorated by the adoption of another recommendation of the Commission, related to the office of a "Children's Friend". This resulted in the Mediation in Certain Divorce Matters

Act 24 of 1987, which created the office of the family advocate, to champion the rights of children involved in divorce. Any development which offers greater protection to the interests of children must be welcomed. It was soon perceived by many, however, that Act 24 of 1987, as well as the function of the family advocate, had little or nothing to do with mediation (Mowatt "Divorce mediation – the Mediation in Certain Divorce Matters Act 1987" 1988 *TSAR* 47; Clark "No holy cow – some caveats on family mediation" 1993 *THRHR* 454).

Another relevant legal development, related to the recommendations of the Hoexter Commission, was the publication for comment, in 1991, of the Draft Divorce Amendment Bill, 1992 (GN 513 *GG* 13297 of 1991-06-14).

A memorandum introducing the bill explained that, although special courts for Blacks were abolished by the Special Courts for Blacks Abolition Act 34 of 1986, a single separate court for Blacks in respect of divorce actions had been retained.

It illustrated the position as follows:

> "In terms of section 10 of the Black Administration Act, 1927, Amendment Act, 1929 (Act No 9 of 1929), the State President may by proclamation in the *Gazette* institute divorce courts which have jurisdiction to hear and determine suits of nullity, divorce and separation in respect of marriages between Blacks and to decide any question arising therefrom. These courts enjoy concurrent jurisdiction with the Supreme Court of South Africa . . . At present these courts are used extensively, which is an indication that they fulfil a real need. In the light of the present constitutional developments in South Africa, it is untenable to maintain a separate forum exclusively for a specific population group, and the opinion is held that all divorce actions ought to be tried in the same forum. It is recommended that such a rationalisation process ought to take place in such a way that those features of the present Black divorce courts which ensure increased accessibility, are maintained as far as possible. These features include an elementary and inexpensive procedure, speedy adjudication and the appearance of attorneys in such courts. Such an adjustment will by its very nature bring about changes to the divorce procedure in the Supreme Court."

The 1991 bill made provision for the constitution of specialist divorce courts, which would try only divorce actions, and function within the existing structure of the supreme court. It would be governed by rules envisaged to embrace features which enhanced the accessibility of the existing black divorce courts. Furthermore, attorneys would have the right of appearance in the reconstructured divorce courts – this proposed extension would limit the costs of divorce proceedings.

It is against this background that the Magistrates' Courts Amendment Act 120 of 1993 should be viewed. This act will come into operation on a date to be proclaimed (GN 1287 *GG* 14986 of 1993-07-20). It is only necessary here to discuss the perceived changes that it will introduce in the family law area.

The 1993 act will amend the Magistrates' Courts Act 32 of 1944, which will, upon commencement of the former, be called the Lower Courts Act 32 of 1944.

Inter alia, the amending act seeks to establish a forum for the adjudication of divorce actions within the structure of the civil lower courts. The civil lower courts will have family divisions, in which family courts will be established. These courts will have the usual jurisdiction expressly conferred upon them by

law, and be able to adjudicate divorce actions as defined in section 1 of the Divorce Act 70 of 1979. Family magistrates will preside in the family courts. Provision is made in the 1993 act for family magistrates to be appointed by the Minister of Justice under advisement from an advisory board. Such an appointment need not necessarily be of a magistrate, but of any suitable person, including a legal practitioner.

The proposals in the 1993 act regarding the establishment of the family court, apparently emanate from comments received on the Divorce Amendment Bill, 1992. As a result of these comments, the 1992 bill was adjusted:

> "[T]he principle that divorce actions should also be adjudicated in the lower courts enjoys the support of a wide spectrum of interested parties" (see Explanatory Memorandum on the Objects of the Magistrates' Courts Amendment Bill, 1993 B97B–93 (GA)).

The introduction of a family court into the judiciary would indeed be most welcome. The question needs to be asked, however, whether that is what will occur when Act 120 of 1993 comes into operation. It seems to me that the family courts proposed in that act are not much more than another forum for adjudicating on divorce actions. In fact, this could prove to be most detrimental in post-apartheid South Africa – it is probable that affluent Whites will continue to go to the supreme court for their divorces, while Blacks will still avail themselves of black divorce courts (although these will now have the name of family courts, and it also appears that the services of the family advocate's office may be extended, by proclamation, to these courts too). With respect, one wonders where the real change is considered to have been made. It seems to me that the considered opinion of the Hoexter Commission, with its emphasis on mediation services as a possible way of sensitively handling dissolution of marriage, has, in the end, largely been ignored. I am reminded here of the remarks made by Schäfer 1988 *THRHR* 297:

> "The current problem with the law of divorce in its broadest sense is that, inasmuch as significant changes in recent years have been effected to the substantive law of divorce, very little has been done to overhaul the court structure and the divorce procedures that govern it."

Lest this be an accurate reflection of the position now too, I propose to argue that the benefits that would be derived from the incorporation of the Hoexter family court model, necessitate that this matter be revisited.

Recent developments in the United Kingdom

Mediation services were first established in England from 1978. In family law, mediation was initially confined to resolving disputes around custody of and access to children, often by district judges or divorce courts welfare officers. In addition, some private mediation services existed and couples were often referred there by, *inter alia*, their solicitors, or general practitioners. In 1985 the Lord Chancellor's department called for a major research study of the costs and effectiveness of various mediation schemes. The study confirmed that mediation is effective in reducing the areas of dispute and in increasing the parent's well-being and satisfaction with the arrangements made. These benefits, it held, were

generally greater where mediation took place away from the courts (Report of the Conciliation Project Unit at the University of Newcastle Upon Tyne, 1989; Consultation Paper 83).

It was found that although court-based mediation is valuable, it has some drawbacks: pressure to reach quick settlement at a later stage; pressure on the couple because of the perceived authority of the district judge, thus influencing the outcome; conflict of interest between the court welfare officer's role to report to court on the best interests of children, and their role in facilitating the parties' agreement (*ibid*).

Independent mediation organisations in England have recently agreed to a joint code of practice, which aims to achieve out-of-court mediation of a high standard, mainly in respect of the arrangements with regard to children, but now also in respect of property division and financial issues. The largest such organisation is the National Association of Family Mediation and Conciliation Services, which has 58 affiliated mediation services and deals with approximately 6500 cases annually. Its funding is largely charitable and fees are charged based on a sliding scale of income. Mediators are trained by the organisation and must adopt the National Family Mediation Code of Practice. Also, there is the Family Mediators Association which offers training, supervision and accreditation, and which requires five years of relevant experience before training, followed by training and a period of supervised practice. Mediators must be lawyers of five years' standing, social workers, counsellors or similarly qualified professionals. The model that they use in practice is co-mediation, and this organisation deals with approximately 1500 cases annually (*ibid*).

Clearly, then, mediation is on the increase in the United Kingdom, although it is far from the norm.

Very recently, the Law Commission published recommendations to reform the law of divorce, after finding that it has serious effects. The one major change would be that anyone seeking a divorce would have to wait a year before obtaining it. This is perceived to be a "cooling-off" period, for the parties to reflect on the possibility of reconciliation. That would be the first prize. However, if that most desirable state of affairs could not be attained, the Law Commission recommended that

> "the process of bringing the marriage to an end should be brought about in such a way as to minimise the distress thereby occasioned, and to face and sort out the consequences of a divorce" (Consultation Paper iv – Foreword by the Lord Chancellor, Lord MacKay of Clashfern).

In the light of these recommendations, the Green Paper which is the subject of this note was prepared, published and circulated for national consideration and comment before 11 March 1994, so that the British government could propose changes on what was considered to be vital issues. It was stated to be the view of the government that the debate should be focused on what should be done

> "by the development of mediation and other more detailed arrangements to accompany the Law Commission proposals and to avoid wasteful expenditure on bitter and costly disputes between the parties".

I consider that the proposals outlined in the Green Paper are insightful and laudatory, in the light of the clear underlying policy of protecting and respecting the institution of marriage, and curtailing the detrimental effects of divorce, particularly on children.

In the section of the Green Paper devoted to family mediation, an overview is given of the divorce process and its traditionally deleterious effects, as well as the unsuitability of the adversarial model (*idem* ch 7 49).

Family mediation is defined and described. It is perceived as better suited than litigation to identify marriages where reconciliation can take place; as an aid to separating couples, that they may make their own arrangements about the future and learn to co-operate in child-rearing; as encouragement to focus on the children's needs rather than be self-serving, whilst at the same time being able to take into account that there are two individuals with different agendas and attitudes involved; and as a method of empowerment of the spouses, so that they may plan at their own pace for the future with reference to the past (*idem* 50).

It was clear to the Commission that increased use and development of the potential of mediation, necessitated a substantial change to the divorce process. Presently, the spouses resolve very painful issues late in the proceedings, if at all. This is not conducive to mediation – the strain often causes a heightening of tension and anxiety. Whilst mediation at an earlier stage may not alleviate these feelings, it would ensure that by the time the divorce is granted, important issues regarding post-divorce arrangements would be resolved.

The Commission recommended the encouragement of mediation

> "as part of a new and more constructive approach to the problems of marital breakdown and divorce . . . Through carefully designed divorce procedures, it should be possible to encourage greater use of out of court mediation as an integrated part of the divorce process *without actually making it mandatory*. The aim would be for mediation to become the norm rather than the exception" (*idem* 51–52; italics added).

To its credit, the Green Paper gives an exhaustive overview of the different models of mediation as well as its advantages and disadvantages. There is a wealth of literature on all of these aspects. I do not propose to traverse any of this at this juncture – it makes more sense to deal with some that are relevant to the South African position later on.

The British government's initial view appeared to be that mediation should be integrated into a reformed divorce law, at no additional cost to the parties and the state. Greater access should be provided wherever possible, to good quality mediation. To this end, incentives to mediate, and disincentives to litigate at arms' length should be provided. Specifically, it considered that such an integrated system would have to set standards for mediators and provide a means of monitoring those, provide for means testing for those who qualify for public funding, keep to a budget and maintain the public in-court mediation conducted by welfare officers – this would be useful if the parties did not attempt or succeed at earlier mediation (*idem* 56).

Mandatory mediation, particularly where violence is an issue, is not favoured in the Green Paper (*idem* 57). It is therefore most interesting to note the

projected scheme outlined by the government (*idem* 60 ff) for integrating mediation on such a large, yet voluntary basis. It seems that anyone who wishes to commence divorce proceedings would have to attend an initial interview. That interview would be used to provide essential information, as opposed to advice, regarding the divorce process, the avenues available, one's legal rights, as well as the consequences of divorce. This would be backed up by information packs and videos, as well as general examples of how the law operates in practice. In this regard, the government is astute in recognising the importance of empowering couples who wish to divorce to make informed decisions. Encompassed within this information would be advice on, and encouragement for, both reconciliation and mediation. It considered that personal explanations of mediation are more effective than leaflets, and in this manner, explanation and encouragement of mediation would become an integral part of the initiation of divorce. This might even have a ripple feedback effect on couples who had not yet decided to commence proceedings. As to who would conduct the interview, the government considered that a new and independent organisation would be the best way to avoid conflicts of interest. The person conducting the initial interview would also be able to advise on the cost of and available financial assistance for mediation. Finally, an assessment would be made immediately, or after time for reflection, about the most appropriate option to choose, with relevant referrals and appointments being offered.

If the couple choose to mediate, they will be free to select the model to be used, and any agreement reached could remain a private agreement, enforceable as a contract, without having to be supervised by the court as a matter of course (*idem* 65).

Of course, the most important and practical question which had to be considered, was that of cost. The government believed (*idem* 66 ff) that as mediation of itself would avoid unnecessary costs of litigation, the couple should receive a better and cheaper service than the present one. To ensure this, costs in individual cases, whether privately or publicly funded, would need to be carefully controlled, for example by ensuring that the couple do not unnecessarily traverse the same ground with lawyers. Generally, the costs of divorce should be borne by the couple – this is a recognition of the responsibility of the parties and may curb wastage. However, where this approach would create an unequal bargaining position, or be detrimental to the children, public funding could be offered according to very careful criteria based on a means test, with recovery of costs if property or money is eventually awarded in the divorce. In referring a couple to publicly-funded mediation, the interviewer would ascertain whether mediation was being useful and progressing. If legal advice was necessary, the same lawyer could be used for both spouses, where appropriate. The government makes no pretence about its intention to encourage the use of mediation because of the prohibitive cost of litigation. In order, then, to provide a huge disincentive to unco-operative spouses who refuse to mediate, a cost sanction would be imposed whereby the resistant spouse could be ordered to bear the entire cost of the divorce. In the final analysis, the British government considered that the cost of the outlined scheme should not, and would not, exceed that of the present legal aid scheme – if anything it would be better service at a lower cost (*idem* 72).

Some comments on the United Kingdom's Green Paper

I believe that the policy underlying the outlined potential reform is commendable. It appears to display respect for the well-documented and harmful effects of divorce on children. There appears to be no doubt that, on average, children of divorced parents experience psychological, educational and social trauma, compared to those who grow up around married parents. It is surely reasonable, then, to expect that the law should do its best to turn that around.

I have several reflections on the actual infrastructure that the British government has indicated it might adopt. First, the fact that the scheme might encourage rather than enforce mediation, may well satisfy those who argue that mandatory mediation is a contradiction in terms (see, *inter alia*, Scott Macnab and Mowatt "Family mediation – South Africa's awakening interest" 1987 *De Jure* 47; Grillo "The mediation alternative: process dangers for women" 1991 *Yale LJ* 1583). However, it appears to me that by imposing implied sanctions regarding payment of costs, for example, that that is mandatory mediation by another name. This is not to say that mediation should not be mandatory – I remain unconvinced of the detrimental effects of mandatory mediation. Grillo 1991 *Yale LJ* 1583 has this to say:

> "Mediation poses such substantial dangers, and provides so few benefits to unwilling female participants . . . that to my mind it is indefensible to require mediation, notwithstanding that such a requirement would help women who do want to mediate. In addition, the woman who participates in the mediation process with a reluctant spouse may have gained little."

In fact, it is interesting to note that a recent study in America has exposed as a myth that mediation cannot be effective unless participation is voluntary. The study suggests that "the experience depends more upon the quality of the program and the issue being mediated than whether the program is voluntary or mandatory" (Pearson "Ten myths about family law" 1993 *Family LQ* 286–287). Then, too, in a study on the family court in Australia, with specific reference to the "conciliation counselling service", it was concluded that early intervention is the key to success, as well as the introduction of information sessions, rather than whether counselling or conciliation is voluntary or compulsory (see Family Court of Australia, Report of the Simplification Procedures Committee, January 1993 AGPS 1993 (Vol 17 No 2) *Australian J of Family L* 95).

In fact, it is my contention that if the benefits of mediation outweigh the disadvantages, divorcing spouses should be compelled into mediation. I do not see this as a contradiction – the result of the mediation is not being forced upon either one of them, only the process – a "being cruel to be kind" philosophy, as it were. Goldberg, Green and Sander (*Dispute resolution* (1985) 313 504) say that

> "coercion *into* mediation does not seem objectionable, as long as there is no coercion in mediation to accept a particular outcome, and as long as unsuccessful mediation does not serve as a barrier to adjudication".

It seems that a large number of states in America have opted for mandatory mediation. In fact, California enacted mandatory mediation in an attempt to overcome a substantial attrition rate that most voluntary programmes experience.

A few studies have shown that some half of the disputants, offered free mediation, reject it, refuse to mediate, or simply fail to show up. In fact, Pearson and Thoennes ("Mediating and litigating custody disputes: a longitudinal evaluation" 1984 *Family LQ* 516) conclude that mediation services are severely underused by people; that the high refusal rate experienced in all voluntary mediation programmes possibly reflect a need for legislation that makes an attempt to mediate mandatory. Perhaps we should learn from these experiences.

More specifically, with regard to the Green Paper, Gwynn Davis ("Mediation and the ground for divorce: a new era of enlightenment or an Orwellian nightmare?" 1994 *Family L* 103) has expressed reservations on the proposals. She believes that requiring a preliminary interview is "both oppressive and needlessly expensive". This, with respect, begs the question. It may be oppressive, and that is open to question, but might not the benefits of such oppression necessitate it? An unruly child must be disciplined in case it hurts itself. As far as the expense is concerned, this matter is addressed in the Green Paper. I do, however, agree with Davis that the rationing by the interviewer of legal aid, in terms of the spouses' willingness to reason, may be somewhat nightmarish. Strict controls must exist. The criticism of Davis appears largely to stem from her hesitation about the benefits of mediation, as well as the fact that she views the paper as an attempt by the government to stem the abuse of legal aid.

The Green Paper and the South African experience

It is my belief that the South African government must reconsider the position. It would be a great pity to let the recommendations of the Hoexter Commission about mediation fall by the wayside. It is true that the introduction of the family courts will introduce "local, cheaper and quite probably, quicker justice" (Editorial "Divorces in the lower courts: taking justice to the people" 1993 *De Rebus* 731). The solution, however, should not be in the introduction of a conveyer-belt. We should be focusing on the needs and emotional well-being of the parties involved. I would urge that mediation be introduced on a large scale in matrimonial disputes, whether by encouragement through education, or by mandatory legislation.

The benefits of mediation have been the subject of much literature (see eg Clark 1993 *THRHR* 458). More specifically, the use of mediation in family courts has often been validated by the encouraging trends that have emerged. Atkin ("New Zealand: reflections five years after reform" 1986–1987 *J of Family L* 191), writing on the family courts, comments that they, and the procedure for counselling and mediation, have generally been adjudged to be a success since their introduction. In New Zealand, lawyers are obliged by statute to inform clients about reconciliation and mediation procedures, as well as to attempt to effect them. Also widely documented are the disadvantages of mediation. Some use the word "oppression" when they talk of it (see eg Burman and Rudolph "Repression by mediation: mediation and divorce in South Africa" 1980 *SALJ* 275; Grillo 1991 *Yale LJ* 1545). I do not propose to retrace the arguments, save in so far as recent studies may confirm or belie them.

It is often alleged that mediation may result in a lack of protection for the parties, since their access to lawyers is diminished. Pearson 1993 *Family LQ* 281 addresses this – in the study which is the subject of her article, she exposes as another myth, the belief that both parties to a divorce are represented by attorneys. The reality is that only a very small percentage of the divorcing population has two-attorney representation. How much more so must this be for the case in South Africa, where representation even by one attorney is often a luxury? Then too, Pearson examines the view that "ADR procedures have eroded the financial status of women". She states (*idem* 283):

> "This myth contends that women in mediation bargain away important and needed property and support benefits in order to avoid joint custody arrangements and excessive visitation. Therefore mediated outcomes are less favourable to women than those produced in other forums, such as going to court."

In three different research projects, and although she concedes that more research is needed on mediated and non-mediated outcomes, the results failed to indicate negative financial consequences for women from the use of mediation (*idem* 284). She continues:

> "Indeed, the only differences we found by forum had to do with legal fees and respondent satisfaction with the agreement, both of which were more favorable for the mediation group. Legal fees were significantly lower for those who mediated; agreements were perceived to be fair, even among non-custodians and those who objectively might be viewed as the 'losing party'. Taken together, these findings suggest that mediation has fewer substantive effects than feared (or hoped). Although mediation does not appear to do a better job in protecting women from prolonged and severe financial dislocations following divorce, it does not appear to exacerbate their financial predicament."

Clearly then, every argument can be countered by an opposing point of view.

I do not propose that mediation is without danger. Indeed, Mowatt 1988 *TSAR* 299 puts it thus:

> "It remains important to place the matter in perspective. Private ordering does not necessarily imply a better result or settlement than could have been achieved by adjudication. All it means is the attaining of reasonable and realistic goals set by the parties through a process of conciliation or compromise. It should be remembered that, as in any other form of human endeavour there are risks of failure; and failure to find a satisfactory settlement can lead to further bitterness. Furthermore, it should be remembered that marital breakdown is a trauma which does not necessarily reach its apex (or nadir) during the actual divorce settlement, and it may well be unrealistic to expect to resolve entrenched problems of custody and distribution of assets by private ordering. Consequently, it is not a palliative to be applied in all cases of divorce. It has limitations. And to the extent it has limitations, the function of the court remains vital."

Especially in South Africa, the potential for failure is great – cross-cultural issues exist that may well be deeply significant in mediation (see, eg, Burman and Rudolph 1980 *SALJ* 275, esp 270 ff).

What I do propose, however, is a movement away from an either-or situation. No system is without drawbacks – that should not result in the system being excised from existence. Rather that the long-term benefits are recognised, and the inherent pitfalls considered and proposed solutions thought out. Many dangers in mediation, for example, could be diminished, if not avoided, if

mediation were the subject of a Commission of Enquiry to investigate the following: adequate standards of training and accreditation; specific models of mediation methods; a strict code of conduct and ethics for mediators; issues and dilemmas such as privilege, confidentiality and the protection of the mediator (or his records), from court subpoena; a scale of fees, with specific reference to how the extra layer of costs that mediation may imply can best be averted, for example, by setting the maximum amount that the lawyer who takes the matter through court may charge, or by allowing lawyer-mediators to do so; and finally, the possibility of introducing the teaching of actual mediation skills, as a compulsory part of courses in family law at universities.

Recommendations

1 Mandatory mediation

I believe not only that the Hoexter-model family court should be adopted, but that we should go one step further. Failing the compulsion of the divorcing parties into mediation for all the issues, I believe that we should at least go the route of compelling them to mediate on custody of and access to children (but having due regard to the insightful comments by Burman and Rudolph (*ibid*) that the financial issues and custody are often interwoven). It has been shown that even unco-operative couples, with "strained relationships, complex disputes and severe financial pressures" are able to mediate and come to an agreement (Pearson and Thoennes 1984 *Family LQ* 516).

Also, with regard to any criticism that may be raised that cultural differences may detract from mediation being so actively encouraged, I can do no better than refer to the remarks of Mowatt ("Are we ready to mediate?" 1988 *SALJ* 318). He reminds us that mediation has its roots in Africa, where it was considered as a fundamental method of dispute resolution. Thus, a significant number of people may indeed welcome mediation.

2 Encouragement of mediation

If the first proposition is not acceptable, it is my recommendation that mediation should be actively encouraged on a large scale. It is submitted, with respect, that we could do well to take heed of the Consultation Paper from the United Kingdom. The idea of the initial interview, which may serve as an information, screening and referral process, is very attractive.

3 The role of lawyers

Moving lower down on my list of preferences, I would propose that all practising family law lawyers should be compelled, either statutorily or ethically, to ensure that divorcing clients are informed about alternative divorce dispute procedures; that reconciliation and mediation procedures are recommended, and facilitated if desired.

4 Incorporation of mediation in divorce practice

Finally, and if all else fails, it is my belief that mediation could still be integrated into the system, if the assumption that divorce mediation and divorce litigation

are incompatible, is re-examined. McEwen, Mather and Maiman ("Lawyers, mediation and the management of divorce practice" 1994 *Law and Society R* 149) report on how lawyers in the state of Maine have embraced mediation, as it has helped them manage problems inherent in divorce practice. The authors write:

> "Discussions of legal practice and dispute resolution are often dominated – and distorted – by the tendency to view the world in either-or terms (Nader 1984). Both the popular and academic literatures are preoccupied with contracts between formal and informal processes, competitive and co-operative attorney styles, clients' rights and needs, lawyer and client control of decision-making, and so on. Whatever utility it may have for framing rhetorical questions about legal reform, such binary thinking does not accord with the more complex realities of legal practice, which are often located not at one end or another of such polarities but in the dynamic interplay between them . . . [D]ivorce mediation facilitates both settlement negotiation and trial preparation, permits client participation in decision-making without requiring lawyers to surrender control, provides a forum for resolving both legal and non-legal issues, and promotes efficient case management."

Conclusion

Conflict and communication patterns between divorcing spouses will not be revolutionised by family courts or by mediation. As Schäfer (*The concept of family courts in South Africa* (doctoral thesis University of Natal Durban 1981)) has stated:

> "It must be stressed that the philosophy of a family court is hardly ever expressed in terms of preserving marriage at all costs. Nor, it is submitted, is the philosophy behind the establishment of a family court so much concerned with the question of whether there should be more or less divorce. The divorce problem has been with us for hundreds of years and will no doubt remain with us for the future."

Accepting that this is true, it is imperative that the divorce process be smoothed, in an attempt to stem the pain and dislocation that children, and their parents, suffer through divorce. If we are to go by the example of other countries, once mediation has been tasted, it is an irreversible process, even if it be a slow and gradual one, to the acceptance of mediation. We would do well to recognise this, and integrate, more extensively, this very useful tool of divorce dispute resolution.

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RETRACTION, APOLOGY AND RIGHT TO REPLY

Introduction

The purpose of the *actio iniuriarum* is to compensate a person for the infringement of his or her personality rights: where someone's character (or dignity,

privacy and bodily integrity) is impaired, "to restore it as far as possible" (*Naylor v Central News Agency* 1910 WLD 189 191). The view taken in this note is that an award of damages should not be the only way in which *iniuriae* can be assuaged and that other factors should play a greater role than merely to mitigate damages. All possible means of restoring a person's honour or repairing his or her wounded feelings should be at a court's disposal (see also Burchell *The law of defamation in South Africa* (1985) 316). Retraction and apology, or a right to reply, may in some cases achieve these objects (Voet *Commentarius* 47 10 17).

The amende honorable

Background

In Roman-Dutch law the *actio iniuriarum* was replaced by two remedies, the *amende honorable* and the *amende profitable* (*ibid*; Grotius *Inleiding* 3 36 3; Van Leeuwen *Roomsch Hollandsch recht* 4 37 1; Van der Linden *Koopmans handboek* 1 16 4; Neethling, Potgieter and Visser *Law of delict* (1994) 15; Neethling *Persoonlikheidsreg* (1991) 52). While the latter corresponded closely to the *actio iniuriarum* (Voet 47 10 18; *Van Zyl v African Theatres Ltd* 1931 CPD 61 65; *Maisels v Van Naeren* 1960 4 SA 836 (C) 840D), the *amende honorable*, on the other hand

> "departed completely from the *actio iniuriarum*: an injured person could claim a *palinodia* or *recantatio*, in other words that the wrongdoer withdraw his words and deny the truth thereof; as well as a *deprecatio*, that is an admission of guilt and a request for forgiveness" (Neethling *et al op cit* 15–16; see also Burchell *op cit* 11–12; Ranchod *Foundations of the South African law of defamation* (1972) 90; Van der Merwe and Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 239).

It is thought that the action originated in ecclesiastical law (De Villiers *The Roman and Roman-Dutch law of injuries* (1899) 177), but there is also support for the view that it is based upon Roman law (Ranchod *op cit* 66–67; but cf 90 fn 78). Zimmermann points out that the remedy

> "constituted an amalgam of three distinct institutions, the *declaratio honoris*, with roots in Germanic customary law, the notion of *recantio* and the concept of *deprecatio*, both of which had their origins in church law" (*The law of obligations: Roman foundations of the civilian tradition* (1990) 1072–1073).

De Villiers (*op cit* 178; see also Ranchod *op cit* 65–66 90) explains the essence of the *amende honorable*:

> "This remedy took two forms. In the first place, there is the *palinodia, recantatio* or *retractatio*, that is, a declaration by the person who uttered or published defamatory words or expressions concerning another, to the effect that he withdraws such words or expressions as being untrue; and it is applied when such words or expressions are in fact untrue. In the second place here is the *deprecatio* or apology, which is an acknowledgement by the persons who uttered or published concerning another anything which if untrue would be defamatory, or who committed a real injury, that he had done wrong and a prayer that he may be forgiven. In the case of verbal or literal injuries this deprecation is applicable when what has been said or published is true without the truth affording justification, and, according to Voet, also when 'nearly full proof of the truth has been given'."

Honourable amends could be exacted in various ways. The most common was a written apology to the satisfaction of the plaintiff, but according to De Villiers (*op cit* 178; see also Ranchod *op cit* 90), some of the forms of apology were extremely humiliating, "for instance, that he should be made to beg for pardon kneeling upon his bare knees". Zimmermann *op cit* 1074 offers further examples: "[H]e had to fall on his knees, appear bare-footed, slap himself on his mouth, or even suffer the sombre presence of a hangman." A person who failed to make amends in terms of the court order could be fined or imprisoned (De Villiers *op cit* 179).

Current law

The *amende honorable* has now fallen into desuetude (*Hare v White* 1865 1 Roscoe 246 247 250; *Lumley v Owen* 1882 3 NLR 185 186; *Ward-Jackson v Cape Times Ltd* 1910 WLD 257 263; Burchell *op cit* 315; Neethling *et al op cit* 16; but cf *Wolff v Van Hellings* 1828–1849 1 Menzies 529; *Upington v Murray and St Leger* 1877 7 Buch 31; *Hart v Robinson* 1887 12 EDC 24 30 – the question was left open in *Swarts v Lion Bottle Store* 1927 TPD 316), the reason being that courts were reluctant to enforce the remedy by means of civil imprisonment (*Hare v White* 1865 1 Roscoe 246 247 250; Burchell *op cit* 315). The present position in our law, therefore, is that the only remedy available to a person who has suffered an *iniuria* (in the wide sense) is a claim for damages. The monetary award is intended to assuage the infringement. One cannot, as in Roman-Dutch law, sue for an apology and courts are unable to order that an apology be published, even where it is the most effective (or only) method of restoring a plaintiff's character fully (*Kritzinger v Perskorporasie van SA* 1981 2 SA 373 (O) 389G–H). Viewed from the defendant's perspective, a person who is genuinely contrite about infringing another's right cannot raise immediate apology and retraction as a defence to a claim for damages. At best that fact may be regarded as mitigating the loss and a smaller award for damages may be made (*Botha v Pretoria Printing Works Ltd* 1906 TS 710 714; *Ward-Jackson v Cape Times Ltd* 1910 WLD 257 262–263; *Dymes v Natal Newspapers Ltd* 1937 NPD 85 97; *Norton v Ginsberg* 1953 4 SA 537 (A) 540 550; *Kidson v SA Associated Newspapers Ltd* 1957 3 SA 461 (W); *SA Associated Newspapers Ltd v Samuels* 1980 1 SA 24 (A) 41G; Burchell *op cit* 299 300). The only exception is found in section 93(1)(2) of the Code of Zulu Law, which contains a proviso that no action lies where the defamatory statement was made during a heated quarrel and where "within a short time thereafter the statement is publicly withdrawn with apology" (Bekker *Seymour's customary law in South Africa* (1989) 344).

The position in some foreign jurisdictions

In America the position is the same as in South Africa, namely, that an apology serves to reduce damages. It is not a general defence (50 Am Jur 2d par 186).

However, some countries have responded to the need to expand the law beyond a mere action for damages in these cases. Two options are available in the United Kingdom. An unaccepted apology, or the offer to make an apology, by itself, is not a defence, but serves as evidence in mitigation (s 1 of Lord Campbell's Libel Act 1843; McEwen and Lewis *Gatley on libel and slander* (1974)

par 1341; *Report of the Committee on Defamation* (Faulks Committee Report) Cmnd 5909 (1975) par 373; Heuston and Buckley *Salmond & Heuston on the law of torts* (1992) 192; Dias (ed) *Clerk & Lindsell on torts* (1989) par 21.180). However, if a plaintiff accepts an apology, this may serve as a defence (*Gatley on libel and slander op cit* par 842). In addition, a public newspaper can raise an apology as a defence (in terms of s 2 of the Libel Act of 1845) provided that the libel was inserted innocently (the word is defined in s 4(5)) and money tendered into court by way of amends. None the less, defendants do not make use of this provision, preferring instead, for reasons pertaining to awards of costs, to plead apology in mitigation (*Gatley on libel and slander op cit* par 811; Salmond and Heuston *op cit* 209; *Clerk & Lindsell op cit* par 21.44 21.45: McDonald *Irish law of defamation* (1987) 231). The Australian (Fleming *The law of torts* (1992) 598–600), Canadian (Brown *The law of defamation in Canada* vol 2 (1987) 1016 ff; Williams *The law of libel and slander in Canada* (1988) 98–100) and Irish (McDonald *op cit* 229) positions are similar.

The second option is found in section 4 of the Defamation Act, 1952 which introduced the concept of a non-monetary remedy where material is published innocently. A defendant's offer to make amends, if accepted by the plaintiff, bars any further proceedings, and if rejected, may serve as a defence against the plaintiff's claim if the requirements of section 4 are met. These are that the defendant was not in any way at fault, that the offer was made as soon as it was practicable after the defendant became aware of the import of his conduct, and that the offer was not subsequently withdrawn. (In South Africa, any similar defence would of course only be necessary in cases where liability is strict.) The section is not without its faults, however, which have been summarised as follows (McDonald *op cit* 231; see also the Faulks Committee Report *op cit* par 281):

> "The principal defects cited by the reform bodies are the practical difficulty and expense of arranging the necessary affidavit in time, the ban on the later use of facts discovered after the affidavit is served, and the need for the publisher, where he was not the author, to prove that the author acted without malice."

Canadian jurisdictions also have statutory provisions relating to retractions which apply only to newspapers and broadcasts. A typical provision reads (Williams *op cit* 101–102):

> "In an action for libel contained in a newspaper the plaintiff shall recover only actual damages if it appears at the trial:
>
> (a) that the alleged libel was published in good faith;
>
> (b) that there was reasonable ground to believe that the publication thereof was for the public benefit;
>
> (c) that it did not involve a criminal charge;
>
> (d) that the publication took place in mistake or a misapprehension of the facts; and
>
> (e) that a full and fair retraction of any statement therein alleged to be erroneous was published in the said newspaper before the commencement of the action, and was so published in as conspicuous place and type as was the alleged libel."

This section, of course, does not provide a defence – merely a method of avoiding general and/or punitive damages. Where such a provision applies, a plaintiff

will have to prove special damages (*Bordeleau v Bonnyville Nouvelle Ltd* 97 DLR (4th) 764 (Alta QB) (1993) 768).

Defence or remedy?

Burchell (*op cit* 318; see also 340) contends that in reforming the law the emphasis "should not be placed on retraction and apology as a *remedy*, but rather on retraction and apology as a *defence* to an action for damages (or an application for an interdict)". The effect of this view is that a plaintiff will have no claim for compensation, in other words, no remedy, where a suitable apology has been forthcoming. Courts have on various occasions set out requirements for retraction and apology and these guidelines, Burchell believes, could provide the foundation for a general defence.

It is suggested, however, that an apology should not serve as a defence under the *actio iniuriarum*. First of all, there may be instances where an apology is not sufficient to eliminate entirely the loss suffered. (See, eg, *Channing v South African Financial Gazette Ltd* 1966 3 SA 470 (W) 479G; Brown *op cit* 1019. In *Desaulniers v L'Action Sociale* 1914 20 DLR 566 (Que Ct Rev) 568–569 the court said: "An immediate withdrawal or retraction of a published libel does not always and cannot always, fully repair the damage caused by its publication.") Secondly, it may be necessary to compensate a plaintiff for the infringement suffered between the time of the *iniuria* and the time of the apology. As De Villiers *op cit* 245 points out:

> "Between the time that an injury has been inflicted and the time that the injurious statement is withdrawn, the character of such a person may have been brought into grievous disrepute, his peace of mind may have been seriously disturbed, and in some cases even his health may have been irreparably injured, not to speak of the material loss he may have suffered through others believing the statements against him, so that mere revocation is not always a full reparation for the injurious statement . . ."

Thirdly, there is a very real likelihood that some persons who were aware of the original *iniuria* are not made aware of the apology (Burchell *op cit* 31 318–319). Fourthly, sometimes an apology may not be the most effective way of compensating a plaintiff: it may even have the effect of compounding the loss. For example, the apology may involve republication and restatement of the fact that the plaintiff had been convicted of a crime (*Richter v Rand Daily Mails Ltd* 1941 WLD 123 126). Fifthly, if an apology is accepted as a defence, the law takes only the defendant's interests into account instead of balancing the interests of both plaintiff and defendant. Finally, the defence could be open to manipulation. It is possible for persons to defame others and then to conveniently "apologise" for the damage done. Although, as Kuper ("A survey of the principles on which damages are awarded for defamation" 1966 *SALJ* 481) put it,

> "an apology will not avail a defendant where a gross defamation is deliberately published in a magazine or newspaper, in the belief that increased sales of the issue will compensate for any award of damages that may be made against it",

people should not be tempted to contemplate such a course of action.

Statements of fact or opinion

According to Burchell *op cit* 316 there is

> "merit in a spontaneous and unqualified admission by the defendant that what he said was false, and a plea for forgiveness by him . . . But, even assuming this merit of retraction and apology, it appears that its full potential can only be realized where the allegation complained of is one that is false. It is extremely difficult, if not impossible, to brand an opinion as 'false', because of the difficulty of finding any objective basis by which to reach such a conclusion. Thus, a retraction and apology is effective only where an ostensibly factual allegation is made".

Burchell's reservations are valid, but it is doubted whether the distinction between fact and opinion should be emphasised in any legislative amendment. It may encourage unnecessary bickering as to what is fact and what is opinion. If, as is suggested below, it is left to courts to decide when an apology is appropriate, the sometimes fine distinction between the two categories may not have much practical relevance.

Refusal to publish an apology

In Roman-Dutch law, if the defendant refused to publish an apology, the sanction was a fine or a period of imprisonment, but it was earlier courts' reluctance to impose the latter option that caused the action to become obsolete (*Hare v White* 1865 1 Roscoe 246 247). However, in *Kritzinger v Perskorporasie van Suid-Afrika (Edms) Bpk* 1981 2 SA 373 (O) 389G the court considered that a financial penalty could serve as an alternative to the apology, but that it was not empowered to make such an order, for even the *amende honorable* did not go that far. Burchell (*op cit* 317; see also 341) points out that such a method of enforcement contains a punitive element and suggests that one should not concentrate on methods of compelling a recalcitrant defendant. Instead, incentives to encourage full, frank and prompt retractions and apologies should be considered. And the best inducement, he suggests, is the knowledge that an apology would serve as a defence to the plaintiff's claim.

However, the *Kritzinger* approach does not introduce a punitive element into the action: the proposed remedy, retraction and apology, is not a punishment. Its aim is to repair the damage to the plaintiff's reputation or injured feelings. It gives the defendant a choice: pay an amount (or nothing, in some cases) if you publish an acceptable apology or pay a larger amount in damages if you do not publish an apology. Viewed this way, the alternative remedy contains not a penalty, but an incentive to publish the apology. This would therefore correspond to Burchell's approach to the issue.

Suggested approach

It is suggested that the correct approach is to treat retraction and apology as alternative remedies under the *actio iniuriarum* (but cf McDonald *op cit* 290, who believes that retraction is a complete remedy in itself, which cannot logically exist as an optional alternative to damages) and not as defences to a claim in terms of that action.

Where an apology is given prior to the court hearing, the defendant has remedied the situation either partially or in full and the apology serves to mitigate any

claim for damages. The existence of the remedy may even serve as an incentive to the parties to settle their dispute. Where no apology has been forthcoming, the court may in appropriate circumstances order that an apology be given and stipulate the form which it should take. (The court may, eg, stipulate that the plaintiff should have a say in the wording of the apology.) This would in no way eliminate the court's ability to award damages, although it may influence the amount which the court awards. The same reasoning would apply to retractions.

Support for the remedy approach can be found in the following passage from De Villiers *op cit* 245:

> "On the whole, with regard to the claim for profitable amends, it seems most consonant with the principles of the Roman-Dutch Law to hold that anger or precipitancy of the language followed by a retraction or apology either at once when the anger has cooled down or at any time before litiscontestation should not be held to be an absolute bar to an action of injury, but merely a mitigating circumstance."

In Roman-Dutch law, therefore, an apology was not an absolute bar to an action for damages (Amerasinghe *Aspects of the actio iniuriarum in Roman-Dutch law* (1966) 198). It was in essence a defence where the *amende honorable* was brought, and not where the *amende profitable* was instituted. In the latter instance recantation served as a mitigating circumstance (De Villiers *op cit* 244–246).

The attractiveness of the course of action suggested above is that it requires minimal amendment to the principles which are currently in force. It also does no more than to restore a principle of law which became redundant, not because it was inherently bad, but because its method of enforcement was not acceptable. At the same time, it is suggested that the remedy should not be limited to defamation actions, but that it should extend to all claims in terms of the *actio iniuriarum*. There is no reason, for example, why an apology should not be a suitable remedy in some instances of invasion of dignity, privacy and even of bodily integrity. The approach recognises that every claim in terms of the *actio iniuriarum* concerns two central issues, a claim for the restoration of the right suffered, an *amende honorable*, and a claim for satisfaction, an *amende profitable*. Were an apology to be regarded as a defence, it would serve as a defence against both aspects of the action. The remedy approach, on the other hand, allows the retraction and apology to restore the right and to continue to serve as a mitigating factor when the question of satisfaction is considered.

The right to reply

The right to reply is a press-law remedy available in many European countries where the defamatory statement has been published in a mass medium (see generally Burchell *op cit* 311–315; Tunc (ed) *International encyclopaedia of comparative law* vol XI *Torts* ch 8 *Consequences of liability: Remedies* par 8 194–198 199). Burchell (*op cit* 311 fn 6) points out that

> "[t]here are three broad approaches to the enforcement of the right to reply: in some countries the right to reply is enforceable by civil proceedings, in other countries (such as Austria and Italy) the right to reply is regulated by the criminal law, and in France and Norway, for instance, the 'private law right of reply is protected by criminal as well as private law'".

In the Faulks Committee Report (*op cit* 618) the French and German positions were summarised as follows:

> "The statutory right which the plaintiffs have, for example, in France and Germany, is that of compelling the editor and publisher of an offending periodical or publication to publish in the next number of the publication, or as soon as possible, a counter-statement or reply by any person who claims to have been defamed or injured by untruthful or inaccurate statements. This reply must be given the same prominence and the same amount of space as the offending statement. When this statutory right is exercised the editor or publisher must comply with it whether or not the counter-statement or explanation is true or whether there are omissions in the statement. A refusal to publish a counter-statement or reply is a criminal offence unless the counter-statement does not comply with the statutory requirements and limitations as to its format and contents (which are mainly formal matters). The counter-statement must in France be published within three days of receipt by the Managing Editor, or in the number which next appears after the Managing Editor has received the letter requiring the counter-statement to be published. Publication of a counter-statement in compliance with the provisions of the Press Law does not, however, deprive the plaintiff of his right to sue for damages."

The merits of the remedy are the following (Burchell *op cit* 313):

(a) It may lead to a reduction in the number of court cases, or at least in the time spent on cases.

(b) It is "an inexpensive and expeditious way of correcting statements". A tailor-made response can be put directly to those who heard or read the first communication so as to negative some of the damage caused (McDonald *op cit* 234).

(c) It is particularly suitable to statements of opinion, but can also serve to correct false factual assertions.

Some negative features are:

(a) It is not suitable as a general remedy and is limited to actions involving newspapers or other mass media (*loc cit*).

(b) It may result in defendants being forced to publish replies which are unwarranted (Faulks Committee Report *op cit* par 623).

(c) Since the reply may often contain only the defamed person's perspective (McDonald *op cit* 235), it may lead to a debate as to who is correct. The dispute may thus be exacerbated.

(d) It is unlikely that the same audience will be reached (McDonald *op cit* 234) and therefore a reply is not a complete remedy.

Although it is true that a "generously shaped right of reply" may counterbalance the enormous "suggestive influence of the mass media" (*Encyclopaedia of comparative law op cit* par 8 201), a right to reply is not, in essence, a remedy aimed at eliminating the delict which has been committed. The original delict still stands, except that once the reply is made, it is no longer uncontradicted. It alerts the public to a dispute, but the right which has been infringed is not restored. As McDonald *op cit* 234 states:

> "Since a right of reply merely facilitates an attempt by a victim to limit the amount of damage done by certain publications, and would not be able to redress the

damage caused – since no admission of wrong by the publisher is involved – it could not in any circumstances constitute an exclusive defamation remedy, and will have to operate at the victim's option, with some other remedy."

It is therefore suggested that a reply, or an offer thereof, should not be introduced as a defence under the *actio iniuriarum*. However, there is no reason why it should not be considered a mitigating factor in assessing damages, nor, as is suggested in the case of apology and retraction, why courts should not be able to order that a reply be published.

The position in criminal law

It is suggested that the above-mentioned approach would not necessitate any changes in the field of criminal law. The position would be different, however, were apology, retraction and the right to reply to be accepted as defences to an action.

Conclusion

It is unlikely that the courts will develop our law by reintroducing concepts similar to the now defunct *amende honorable*, nor can courts order a defendant to give the plaintiff an opportunity to reply. Even though awards for damages in South Africa have not reached staggering proportions, in principle and in practice the reasons for granting courts the power to direct a defendant to retract and apologise, or to grant a plaintiff an opportunity to reply, are sound. It is therefore suggested that Parliament intervenes by enacting a short act containing the following two clauses:

"1 In any instance where a delictual claim has been brought in terms of the *actio iniuriarum*, a court may, irrespective of whether an award of damages is made, order a defendant to retract and apologise, or to grant the plaintiff an opportunity to reply, in such terms and on such conditions as it may deem fit.

2 Notwithstanding the provisions of section 1, a retraction and apology, or an offer thereof, and a defendant's offer to grant the plaintiff an opportunity to reply, may serve as mitigating factors in respect of any award of damages."

A more detailed provision, similar to the Canadian provision quoted above, is considered to be too restrictive. Courts should be given the flexibility to determine which cases are suitable for particular remedies.

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JUVENILE JUSTICE AND CONSTITUTIONALISM

There is widespread and increased concern among South Africans about the growing number of children who are facing the criminal justice system each year. As the human rights ethos pervades the country, so too does the degree of

indignation at the statistics of children in prison awaiting trial or serving sentences. We are, however, a society that is ambivalent about our children. Although we recognise that most of our juvenile offenders are the victims of hunger and poverty perpetuated by the apartheid regime, we nevertheless strongly believe that they must be held accountable for their crimes. This ambivalence is reflected in the present state of our law. We do not have a system of juvenile justice and our children who find themselves in trouble with the law are dealt with in terms of either the Child Care Act 74 of 1983 or the Criminal Procedure Act 51 of 1977. This note examines the impact of the Constitution of the Republic of South Africa Act 200 of 1993 on the current position on juvenile justice.

The Child Care Act (s 5, 6, 7) provides for the establishment of children's courts. The procedure (s 58) followed in these courts embodies the principles of socialisation of the law (see Faust and Brantingham (eds) *Juvenile justice philosophy* (1976); Van Waters *The socialisation of the juvenile court procedure* 189). This concept envisages the court as one of guardianship and not as a penal court. Nothing that the child says can incriminate him because the very object of the court is his welfare. Socialisation necessitates that judges and court officials have to be experts with legal training as well as specialist training in human relations. The concept of "punitive justice" is totally removed. Symbolically, "punitive justice" is portrayed as a woman blindfolded, holding in her hands the scales of justice. Socialisation demands that the blindfold be removed and that the parties are seen as human beings and their strengths and weaknesses recognised. It proposes a programme where the child is treated, not as a criminal legally charged with a crime, but as a ward of the state, to receive the care, custody and discipline that ought to have been administered by his parents. The provisions of the Child Care Act fall almost squarely within the parameters of the concept of socialisation.

The South African reality, however, is that very few juvenile offenders are dealt with in terms of the Child Care Act. It is trite that most children are treated as "miniature versions of adult offenders" (Skelton *Children in trouble with the law* (1993) 3). Children can be held for long periods of time in prison awaiting trial, are sentenced to imprisonment and whipping and in fact, "children are often treated as adults or even worse than adults in both the juvenile and children's court systems" (*Justice for the children* – an independent report by the Children's Rights Research and Advocacy Project CLE, University of Western Cape (1992) 16). This inequitable system can be attributed to the fact that most children are dealt with in terms of the Criminal Procedure Act. Section 254 of the act provides that a court may refer the juvenile accused to the children's court if it appears to the court at trial upon any charge of any accused under the age of eighteen years that such accused is a child as referred to in section 14(4) of the Child Care Act, and if it is desirable to deal with him in terms of that act, it may stop the trial and order the accused to be brought before a children's court. Thus if the court in its discretion decides that the child should not be transferred to the welfare system through a children's court inquiry but is criminally culpable and should be tried as an adult, the child remains within the criminal justice system.

It is against this background that the provisions of section 30(2) of the Constitution must be read. This section provides that every child who is in detention shall, in addition to the rights which he or she has in terms of section 25, have the right to be detained under conditions and to be treated in a manner that takes account of his or her age. Section 25 makes reference to the rights of detained, arrested and accused persons generally and includes, *inter alia*:

(a) the right to be informed promptly in a language that he or she understands of the reasons for his or her detention;

(b) to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate nutrition, reading material and medical treatment at state expense;

(c) the right to be given the opportunity to communicate with, and be visited by, his or her next of kin;

(d) the right to a public trial within a reasonable time; and

(e) the right to legal representation.

In the United States of America the constitutionalist viewpoint presents a serious challenge to the philosophy of the socialised juvenile court (Faust and Brantingham 356; see also Houlgate *The child and the state* (1980) 15). In *In Re Gault* 387 US 1 (1967) the Supreme Court held that a juvenile is entitled to at least some of the procedural protection accorded to adults accused of crimes because "neither the 14th Amendment nor the Bill of Rights is for adults alone". The constitutionalist argument infers that the socialised juvenile court denies children legal rights in exchange for hypothetical benefits of dubious value and denounces the socialised juvenile court in that it fails to recognise the due process of law. One of the primary areas of attack is the informality with which the socialised juvenile court conducts itself. Informality often breeds abuse. This flaw is directly linked to the constitutional argument that the juvenile is entitled to legal representation. It is, however, argued that lawyers would bring a formality to the juvenile court proceedings that will defeat its therapeutic aims. On the other hand, children deserve more protection than adults from intervention in their lives, not less. Although the Child Care Act and the Criminal Procedure Act purport to reflect the fact that children are more physically and emotionally vulnerable than adults and should therefore be treated with greater care and with special assistance to meet their needs, in reality neither act has been effective in protecting the

> "children from unnecessary removal from their homes, detention in adult prisons and police cells, police harassment and abuse, and mental, physical and psychological torture at the hands of these court systems" (*Justice for the children* 16).

The Constitution aims at eliminating these inequities that currently exist in our legal system. It has become evident that children's rights are high on the agenda of the present regime and the rights entrenched in the Constitution will clearly map out the path that the juvenile justice system will follow. (At a Day of the Child Celebration (1994-06-16) President Mandela committed himself to the

establishment of a trust fund to promote the interests of street children and children in prison.) Skelton proposes a radical change from the "existing one that has failed so miserably to deal with children in trouble with the law" ("Raising ideas for the creation of a juvenile justice system for South Africa" – paper presented at the *Children in trouble with the law* conference held at the University of Western Cape (October 1993) 1).

The shift from parliamentary sovereignty to constitutional supremacy is one which most human rights activists welcome. It is, however, one that comes with the threat of a rigidity and formality in court procedures that due process and a strict adherence to the provisions of the Constitution demands. The consequences of the implementation of these provisions would be that the socialised children's court as envisaged by the Child Care Act would be stripped of its flexibility and informality and be bound by strict rules of evidence and procedure.

The provisions of section 30(2) read with section 25 must, however, be seen against the background of the abuse of children's rights by the apartheid regime. Black children have for decades been traumatised by the laws of the country. As the struggle against apartheid intensified, the children became victims of the criminal justice system where they were detained in the most appalling conditions and often disappeared while in detention. While the struggle against apartheid may be over, South African children are still the victims of an inadequate criminal justice system.

The socio-economic situation in our country has led to the creation of bands of street children homeless and abandoned in the large cities who have to provide for themselves. Children who find themselves victims of the law charged with petty offences are often detained in prison pending their removal to places of safety as envisaged in the Child Care Act. The shortage of space at these institutions means that children found guilty by the criminal court are often imprisoned in adult correctional facilities. Psychologists and criminologists have spoken out about the enormous potential harm to young persons held in adult prisons. Neither the youth nor society is served by the irreparable harm suffered by youth held in these institutions. There is a real risk of physical danger, the risks of being coerced into homosexual behaviour and the likelihood of the young offenders adopting the codes of behaviour prevalent in such places. The United Nations Convention on the Rights of the Child provides in article 37(3) that "every child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so".

The John Howard Society of Ontario describes the admission of young people into adult institutions as being absolutely abhorrent and unnecessary. It quotes a penitentiary inmate as stating:

> "Terrible crimes will always shock us, but the truth of youth in prison would shock us more than the most terrible of crimes. Young people know what it is to die each day in prison. How would a child with an unformed body and underdeveloped mind know better? No society should allow its children to be raped, tortured and murdered as punishment" (Report of the John Howard Society of Ontario "Taking kids into adult prisons" 1990 *Can J of Fam L* 31).

In South Africa thousands of children are presently being held in prison cells pending trial. This callous and inhumane treatment of children must be stopped. If we continue to respond to the escalating violence in this manner, the youth will continue to react with violence. We are only perpetuating this vicious circle of crime and revenge. It is totally unacceptable that our children should be incarcerated together with adults. It is imperative that the Ministry of Justice urgently commissions an enquiry into the present state of juvenile justice in our country and in particular the effectiveness of alternatives to incarceration. Skelton 9 proposes a number of sentencing options, *inter alia*:

(a) the postponement of sentence which may be unconditional or conditional;

(b) community service, victim offender mediation and juvenile school;

(c) correctional supervision; and

(d) placement under the supervision of the probation officer.

The Swedish system, although it too does not have a separate juvenile justice, offers similar sentencing options. Whilst imprisonment is retained as an option it "should be served in a form which is especially adapted to juveniles" (Report of the Swedish Committee on Juvenile Delinquency (1993) 16). The Swedish penal system rests on the notion that imprisonment, as the most severe sentence, may only be used as a last resort. The court is bound to consider circumstances which imply the choice of a more lenient sanction (see Lindelöf "Juvenile justice" – paper presented at the *Children in trouble with the law* conference).

Section 290 of the Criminal Procedure Act makes provision for any court dealing with the sentencing of a juvenile to impose a punishment of whipping. This provision is totally anachronistic and out of line with most modern legal systems where whipping is totally abolished. In the Zimbabwean case of *R v F* 1989 1 SA 460 (Z) the court expressed outrage at the whipping of a boy aged ten. The judge, on review, found that the proceedings greatly offended his sense of justice and was distressed that the administration of justice was unable at any stage to protect the child and consciously perpetrated this grave injustice (460J). In *S v A Juvenile* 1990 4 SA 151 (ZSC) the Zimbabwean Supreme Court held that the sentence of whipping on juvenile offenders was unconstitutional as being an inhuman and degrading punishment in terms of section 15(1) of the Constitution. It is submitted that the interpretation of section 10 of the South African Constitution guaranteeing that every person shall have the right to respect for and protection of his or her dignity, will effectively remove whipping as a sentencing option.

The need to observe constitutional rights in the juvenile court does not necessarily imply conflict with the court's protective philosophy. One solution is that proposed in 1968 by the National Conference of Commissioners on Uniform State Laws (The Uniform Law Commissioners' Model Juvenile Court Act 1968) in the United States. The conference proposed and effected the establishment of two separate stages in juvenile court proceedings. The first stage, adjudication, would include all the elements of procedural due process with a requirement of proof beyond a reasonable doubt. Formally, the hearing is not to enquire or determine the child's innocence or guilt but to establish his status as either

delinquent or non-delinquent. Although the juvenile court partially relaxes the usual rules of evidence, these hearings afford many procedural safeguards. The complainant, generally a police officer, acts as prosecutor, presenting the case with the help of witnesses. Defence counsel may cross-examine all witnesses and where there is no counsel the child or his parents may clarify the complainant's evidence. The child's lawyer will then present the defence with the help of witnesses. The judge may question witnesses at any time; it is court policy, however, not to question children who refuse to testify about the alleged offence.

Only once a finding of "delinquent" has been made, does the court begin to function as a social agency now operating with a different set of rules and purposes. The judge then decides on disposition, a decision that will require him to balance or evaluate conflicting claims of treatment, enforcement of the law and community standards and prevention of possible future serious offences. In this he relies heavily on the probation officer's report, which is derived from the initial interview and outlines briefly the delinquent's background, general behaviour, family situation and school record. A lawyer will also be permitted to make an argument on disposition. Probation and commitment constitute the two main disposition alternatives. A programme of probation requires the child to be supervised by the probation officer and it may include the child's attending recreation-education programmes run by the court. The other alternative is that of commitment. This is the most drastic option open to the court. The court has statutory power to commit children found delinquent to the Youth Correction Authority which then reviews the case and assigns it to the most appropriate institution. Amidst this setting the juvenile court suggests an inherent dualism between legal and social models of that institution.

The court may also decide to treat the accused youth as a "juvenile offender". Where the child is over 14 and the court is of the opinion that his welfare, and the interests of the public, require that he should be tried for the said offence the court may dismiss the delinquency complainant and criminal proceedings may be initiated. In practice this option is invoked very infrequently as judges are reluctant to use it unless the crime is an extremely vicious one. In Canada, judicial officers sentencing a youth for murder were faced with the option of a maximum sentence of 3 years under the Young Offender Act and a maximum sentence of life imprisonment with parole eligibility in ten to twenty-five years under the criminal justice system. This vast disparity between the two systems was reduced with the introduction of Bill C-58. The bill increases the maximum sentence that a youth court may impose for murder to 5 years less a day, with the last two years being served on constitutional supervision in the community. The bill stipulates that the protection of the public shall be paramount when the court decides to transfer; a juvenile convicted of murder in an adult court may receive a life sentence but will be eligible for parole in 5 to 10 years (Bala "Dealing with violent young offenders: transfer to adult court and Bill C-58" 1990 *Can J of Fam L* 11).

Reform legislation would aim to avoid the situation in Canada where the Young Offenders Act was perceived as being "too soft" on the juvenile. If this

happens then the *status quo* will be maintained and this will be intolerable in a future South Africa.

South Africa's unique and tragic past demands that the socialised juvenile court must be tempered with constitutional principles ensuring due process of law and legal representation for the accused. Reform legislation must aim to strike a balance between these two schools of thought and must be sensitive to the peculiar historical imbalances in our country and the impact that this has had on the majority of the youth who, through no fault of their own, have suffered the rigours of poverty and unemployment and have been deprived of a sound education. At eighteen many of them have been self-supporting since tender years and have had their childhood denied them by the repressive apartheid regime. This has bred anger and discord in many a juvenile and society must recognise its obligation to these children of apartheid.

The solution to the legal problems may lie in reform legislation but there have to be fundamental societal changes brought about in a holistic manner. Many more places of safety or shelters need to be set up for these children so that they may be nurtured and feel wanted and loved and not be forced into adult correctional institutions for want of space. The legal process cannot be seen in isolation here and provision must be made for the child, his parents, the social worker, the public defender, the prosecutor and the magistrate to work as a team with a common goal which is and must always be *the welfare of the child.*

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SPANNINGSVELD TUSSEN DIE PSIGO-KULTURELE EN DIE JURIDIESE: OPMERKINGE OOR DIE VERMOëNSREGTELIKE GEVOLGE VAN GEMEENREGTELIKE HUWELIKE TUSSEN SWARTES

1 Inleiding

In 'n redelik onlangse publikasie verwys Van Wyk, hoofsaaklik met beroep op die Duitse juris Peter Häberle, na die (idealiter?) breëre kultuurbasis van die staatsreg ("Kultuur, staat, reg – kultuurstaatsreg?" 1991 *Stell LR* 180). Wat in die algemeen duidelik blyk, is dat sinvolle reg, wat self 'n kultuurmoment is, kultuursinchroniserend moet wees. Regsverandering, in 'n substansiële sin, kan slegs sinvol geskied as dit voorafgegaan word of gepaard gaan met toepaslike kultuurveranderinge. Deur die reg te verander, verander die toepaslike kultuurbasis daarvan nie noodwendig nie (sien hieroor Seidman "Law and development: a general model" 1972 *Law and Society R* 311; Seidman "The communication of law

and the process of development" 1972 *Wisconsin LR* 686; Trubek en Galanter "Law and society" 1974 *Wisconsin LR* 1062; Labuschagne "Regsakkulturasie en wetsuitleg" 1985 *THRHR* 67). Sinvolle regsverandering moet myns insiens ook binne die trefkrag van die betrokke onderdane se (psigiese) konsepsie- en beleweniswêreld, wat 'n kulturele of waarde-onderbou het, val. Daarom is daar in die opskrif van die onderhawige aantekening na die "psigo-kulturele" verwys.

Verskeie skrywers het al daarop gewys dat baie swartes gemeenregtelike huwelike sluit sonder om werklik die gevolge daarvan te besef en te aanvaar (Dlamini "The new marriage legislation affecting Blacks in South Africa" 1989 *TSAR* 415; Dlamini "The modern legal significance of ilobolo in Zulu society" 1984 *De Jure* 148; Peart "Civil or Christian marriage and customary unions: the legal position of the 'discarded' spouse and children" 1983 *CILSA* 39; sien ook tav Nigerië, Achike "Problems of creation and dissolution of customary marriages in Nigeria" in Roberts (red) *Law and the family in Africa* (1977) 145).

In hierdie aantekening word aspekte van die problematiek in dié verband met verwysing na die vermoënsregtelike gevolge van gemeenregtelike huwelike deur swartes gesluit, aan die orde gestel. Die effek van 'n lobolo-ooreenkoms wat saam met 'n gemeenregtelike huwelik gesluit word, is reeds by 'n ander geleentheid onder die loep geneem en word nie weer hier bespreek nie (Labuschagne "Regsakkulturasie, die lobolo-kontrak en 'n gemeenregtelike huwelik" 1985 *Speculum Juris* 12).

2 Huweliksspluralisme in Suid-Afrika

In Suid-Afrika, soos in die res van Afrika, word die huweliksreg gekenmerk deur 'n pluralistiese aard (Bennett en Peart "The dualism of marriage laws in Africa" 1983 *Acta Juridica* 145). Daar word veral twee huweliksvorme aangetref, naamlik die inheemse gewoonteregtelike huwelik en die Westers-Christelike of gemeenregtelike huwelik. Die grondonderskeid tussen dié twee huweliksvorme is dat eersgenoemde vir poliginie voorsiening maak terwyl laasgenoemde streng monogamies van aard is. Die Suid-Afrikaanse howe het van die staanspoor af geweier om potensiëel-poligamiese huwelike te erken (*Ebrahim v Essop* 1905 TS 59 61; *Nalane v R* 1907 TS 407 408–409); *Seedats Executors v The Master (Natal)* 1917 AD 302 308–309; *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo* 1960 2 SA 467 (A) 473). So verklaar appèlregter Trengove in *Ismail v Ismail* 1983 1 SA 1006 (A) 1624:

> "Under our law a marriage is regarded as polygamous if it is celebrated under tenets which allow the husband to take another wife during its subsistence, whether he does so or not. A potentially polygamous union is equated with a *de facto* polygamous union."

(Vir 'n bespreking van en kritiek op dié saak sien Kerr "Back to the problems of a hundred or more years ago: public policy concerning contracts relating to marriages that are potentially or actually polygamous" 1984 *SALJ* 445.) Daar is egter twee teenstrydighede verbonde aan dié houding van die landshowe: Eerstens het die wetgewer en die howe self sekere gevolge van die inheemse huwelik erken (Labuschagne "Erkenning van die inheemse huwelik" 1991 *THRHR* 843; Peterson "Is there still a difference between a common-law marriage and a customary union?" 1992 *SALJ* 18). Erkenning van die gevolge van 'n regshandeling beteken

onvermydelik die erkenning van die regshandeling self, selfs al sou dit slegs vir 'n beperkte doel wees. Tweedens het die howe wat spesifiek daargestel is vir (onder andere) die toepassing van die inheemse reg, die inheemse huwelik as sodanig van die staanspoor af erken (Olivier *et al Die privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) 9).

3 Die posisie voor 1 Januarie 1929

3 1 Kaapprovinsie en Transkei

In die Kaap het geen spesiale reëlings gegeld vir huwelike deur swartes gesluit nie. Die Order-in-Council van 1838 was op alle onderdane van toepassing. Met die anneksasie van die Transkeise gebiede is dit ook daar van toepassing gemaak. Op 19 Oktober 1910 het Proklamasie 142 van 1910 in die Transkei in werking getree (Olivier *et al* 224; Bekker *Seymour's customary law in Southern Africa* (1989) 248–249). Hierdie proklamasie was analogies aan en kan beskou word as die voorloper van artikel 22(6) van die Swart Administrasie Wet 38 van 1927, wat hieronder bespreek word (sien *Pakkies v Pakkies* 1921 CPD 508; *Tonjeni v Tonjeni* 1936 NAC (C and O) 96 98).

3 2 Oranje Vrystaat

In die OVS het Wet 69 van 1899 die totstandkoming en gevolge van huwelike gereël. Geen afsonderlike wetgewing het ten opsigte van swartes gegeld nie (Olivier *et al* 224).

3 3 Transvaal

Artikel 25 Wet 3 van 1871 het dié wet, wat die statutêre grondslag van die huweliksreg in die Transvaal gevorm het, slegs op blankes van toepassing gemaak en 'n afsonderlike reëling vir "kleurlingen" in die vooruitsig gestel. Wet 3 van 1897, wat kragtens artikel 19 op 1 Januarie 1898 in werking getree het, het dan ook daarvoor voorsiening gemaak. Artikel 2 is die kernartikel en bepaal soos volg:

> "Iedere kleurling, die als boven een huwelijk wenscht aan te gaan, moet zich met een daartoe strekkend verzoek wenden tot een door de Regeering daartoe aan te stellen persoon of personen. Hij moet daarbij overleggen een certificaat van hunne ouders, of waar geen ouders in leven zijn, van hunne voogden, of van zijn Kapitein of ander Naturellenhoofd dat volgens wet tegen het voorgenomen huwelijk geen bezwaar bestaat, of indien zij christenen zijn, van den leeraar hunner kerk.
>
> Kleurlingen, komende van buiten de grenzen van dezen Staat en wenschende alhier in het huwelijk te treden, zullen ten genoege van bovengemelden persoon door een certificaat of door voldoende getuigenis moeten aantoonen dat volgens wet tegen het voorgenomen huwelijk geen beswaar bestaat."

Kragtens artikel 15 geld die bepalings van Wet 3 van 1871 waar dié wet geen voorsiening maak nie (Olivier *et al* 224–225; Bekker 249).

3 4 Natal

Wet 46 van 1887 is spesifiek verorden om huwelike te reguleer wat swartes volgens die Christelike godsdiens sluit. Indien een of albei partye aan die inheemse gewoontereg onderworpe was, kon 'n Christelike huwelik slegs gesluit word na die uitreiking van 'n lisensie (a 7 en 8).

Artikel 11 lui soos volg:

> "No marriage between Natives solemnised under this Law shall, when the male Native is subject to the Native Law in force in this Colony in anywise, except as is in this Law provided, remove either of the parties to such marriage from the operation of such Native Law, either in their persons or their property."

(Vgl hieroor *Mvelase v Mbhele* 1946 NAC (N and T) 94; *Xakaxa v Mkize* 1947 NAC (N and T) 85 86; *Matshali v Gwala* 1960 1 SA 597 (A) 600.)

Indien albei partye van die inheemse gewoontereg vrygestel was, kon hulle kragtens Ordonnansie 17 van 1846 burgerlike en kerklike huwelike soos blankes sluit. In *R v Saul* 1927 NLR 75 was S van die werking van die inheemse gewoontereg (kragtens Wet 28 van 1865) vrygestel. Hy het 'n Christelike (kerklike) huwelik met 'n nie-vrygestelde vrou gesluit. Daarna, staande dié huwelik, het hy 'n huwelik volgens die inheemse gewoontereg met 'n ander vrou gesluit. Die hof beslis dat laasgenoemde huwelik nietig is en dat S skuldig is aan statutêre bigamie (oortreding van a 13 Wet 46 van 1887).

Kragtens artikel 1 Wet 46 van 1887 kon 'n burgerlike huwelik nie gesluit word indien nóg die man nóg die vrou van die inheemse gewoontereg vrygestel is nie. Hulle kon wel 'n Christelike (kerklike) huwelik sluit, soos hierbo bespreek (sien verder *Mtunzi v Tshabalala* 1933 NAC (N and T) 1 2; *Ngcobo v Masango* 1936 NAC (N and T) 26; *Dhlamini v Dhlamini* 1953 NAC (N-E) 266 267). Die regsposisie soos in Natal van krag is mettertyd na Zoeloeland uitgebrei (*Daniël v Hester* 1910 NHC 119 120–121; *Ntuli v Mhlongo* 1936 NAC (N and T) 55 61).

4 Die posisie vanaf 1 Januarie 1929 tot 2 Desember 1988

Die Swart Administrasie Wet 38 van 1927 het op 1 Januarie 1929 in werking getree. Artikel 22(1) bepaal dat indien 'n swartman, solank 'n inheemsregtelike huwelik tussen hom en 'n vrou bestaan, 'n gemeenregtelike huwelik met 'n ander vrou wil aangaan, hy eers onder eed voor die magistraat of kommissaris van die distrik waarin hy gedomisilieerd is, moet aangee die naam van elke sodanige vrou en kind uit so 'n inheemse huwelik (gebruiklike verbinding) gebore en die soort en hoeveelheid goedere waarmee hy elke sodanige vrou of huis volgens inheemse reg bedeel het asook ander inligting wat van hom verlang word. Kragtens artikel 22(3) moet 'n sertifikaat te dien effekte aan die huweliksbevestiger voorgelê word (Olivier *et al* 225–226). In *Ndhlovu v Ndhlovu* 1937 NAC (N and T) 80 83 het die hof beslis dat nie-nakoming van artikel 22(1) die gemeenregtelike huwelik *ab initio* nietig maak. Byna 40 jaar later het die hof in *Malaza v Mndaweni* 1975 ACCC (C) 45 58 tot 'n teenoorgestelde konklusie gekom en soos volg verklaar:

> "The conclusion seems inescapable that, where there has been non-compliance with section 22(1) of Act 38 of 1927, the legislature intended merely to punish the husband of the civil marriage, and to leave the validity of the marriage unaffected."

(Sien ook Peart 1983 *CILSA* 56–57; *Mutandaba v Morenwa* 1971 NAC (N-E) 326; Olivier *et al* 227.)

Artikel 22(6) is die volgende artikel van belang. Hierdie artikel bepaal dat 'n (gemeenregtelike) huwelik tussen swartes, as uitgangspunt, nie in gemeenskap van goedere is nie. Die partye kan egter, in gevalle waar die man nie

inheemsregtelik met 'n ander vrou getroud is nie, binne een maand voor die bevestiging van die huwelik gesamentlik voor 'n magistraat, kommissaris of huweliksbevestiger verklaar dat hulle begeer om in gemeenskap van goedere en van wins en verlies te trou. In sodanige geval sal die huwelik in gemeenskap van goed en van wins en verlies wees. Grond wat in erfpag in 'n lokasie gehou word, is egter van die gemeenskap uitgesluit. Die maritale mag van die man geld maar kan deur 'n huweliksvoorwaardeskontrak uitgesluit word, behalwe in daardie gevalle waar die man in 'n voorafgaande inheemse huwelik met 'n ander vrou gestaan het (Olivier *et al* 265; Bennett *The application of customary law in Southern Africa* (1985) 156). Die regsgevolge van gemeenskap van goed en van wins en verlies is dieselfde as vir nie-swartes en word nie deur die inheemse reg beheer nie (*Ex parte Minister of Native Affairs: In re Molefe v Molefe* 1946 AD 315 320; *Mpushu v Mjolo* 1976 3 SA 606 (O) 608; *Sikenkelane v Ngcukana* 1947 NAC (C and O) 9 12; *Rabotapi v Nkonyane* 1946 NAC (N and T) 72 74; *Mobiletsa v Mobiletsa* 1946 NAC (N and T) 84 85; *Malunga v Zilwana* 1947 NAC (N and T) 64; *Kotole v Kotole* 1953 NAC (C) 123 124; *Khumalo v Khoza* 1982 ACCC (C) 120 124).

Artikel 22(7) bepaal dat indien 'n man 'n gemeenregtelike huwelik sluit en 'n vrou uit 'n voorafgaande inheemse huwelik daardeur agtergelaat word, dit geen invloed op die materiële regte van so 'n agtergeblewe vrou of haar kinders het nie. Verder het 'n weduwee van so 'n gemeenregtelike huwelik en haar kinders nie groter regte teenoor die boedel van die oorlede eggenoot as wat hulle sou gehad het as genoemde (gemeenregtelike) huwelik 'n inheemse huwelik (gebruiklike verbinding) was nie. Hierdie subartikel beskerm die vrou en kinders uit 'n voorafgaande inheemse huwelik gedurende die bestaan van die latere gemeenregtelike huwelik asook na die dood van die eggenoot (Olivier *et al* 251).

In *Nkambula v Linda* 1949 NAC (N-E) 60 het verweerder se dogter Lena 'n inheemse huwelik met eiser gesluit en lobolo is gelewer. Eiser sluit vervolgens 'n gemeenregtelike huwelik met 'n ander vrou. 'n Jaar later verlaat Lena die eiser waarop hy eis dat sy na hom moet terugkeer of dat die lobolo teruggelewer word. Die ou Naturelle-appèlhof beslis dat die inheemse huwelik nie deur die latere gemeenregtelike huwelik ontbind is nie en verduidelik (61):

> "Lena married respondent by lobolo (Native) custom, which recognises the right of her husband to contract marriage unions with other women. The fact that he married another woman subsequently under Common Law does not in any way affect Lena's rights or privileges which are specially protected as stated above.
>
> Being a tribally minded individual (*vide* her marriage by Native Custom) it cannot matter to her morally under what conditions her husband contracted the second marriage – he has merely acquired a second wife. Such second marriage cannot affect her in the least merely because it was not a customary union."

Die hof beslis verder dat die begrip "materiële regte" die reg tot kohabitasie met haar man insluit. Dié saak het uiteindelik die Appèlafdeling van die Hooggeregshof bereik (*Nkambula v Linda* 1951 1 SA 377 (A)). Die appèlhof beslis egter dat die man deur die sluit van 'n gemeenregtelike huwelik beskou moet word sy vrou uit die inheemse huwelik te verlaat het en dat laasgenoemde vrou geregtig is om sy woning of kraal te verlaat sonder dat haar vader of voog verplig is om

die lobolo terug te lewer (384). Appèlregter Fagan verduidelik in dié verband soos volg (382):

> "[T]he 'material rights' of the woman and the issue of the customary union are preserved and safeguarded, but in other respects the Act does not contemplate the existence side by side of a civil marriage and a customary union.
>
> Such co-existence is entirely repugnant to our idea of a civil marriage. By ordering Lena's father to return her to the respondent, and penalising him if she does not return, the Court would be telling her father to send her to a life of adultery. I need surely not stress the impropriety of such an order."

'n Gemeenregtelike huwelik ontbind 'n bestaande inheemse huwelik outomaties en die ontbindingsprosedure neergelê deur artikel 78(2) van die Natal en KwaZulu Wetboeke van Zoeloereg hoef nie gevolg te word nie (*Kumalo v Kumalo* 1954 NAC (S) 54 57–58). Olivier *et al* voer aan dat dit onseker is hoe die beskerming van "materiële regte" in artikel 22(7) genoem, moet plaasvind. In die inheemse reg word onderskei tussen kraaleiendom en huiseiendom. Huiseiendom behoort aan die huis en kraaleiendom aan die kraalhoof (of breëre kraalgemeenskap). 'n Mens sou kon argumenteer dat die man (kraalhoof) die kraaleiendom in die gemeenregtelike huwelik sou kon saamneem. Die probleem is egter dat die kraaleiendom volgens die inheemse reg ter beskikking van 'n huis gestel moet word indien dit nodig mag wees vir die onderhoud van lede van die huis (Olivier *et al* 251–252). Volgens Olivier *et al* is die volgende alternatiewe binne tradisionele konteks moontlik (253–254): (i) Die huis van die agtergeblewe vrou uit 'n inheemse huwelik kan bly voortbestaan in die kraal soos wanneer die man oorlede is. Kinders sou ook by haar verwek kon word kragtens die *ukungena*–gebruik. As haar voormalige man egter met haar geslagsomgang het, sou die gemeenregtelike vrou haar vir owerspel kon aanspreek (Peart 1983 *CILSA* 44 vn 28). In dié geval bly die tradisionele verhouding tussen die families voortbestaan. Dit wil voorkom of die enigste verskil in dié geval met 'n tradisionele poliginiese opset is dat die man nie regtens meer met die agtergeblewe vrou geslagsomgang mag hê nie. (ii) Die tweede alternatief is dat die verhouding tussen die twee families ook verbreek word en die agtergeblewe vrou na haar familie terugkeer. Sy sou dan ook weer in 'n huwelik gegee kon word. (iii) Derdens sou die huis van die agtergeblewe vrou selfstandig as 'n vermoënseenheid kon voortbestaan en sou sy haar vervolgens teen albei families handhaaf. Sy sou ook by haar oudste seun kon gaan bly indien hy reeds meerderjarig is.

Wat egter duidelik blyk, is dat die man die vermoë van die agtergeblewe vrou se huis ooreenkomstig die inheemse reg moet bestuur (*Kopman v Nohakisa* 3 NAC 228 (Tsolo) 230).

Boonzaaier, wat navorsing oor die Nkuna van Ritavi gedoen het, wys daarop dat die kraalhoof saam met elke vrou in 'n poliginiese huishouding 'n afsonderlike vermoënseenheid vorm. Tydens die kraalhoof se leeftyd word egter nie 'n duidelike onderskeid tussen die verskillende vermoënseenhede gemaak nie. Alle goedere wat deur 'n kraallid verkry word, word in 'n gesamentlike boedel opgeneem wat onder beheer van die kraalhoof staan (*Die familie-, erf- en opvolgingsreg van die Nkuna van Ritavi, met verwysing na ander aspekte van die privaatreg* (DPhil-proefskrif UP 1990) 271). Uit die navorsing van Hartman

blyk dat dit ook die posisie by die Changana-Tsonga van Mhala is (*Die samehang in die privaatreg van die Changana-Tsonga van Mhala, met verwysing na die administratiefregtelike en prosesregtelike funksionering* (DPhil-proefskrif UP 1978) 351). Die navorsing van Boonzaaier en Hartman bevestig die standpunt wat die howe vroeër oor die Changana-Tsonga ingeneem het (*Maganu v Maganu* 1938 NAC (N & T) 14; Peart 1983 *CILSA* 58). Wat duidelik blyk, is dat bogenoemde moontlikhede deur Olivier *et al* geopper nie op die Changana-Tsonga van toepassing kan wees nie, aangesien daar gedurende die leeftyd van die man nie werklik sprake van huisvermoëns is nie. Die agtergeblewe inheemse "huweliksgenoot" en die gemeenregtelike vrou asook hulle kinders moet uit dieselfde boedel onderhou word. Trouens, die begrippe in en buite gemeenskap van goedere en van wins en verlies kan in die lig van artikel 22(7) nie sinvol op die gemeenregtelike huwelik van toepassing gemaak word nie.

In *Kumalo v Jonas* 1982 ACCC (S) 111 was A en B volgens die inheemse reg getroud. B pleeg owerspel met C. A en B sluit daarna 'n gemeenregtelike huwelik. A eis van C genoegdoening weens die owerspel. Die hof beslis dat die latere gemeenregtelike huwelik nie die voorafgaande inheemse huwelik as sodanig beëindig het nie en vervolg (116):

> "Ek kom dus tot die gevolgtrekking dat die huwelik in die onderhawige geval miskien die onderlinge verhouding tussen die eggenote geraak het insoverre dit wat die landsreg betref sekere vermoënsregtelike (en miskien ander) gevolge meegebring het, indien dit volgens die gemenereg en die landswette beoordeel word, maar dat dit vanuit die oogpunt van die Swart reg gesien nie die uitwerking gehad het dat dit die huweliksverhouding wat deur die gebruiklike verbinding tot stand gekom het as sodanig beëindig het nie. Dit het allermins die eiser se reg van aksie teen die verweerder vernietig."

Die problematiek verbonde aan huweliksduplikasie is by 'n ander geleentheid onder die loep geneem en die argumente daar aangevoer en die oplossings wat aan die hand gedoen is, word nie hier herhaal nie (Labuschagne "Regspluralisme en huweliksduplikasie in Suid-Afrika" 1993 *De Jure* 171).

Hoewel artikel 22 in 1988 ingrypend gewysig is, is die grootste hoeveelheid gemeenregtelike huwelike nog daarvolgens gesluit en sal dit vir baie jare nog so bly. Die Westersregtelike konsepte van "in gemeenskap van goedere en buite gemeenskap van goedere" is nie aan die tradisionele inheemse reg bekend nie en ook nie aan die tradisionele swartes se konsepsie– en beleweniswêreld nie. Tog het hulle om 'n verskeidenheid van redes gemeenregtelike huwelike gesluit (en sluit dit nog steeds) sonder om die regsgevolge daarvan werklik te begryp. Hulle leef ook nie daarvolgens nie en gaan bloot voort om volgens hulle tradisionele waardes te leef. Die tradisionele regsprekers bereg ook die huweliksgeskille asof dit om inheemse huwelike gaan.

5 Die posisie vanaf 2 Desember 1988

Artikel 22 is gewysig deur die Wysigingswet op Huweliks- en Huweliksgoedereg 3 van 1988. Artikel 22(1) bepaal sedertdien dat 'n inheemse huwelik (gebruiklike verbinding) in 'n gemeenregtelike huwelik omskep kan word. Artikel 22(2) verbied 'n gemeenregtelike huwelik met 'n persoon wat in 'n inheemse huwelik

met 'n ander staan. Kragtens artikel 22(3) bevestig 'n huweliksbevestiger nie 'n huwelik nie tensy hy 'n verklaring afgeneem het tot die effek dat een van die partye nie in 'n inheemse huwelik met 'n ander persoon staan nie. Die nie-nakoming van die voorskrifte en die aflê van valse verklarings is strafbaar (a 22(4)–(5)). Dit wil voorkom of so 'n gemeenregtelike huwelik slegs vernietigbaar en nie nietig is nie (sien Labuschagne "Op die voetspoor van die wetgewingsproses: dwingende en aanwysende bepalings" in Joubert (red) *Petere fontes LC Steyn-gedenkbundel* (1980) 80; Maithufi "Do we have a new type of voidable marriage?" 1992 *THRHR* 628). Blykbaar sal 'n eggenote uit 'n inheemse huwelik of die gemeenregtelike eggenote die reg hê om die huwelik nietig te laat verklaar. Indien dié interpretasie korrek is, sou die probleme wat hierbo bespreek is, nog steeds bestaan. Artikel 22(7) is egter deur Wet 3 van 1988 uitgesluit van huwelike wat gesluit is na die inwerkingtreding van genoemde wet (Olivier *et al* 256). Die aanwasbedeling, soos hieronder genoem, is op laasgenoemde huwelike van toepassing (Dlamini 1989 *TSAR* 413). Artikel 7(3)–(6) van die Wet op Egskeiding 70 van 1979 is ook van toepassing gemaak op huwelike wat buite gemeenskap van goedere deur swartes gesluit is (vgl *Mathabathe v Mathabathe* 1987 3 SA 45 (W); *Milbourn v Milbourn* 1987 3 SA 62 (W); Dlamini 1989 *TSAR* 415).

Die Wet op Huweliksgoedere 88 van 1984 het die aanwasbedeling in Suid-Afrika ingevoer. Die *ratio* vir die aanvaarding van die aanwasbedeling is terugherleibaar tot die beginsel van gelyke behandeling van huweliksgenote, in besonder ten aansien van die vermoë wat na huweliksluiting opgebou word (Van der Vyver en Joubert *Persone- en familiereg* (1991) 562). Die maritale mag van die man is ook in beginsel afgeskaf; dit is reëlreg in stryd met die paternalistiese aard van die inheemse gemeenskapslewe (Peart "The effect of the matrimonial property bill on marriages between blacks" 1982 *SALJ* 79; Olivier "Swartes en die reg" 1984 *De Jure* 317; Bekker 255). As gevolg van die tradisionele ondergeskikte posisie van die vrou in die inheemse gemeenskapsorganisasie val nóg die aanwasbedeling nóg die uitsluiting van die maritale mag binne die waardesisteem en konsepsie- en beleweniswêreld van die tradisionele swarte (sien in die algemeen Bennett "The compatibility of African customary law and human rights" 1991 *Acta Juridica* 25).

6 Konklusie

Uit bogaande bespreking blyk duidelik dat sekere aspekte van die vermoënsregtelike gevolge van gemeenregtelike huwelike in stryd is met die konsepsie- en beleweniswêreld, asook met die gevolglike (kulturele) waardesisteem van tradisioneel-geöriënteerde swartes. Die oplossing vir dié probleme lê myns insiens, soos by 'n vorige geleentheid aangetoon is, in die deregulering van die huwelik (sien Labuschagne "Nietige en vernietigbare huwelike: opmerkinge oor die deregulering van die huwelik" 1989 *TSAR* 370; sien ook Dlamini "The Christian v customary marriage syndrome" 1985 *SALJ* 701). Hiervolgens word erkenning aan die outonomie van die partye gegee. Die lewensomstandighede en kulturele milieu waarin die partye leef, stel faktore daar waaruit die partye se oogmerk met betrekking tot die gevolge van hulle verhouding afgelei kan word. Partye wat volgens die inheemse reg leef en 'n "gemeenregtelike

huwelik" sluit, se huwelik sal hiervolgens ooreenkomstig die betrokke inheemse regstelsel bereg word. Die reg moet met die psigo-kulturele sinchroniseer anders verloor dit sy ordeningswaarde en sy funksionele sinvolheid.

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THE ADVOCATE'S MANDATE AND THE ACCUSED'S RIGHT TO TESTIFY: *R v MATONSI* REVISITED

Section 196(1) of the Criminal Procedure Act 51 of 1977 provides that the accused is competent to testify but cannot be compelled to do so. The statute is silent, however, as to whether the decision to testify or to remain silent inheres in the accused or in his or her legal representative (see Leslie "The right of a represented accused to give evidence; who decides?" 1984 *SACC* 237).

In *R v Matonsi* 1958 2 SA 450 (A) 456C the Appellate Division established the rule in the following terms:

> "Once the client has placed his case in the hands of counsel the latter has complete control and it is he who must decide whether a particular witness, including the client, is to be called or not."

What follows is a summary of what I take to be the salient propositions for which *Matonsi* stands, and its ancillary consequences and implications:

(a) The terms of the relationship between the accused and the advocate are governed by principles derived from the law of mandate (*Matonsi* 456G–H; see also *Ras v Liquor Licensing Board* 1966 2 SA 232 (C)). For purposes of the rule it makes no difference that counsel was not retained but may have been appointed to act *pro deo* on the client's behalf by the court, an independent organisation such as the Legal Aid Board or even by the Attorney-General (*ibid*).

(b) Once an accused has counsel, whether retained or appointed, the latter possesses a mandate to represent him or her that is exclusive, cannot be shared with the client, and is beyond the latter's direction and control (*R v Baartman* 1960 3 SA 535 (A) 537–538). The mandate extends to all decisions involving trial strategy, such as the extent to which adverse witnesses should be cross-examined, evidence objected to, stipulations as to matters of practice, procedure and evidence, which witnesses to call and what evidence to tender on behalf of the accused, and whether to call the accused or not (*S v Bennett* 1994 5 SACR 392 (C) 398–399; *S v Mkhise, S v Masia, S v Jones, S v Le Roux* 1988 2 SA 868 (A) 875C–E; *Pendock v Attorney-General of Natal* 1958 3 SA 875 (A) 879C–D; *Klopper v Van Rensburg* 1920 EDL 239 242).

(c) The client is entitled to withdraw the advocate's mandate, and to continue the conduct of his or her case in person (*Matonsi* 456H). Conversely, the

advocate is entitled to request the court for leave to withdraw from further representation of the client (*S v Assel* 1982 1 SA 125 (A); see also *Matonsi* 457C per Van Blerk AJA).

(d) However, unless the client withdraws the advocate's mandate, or the advocate withdraws from the case, the accused is bound by the decisions that the advocate takes, whether the client approves of them or not, or agrees with them or not, or has been consulted or not (*S v Louw* 1990 3 SA 116 (A); *S v Bennett supra*; but see *S v Majola* 1982 1 SA 125 (A)).

(e) Once the matter has been litigated to finality, and a verdict has been entered, disagreements between the advocate and the client cannot be relitigated (*S v Bennett supra*). The client's objections to the advocate's conduct as regards the case, such as the latter's decision not to call the accused as a witness, do not form adequate grounds for appeal or for any other form of review (*ibid*).

(f) The advocate is not placed under any obligation, legal or ethical, to consult the client on such matters or to obtain his or her consent or approval or to explain the grounds for his choice and decisions (*S v Louw supra*; but see *S v Majola supra*). Failure to do so is neither an irregularity nor does it compromise either the fairness of the trial or the validity of the verdict entered (*S v Bennett supra; S v Louw supra*; but see *S v Majola supra*).

(g) Nor, apparently, is a claim for damages against the advocate, whether for failing to consult with the client, or for failing to follow instructions, cognisable (*S v Bennett supra*; see also Van Dijkhorst "Legal practitioners: Advocates" 14 *LAWSA* par 261).

(h) Finally, the advocate is accountable neither to the client nor to the court for the manner in which he represents the client's interests (Hunt "The ivory tower" 1966 *SALJ* 363), nor are strategic decisions made during the course of the conduct of the defence, open to subsequent investigation.

(i) The rule does not place any risk on the advocate. He or she is under no legal or ethical obligation either to explain to the client that it is not the client's but rather the advocate's right to make the decision whether the client will be called to testify or not; or to explain that if they are not able to reach agreement on this issue, the client has the right to dismiss the advocate by withdrawing his or her mandate (*S v Louw supra*).

(j) The accused is held to a strict standard. The rule makes no allowance for the accused's ignorance of its terms, and permits no exceptions on grounds of lack of knowledge of the remedies available to him or her.

Conclusion

The rule in *Matonsi*'s case reflects a view of the lawyer-client relationship that is at once authoritarian and paternalistic. It is heavily biased in favour of the advocate, and is indifferent to the interests and concerns of the client.

It is incompatible with the most fundamental principle on which a constitutional democracy is based – that the individual has the right to be involved and to make decisions with regard to all matters that affect his or her own interests, whether as citizen, taxpayer, voter or as the accused.

Democracy requires that individuals take their own decisions and accept responsibility for their own affairs, for better or for worse. For them to be able to do so, they must be "empowered" to make their own choices, whether moral, economic, political or legal.

Neither the rule nor its underlying premises are compatible with the logic of democracy. The rule can no longer be justified, and it may even be unconstitutional. It ought to be overruled and should no longer be followed.

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The Constitution does not only deal with lofty ideals and principles. It has many provisions on mundane matters. The transitional arrangements in ss 234–247 are some of them. In respect thereof one would do well to bear in mind that the question to be asked still is, as it has always been: what did the draftsmen have in mind? What does their instruction mean? We may have a new ball game but the goal is still the same, namely to determine the intention of the Legislature. It follows that one must start with the words used. The rules to be applied in case of ambiguity have not evaporated or been abolished. They form part of the law of the land, which has not been abrogated by the Constitution (*per* Van Dijkhorst J in *Kalla v The Master* 1995 1 SA 261 (T) 269).

VONNISSE

KARAKTERKOMMERSIALISERING ("CHARACTER MERCHANDISING") EN ONREGMATIGE MEDEDINGING IN DIE SUID-AFRIKAANSE REG

Federation Internationale de Football v Bartlett 1994 4 SA 722 (T)

Hierdie saak is die *locus classicus* vir die erkenning in die Suid-Afrikaanse reg van die handelspraktyk van sogenaamde karakterkommersialisering ("character merchandising"), die bestaan waarvan in ons land in 1981 nog deur regter Van Dijkhorst in *Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd, Lorimar Productions Inc v OK Hyperama Ltd, Lorimar Productions Inc v Dallas Restaurant* 1981 3 SA 1129 (T) 1152 so goed soos onbekend geag is:

> "Character merchandising is not so well-known in South Africa that I can, without proper evidence in this regard, assume that the man in the street will have any knowledge thereof. I would rather be inclined to find that he has none" (sien ook *Bartlett* 735I–736A).

Karakterkommersialisering kan omskryf word as die kommersialisering (handeldrywe in, verhandeling of bemarking) van populêre name en karakters ten einde die verkope van die verbruikersgoedere- of dienste in verband waarmee die name of karakters gebruik word, te bevorder (sien *Bartlett* 736E). Die gebruiker-ondernemer benut met ander woorde die *reklame- of advertensiewaarde* van die naam of karakter ten einde as voorspan vir sy prestasie (onderneming, produk of diens) te dien en sodoende sy onderneming se werfkrag uit te bou. So gesien, sal die ongemagtigde benutting of uitbuiting ("misappropriation") van bedoelde name of karakters op *aanleuning* ("leaning on") neerkom, wat in ondernemingsverband juis daarin bestaan dat een ondernemer die reklamewaarde van 'n ander ondernemer se reklametekens – soos sy handelsnaam, handels- of diensmerk, of trouens enige ander teken, merk, naam of karakter wat reklamewaarde in verband met sy prestasie het – sonder sy toestemming benut (sien Van Heerden en Neethling *Unlawful competition* (1995) 201–202, veral vn 4). Alhoewel aanleuning sowel binne as buite mededingingsverband kan voorkom en op 'n openlike of bedekte wyse kan geskied (*idem* 202 ev), is vir huidige doeleindes bedekte aanleuning tussen mededingers van primêre belang.

Nou is dit so, soos Rutherford ("Misappropriation of the advertising value of trade marks, trade names and service marks" in Neethling (red) *Onregmatige mededinging/Unlawful competition* (1990) 59) tereg aandui, dat 'n bedekte aanleuningshandeling binne mededingingsverband in die reël tegelykertyd ook aanklamping ("passing off") daarstel – volgens hom is "reliance on misappropriation of the advertising value of the mark as a cause of action [dan] unnecessary". Die rede is dat die aanklampingsaksie, afgesien van die

onderskeidingswaarde van handelsmerke, handelsname, ensovoorts, in hierdie gevalle normaalweg ook voldoende beskerming aan die ander min of meer selfstandige waardes – te wete die reklame- en herkomswaarde (sien Van Heerden en Neethling 107 fn 86 204) – van hierdie merke en name verleen.

Juis in hierdie verband bied die *Bartlett*-saak 'n treffende voorbeeld. Die eerste applikant is die wêreldwye organiseerder van sokker, onder andere die Wêreldbekertoernooi. Die ander applikante was almal lisensiehouers en/of -verleners met betrekking tot alle Wêreldbekeronderskeidingstekens ("insignia"). Ingevolge 'n lisensie-ooreenkoms tussen die eerste en tweede applikant het laasgenoemde

> "the exclusive and sole right to the use of, *inter alia*, all World Cup trade marks, designs, artistic works, names, designations, symbols and emblems of the first applicant in all countries around the world in relation to all goods and/or services capable of commercial exploitation" (726G).

Die tweede applikant het ook die bevoegdheid verkry om sublisensies ten opsigte van al hierdie onderskeidingstekens te verleen, welke lisensies via die derde en vierde applikant dwarsoor die wêreld, inbegrepe Suid-Afrika, uitgekring het.

Die vyf respondente was die eienaars of lisensiehouers van geregistreerde handelsmerke wat die woorde "World Cup", geplaas bo-op 'n wêreldkaartontwerp, bevat het.

Die applikante beweer dat die respondente 'n veldtog geloods het (ook in sekere korrespondensie) wat die wanvoorstelling wek dat hulle die lisensieregte in Suid-Afrika ten opsigte van die Wêreldbeker VSA '94 het, en daarom bereken is om onherstelbare skade aan die applikante te berokken. Gevolglik word 'n interdik op grond van aanklamping en onregmatige mededinging aangevra ten einde die respondente te verbied om met die gewraakte optrede voort te gaan (730H–731A). (Die ander gevraagde regshulp, op grond van skending van outeursreg en kragtens artikel 18 van die Wet op Handelsmerke 62 van 1963, word daargelaat (sien 731A–D 740–743).)

Ten aanvang wys regter Joffe daarop dat die applikante betrokke is by die praktyk van karakterkommersialisering, dit wil sê

> "the business of merchandising popular names, characters and insignia in order to enhance the sales of consumer products in relation to which such names or characters are used" (736E).

Die regter aanvaar dat hierdie handelspraktyk in Suid-Afrika beslag gekry het en beklemtoon die advertensiewaarde wat bedoelde karakters kan hê. Hy verklaar (736F–737A):

> "The association of a famous person or character with a consumer product can boost that product's sales considerably. The fame and popularity of the name or character in question enhances the desirability of the product from the consumer's point of view. The association between the name or character, which can be referred to as the 'merchandising property', and the consumer product is usually created by depicting the merchandising product [property?] prominently on the product. A typical merchandising product is the well-known cartoon character Mickey Mouse. As the proprietor of the merchandising property has already invested substantial time and money in developing and popularising such character, and it is the fame and desirability of the merchandising property which will promote the sale of the goods to which it is applied, the proprietor of the merchandising property charges a royalty or licence fee for the use of his merchandising property. The royalty is payable in terms of a licence agreement under which the owner of the merchandising property authorises the licensee to

> utilise the merchandising property in relation to his goods. Generally a licensor exercises a measure of supervision over the use of the merchandising property which is the subject of the licence and such supervision is commonly exercised by a licensing agent . . . It appears that the consumer makes a connection and an association between the character and its creator or owner and the products featuring the character. Thus it is widely known . . . that the character Mickey Mouse was created by Walt Disney. Clothing bearing the image of Mickey Mouse is inevitably then associated with Walt Disney."

Volgens die hof kan die kommersiële aanwending van die Wêreldbekertekens as karakterkommersialisering in 'n breë sin beskou word aangesien die publiek 'n verband sal vestig tussen die tekens wat op klere en ander produkte gebruik word en die Wêreldbekertoernooi, asmede die persoon of entiteit wat die "merchandising property on its path to fame and fortune" geloods het (737B–D). Wat Suid-Afrika betref, is regter Joffe se slotsom soos volg (738A–B):

> "In view of the evidence that has been placed before me, I find that the concept of character merchandising has taken hold in South Africa. The man in the street would have knowledge thereof. He would make the link between the merchandising property and the events or circumstances which made it famous. He would be aware that the link is established by licensing or a licence."

Met betrekking tot die aanklampingsaksie aanvaar die hof die bekende definisie van hierdie verskyningsvorm van onregmatige mededinging in *Capital Estate and General Agencies (Pty) Ltd v Holiday Inns Inc* 1977 2 SA 916 (A) 929, wat impliseer dat 'n gemeenskaplike mededingingsveld ("common field of activity") nie 'n vereiste vir aanklamping is nie (739D–G; sien ook *Brian Boswell Circus (Pty) Ltd v Boswell Wilkie Circus (Pty) Ltd* 1985 4 SA 466 (A) 478–479; Van Heerden en Neethling 192–193 208). Regter Joffe beslis (739I–740C) dat aangesien die applikante en hulle lisensiehouers 'n reputasie en werfkrag met betrekking tot die karakterkommersialisering van Wêreldbekeronderskeidingstekens in Suid-Afrika opgebou het – dit wil sê die publiek sal enige verwysing na die 1994 Wêreldbeker met die applikante assosieer – die respondente deur hulle optrede inderdaad die beweerde wanvoorstelling verwek het; en aangesien daardeur 'n waarskynlikheid van skade (verlies van inkomste deur lisensiëring en verlies van kliënte) vir die applikante geskep is, word die interdik op grond van aanklamping toegestaan. In die lig van hierdie bevinding vind die regter dit onnodig om hom ook oor onregmatige mededinging as skuldoorsaak uit te spreek, alhoewel hy bereid is om ook op hierdie basis die aansoek toe te staan.

Aspekte van die *Bartlett*-beslissing verdien beklemtoning en verdere kommentaar:

(a) Die beslissing geld as 'n mylpaal in die Suid-Afrikaanse reg vir sover die praktyk van "character merchandising" regtens erkenning verkry; terselfdertyd word die noodsaaklikheid van die beskerming van die onderskeidings- en reklamewaarde van bedoelde karakters (as handelsname, handelsmerke en diensmerke) onderstreep. Sodoende sluit die hof aan by Callmann (*The law of unfair competition, trade marks and monopolies* vol 1A (1981; 1994-byvoegsel deur Altmann) 4:139 ev) wat suggereer dat "[i]f a character becomes famous enough to be a means of identification, it may then assume a trademark significance" (4:143; sien ook Mostert *Grondslae van die reg op die reklamebeeld* (LLD-proefskrif RAU 1985) 139–140 153 ev oor die posisie in die Amerikaanse reg). Ondersteuning vir Callmann se standpunt kan gevind word in die minderheidsuitspraak van regter Carter in *Kurlan v Columbia Broadcasting* (1953) 256 P 2d 962:

> "Characters and characterizations which are products of the mind should be held to be protectable property interests. The radio industry is a large one and radio programs are frequently based upon a single character, personality or characterization. To illustrate the extremely valuable theatrical-radio properties which are in existence one must only look as far as the radio column in his daily paper to note the programs, built around a single character, or family, which continue from day to day, week to week and year to year. It should be apparent to even the least intelligent that these programs are as valuable as the most gilt-edged security listed on the Stock Exchange. No court would hesitate to extend its protection to the lawful owner of a security and yet equally valuable 'character-types' are not given the same protection."

(b) In die *Bartlett*-saak word die beskerming van die ter sake karakters en tekens op aanklamping gegrond, dit wil sê 'n inwerking op die onderskeidingswaarde (sien Van Heerden en Neethling 106 ev 163 ev) wat die karakters en tekens ten aansien van die applikante se ondernemings, produkte of dienste het. (Die hof se beskouing dat aanklamping as *species* van die *genus* onregmatige mededinging ook nie-mededingers omvat omdat 'n "common field of activity" nie 'n vereiste vir "passing off" is nie, is vatbaar vir kritiek. Hieraan word egter nie verder aandag gegee nie (sien Van Heerden en Neethling 192–193).) Langs hierdie weg, soos gesê, geniet die advertensie- of reklamewaarde van die tekens en karakters net insidentele of indirekte beskerming. Die vraag is egter of, *in die afwesigheid van aanklamping* en dus 'n wanvoorstelling aan die kant van die dader, die eienaar (of lisensiehouer) van die karakters of tekens nie ook op direkte beskerming teen die uitbuiting van die reklamewaarde daarvan deur mededingers geregtig behoort te wees nie. Indien wel, sou dit neerkom op die erkenning van *aanleuning* as selfstandige aksiegrond binne mededingingsverband (vgl Van Heerden en Neethling 205 ev). Nou kom dit voor of daar veel vir hierdie standpunt te sê is (sien vir besonderhede Neethling "Onregmatige mededinging: onregmatigheidskriteria, aanklamping ('passing off'), aanleuning ('misappropriation'), erosie ('dilution') en die reg op die reklameteken" 1990 *THRHR* 584–587; Neethling "Die reg aangaande onregmatige mededinging sedert 1983" 1991 *THRHR* 555–559; Van Heerden en Neethling 205–208): die aanleuningsoptrede stel naamlik 'n verskyningsvorm van onregmatige mededinging daar omdat dit in stryd met die mededingingsprinsiep – en daarom ook *contra bonos mores* – die getroffene se werfkrag bedreig of inderdaad skend; die waarskynlikheid van sodanige bedreiging of skending word in der waarheid vergroot deur die reële gevaar van die verwatering ("dilution") van die reklamewaarde van die karakters of tekens.

Die howe is in die algemeen egter nie geneë om die inwerking op die reklamewaarde van handelsmerke, ensovoorts op sigself as onregmatige mededinging aan te merk nie (bv *Union Wine Ltd v E Snell and Co Ltd* 1990 2 SA 189 (K) – sien Neethling 1990 *THRHR* 580 ev, Neethling 1991 *THRHR* 555 ev en Van Heerden en Neethling 205 ev vir besprekings van hierdie saak; vgl ook die *Dallas*-saak *supra* mbt nie-mededingers). In *Moroka Swallows Football Club Ltd v The Birds Football Club* 1987 2 SA 511 (W) 531 vat regter Stegmann die algemene gevoel soos volg saam:

> "The mere fact that a person has made a name famous does not give him a right of property in the name. He cannot stop other entrepreneurs from making such use of the famous name in the marketing of their goods and services as they may be able to make without either defaming any person or causing a likelihood of confusion as to the origin of the goods and services. Provided that he does not commit the delicts of defamation or passing off or offend against any specific statutory

> prohibition, there is no reason why an entrepreneur should not take the benefit of such advantage as he may be able to gain in the marketing of his goods and services by associating them with names that have become famous."

En in die *Union Wine*-saak *supra* 203 stel regter Van Deventer dit so:

> "However great a reputation and goodwill it may have built up and however much money and energy may have been expended to achieve its share of the market, an unregistered trade mark or name has no statutory or judicial protection and it may be appropriated by competitors provided they do not mislead the public by passing off or compete unlawfully in some other manner."

Die feit dat daar geen presedent vir die beskerming van die reklamewaarde van handelsmerke in ons reg bestaan nie, doen egter nie afbreuk aan die meriete en noodsaaklikheid van bedoelde beskerming nie. Hierbenewens maak die generaliserende benadering van ons deliktereg tot Aquiliese aanspreeklikheid in elk geval voorsiening vir onregmatige nuuthede, en word die resultaat van die regspraak se houding – soos weerspieël in die *Dallas*-saak *supra* – deurgaans deur skrywers veroordeel (sien Van Heerden en Neethling 213; Mostert *Grondslae* 369 ev; Rutherford in Neethling (red) 62–63; Hertzog "Ongelisensieerde karakterkommersialisering ('character merchandising') as daad van onregmatige mededinging in die Suid-Afrikaanse reg" 1982 *De Jure* 77 ev). Die houding van regter Joffe in *Bartlett* is daarom te verwelkom. Soos aangedui, is hy bereid om afgesien van aanklamping, die applikante ook op grond van onregmatige mededinging tegemoet te kom. Alhoewel hy nie sy redes hiervoor verskaf nie, is dit duidelik uit wat hierbo gesê is dat hy sodoende die deur ooplaat vir die beskouing dat die onregmatige mededinging goedskiks in aanleuning geleë kon gewees het.

(c) Afgesien van beskerming van die reklamewaarde van reklametekens (soos karakters) op grond van aanleuning, word 'n sterk saak ook uitgemaak vir die beskerming van bedoelde reklamewaarde (as waardevolle vermoënsgoed) deur die erkenning van 'n selfstandige immaterieelgoedereg op die reklameteken (sien Mostert *Grondslae* hfst IV V VI; sien ook Mostert "The right to the advertising image" 1982 *SALJ* 413 ev; Van Heerden en Neethling 216 ev; Rutherford in Neethling (red) 63; Neethling "Passing off and misappropriation of the advertising value of trade names, trade marks and service marks" 1993 *SA Merc LJ* 312–313). Dit behoef geen betoog nie dat 'n ondernemer se reklametekens vir hom van groot immateriële ekonomiese waarde is – 'n waarde wat hy deur sy bedrewenheid, arbeidsaamheid en onkoste ontwikkel het. Daarom behoort die vrugte van sy skepping die ondernemer-skepper self en nie ander ondernemers nie, toe te val. Die teenoorgestelde beskouing stel die ongemagtigde gebruiker in staat "om te maai waar hy nie gesaai het nie" en sodoende op die reklamewaarde van bedoelde tekens te teer (vgl die *Union Wine*-saak *supra* 195). Die reg op die reklameteken behoort dus in ondernemingsverband erken te word. Die *boni mores*-onregmatigheidsmaatstaf verskaf aan die howe die regsbasis nie alleen vir die erkenning van die reklamewaarde as regsgoed nie, maar ook vir die omlyning van die grense van die reg daarop.

Hierdie beskouing blyk *obiter* ook uit *Bartlett* (736F–737A, hierbo aangehaal) ten aansien van name en karakters as reklametekens. Die hof beskou die name en karakters as *merchandising property* wat aan die *proprietor* die bevoegdheid verleen om teen vergoeding (verlening van lisensies) ander persone in staat te stel om die advertensiewaarde daarvan te benut. So gesien, beskik die eienaar oor 'n subjektiewe reg (hier immaterieelgoedereg) op die advertensiewaarde

van die karakters as immateriële goed (regsobjek) wat aan hom die bevoegdheid verskaf om die goed te gebruik, te geniet en te vervreem (sien Neethling, Potgieter en Visser *Law of delict* (1994) 43 ev en Van Heerden en Neethling 79–81 oor die leerstuk van subjektiewe regte). Ongelukkig was dit egter nie vir regter Joffe nodig om sy beslissing op skending van hierdie immatereieelgoedereg te grond nie – soos reeds uitgewys is, is sy uiteindelike *ratio decidendi* dat die uitbuiting van die reklamewaarde van die Wêreldbekertekens aanklamping daargestel het.

Die slotsom is dat die hof in *Bartlett*, in ieder geval met betrekking tot karakterkommersialisering, die deur oopgelaat het vir die erkenning van aanleuning as verskyningsvorm van onregmatige mededinging in die Suid-Afrikaanse reg, en *obiter* erkenning aan die reg op die reklameteken verleen het. Hopelik sal dié benadering daartoe bydra om die howe se weerstand teen die selfstandige beskerming van die reklamewaarde van handelsmerke ensovoorts af te breek sodat hierdie beskerming op 'n vaste grondslag geplaas kan word.

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VERDERE HELDERHEID OOR 'N VEREISTE VIR DIE APPELLEERBAARHEID VAN INTERLOKUTORE HOFBESLISSINGS OOR SPESIALE VERWERE

Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Red Head Boer Goat (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk 1994 3 SA 407 (A)

1 Inleiding

Dit het hier gehandel oor drie appèlle waarin identiese geskilpunte ter sprake was en wat gevolglik saam hanteer is. In die loop van verrigtinge gerig op die likwidasie van drie ondernemings wat boerderybedrywighede gedeel het, het die vraag ontstaan of sertifikate wat uitgereik is ingevolge artikel 21(1) van die Wet op Landboukrediet 28 van 1966 die oorweging van die likwidasie-aansoeke teen die skuldenaars ten aansien van wie die sertifikate uitgereik is, verhinder. Die gemelde artikel bepaal dat die indiening van só 'n sertifikaat by 'n hof 'n geding opskort waar daardie geding teen iemand ingestel is om 'n bedrag wat hy skuld of beslaglegging of verkoop van sy bates te vorder as só 'n vonnis van die hof uitgevoer sou word, en die sertifikaat bevestig dat die persoon om finansiële bystand aansoek gedoen het en dat daar 'n redelike kans bestaan dat die aansoek kan slaag.

Die Kaapse hof het by monde van regter Berman op die onderhawige likwidasie-aansoeke, kragtens ooreenkoms tussen die partye, slegs oor die kwessie van die effek van die uitreiking van die sertifikate beslis. Die besluit wat geneem is, was dat met die likwidasie-aansoeke voortgegaan kon word ten spyte van die

uitreiking van die sertifikate. Die vatbaarheid van daardie beslissing vir appèl is hier ter sprake.

2 Die appelleerbaarheid van interlokutore beslissings

Elders is uitvoeriger oor verskeie aspekte in verband met die appelleerbaarheid van interlokutore hofbeslissings geskryf (sien 1992 *THRHR* 624; 1993 *THRHR* 357–379; 1994 *THRHR* 317–324; 1994 *THRHR* 576–586). Op daardie besonderhede word hier nie weer ingegaan nie. In hierdie bespreking word net 'n enkele aspek rakende die kwessie van die appelleerbaarheid van die tersaaklike bevel na vore gebring. Dit is 'n aspek waaroor daar tot nog toe nie 'n eenduidige standpunt in ons positiewe reg bestaan het nie, 'n gebrek wat nou met hierdie beslissing deur die appèlafdeling (by monde van Hefer AR) reggestel is.

Die onderhawige aspek het te make met die vereiste wat gewoonlik in verband met die vraag na die appelleerbaarheid van interlokutore hofbeslissings gestel word, naamlik dat die beslissing moet gehandel het oor regshulp wat inderdaad deur een van die partye aangevra is. In *Dickenson v Fisher's Executors* 1914 AD 424 427 word dit soos volg uitgedruk:

> "[T]he term judgment is used to describe a decision of a court of law upon relief claimed in an action . . . [T]here must be a *distinct application by one of the parties* for definite relief" (kursivering ingevoeg).

3 Gaan dit oor 'n formele aansoek om regshulp?

Uit vorige uitsprake hieroor kan twee moontlike standpunte vasgestel word. Enersyds kon gevra word of dit beteken dat die hof *formeel* (waar anders kan so iets gebeur as in die pleitstukke of wysigings daarvan?) om die betrokke regshulp gevra moet gewees het. Hier kan gedink word aan die eksepsie-argument in *Heyman v Yorkshire Insurance Co Ltd* 1964 1 SA 487 (A) 492A–B; die verwerping van só 'n argument in *Nxaba v Nxaba* 1926 AD 392 394; die standpunt dat nie van een tipe verrigtinge na 'n ander tipe geredeneer kan word nie, soos dit in *Holland v Deysel* 1970 1 SA 90 (A) 92C ev gestel is; asook die uitsprake in *Minister of the Interior v Moonsamy* 1932 NPD 202 205–206; *Pfizer Inc v South African Druggists Ltd* 1987 1 SA 259 (T) 262–263; *Government Mining Engineer v National Union of Mineworkers* 1990 4 SA 692 (W) 701G–I; *Priday t/a Pride Paving v Rubin* 1992 3 SA 542 (K) 547H–I; en *SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 2 SA 786 (A). Andersyds kon gevra word of dit beteken dat die beslissing moet gehandel het oor 'n kwessie wat net in die loop van die hofverrigtinge opgeduik het, waaroor die hof dan pertinent (deur enigeen van die partye) versoek is om uitsluitsel te gee. Myns insiens moet laasgenoemde as die algemene siening beskou word.

In eersgenoemde geval sou, streng gesproke, die pleitstukke die versoek moet bevat of dienooreenkomstig gewysig moet word; in die tweede geval is dit beslis nie nodig nie. Terwyl die algemene siening is dat 'n aansoek nie *formeel* gerig hoef te gewees het nie, is dit tog so dat die hof pertinent om die beslissing gevra moet gewees het. Juis dáárom kan die afleiding makliker gemaak word dat 'n formele aansoek vereis word. Hierdie risiko word verhoog weens die oorweging dat die beslissing in 'n sinvolle, formele hofbevel uitgedruk moet gewees het of kon geword het (*Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 1 SA 839 (A); *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 4 SA 569 (A); *SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 2 SA 786 (A) 792). Oorbeklemtoning van hierdie vereiste sou dus daartoe kon bydra dat die onderskeid tussen bogenoemde twee benaderings

vervaag. Daarteen moet gewaak word. Die voorgaande effense dubbelslagtigheid is egter nog nie die einde van die probleem nie.

4 Eise in hoof teenoor spesiale verwere

Die probleem kan verder soos volg verduidelik word: Die grondvereiste vir die appelleerbaarheid van 'n hofbeslissing is sekerlik dat daardie beslissing die uitwerking moet gehad het dat dit die regshulp wat aangevra is, moet vooruit geloop het (1994 *THRHR* 322–323). Terloops kan met waardering kennis geneem word van die klem wat appèlregter Hefer daarop plaas dat dit die *uitwerking* van die beslissing is wat van belang is, en nie die *vorm* (of *tydstip*, kan bygevoeg word) daarvan nie (414D–E; en sien 1994 *THRHR* 321).

In elke geding moet daar, weens die vereistes vir die bereiking van *litis contestatio*, toereikende pleitstukke gewees het waarin uitdruklik en duidelik genoeg dat daarop gepleit kon word, regshulp aangevra is – dit behoef geen betoog nie. Beslissings wat daardie gevraagde regshulp vooruitloop, moet as uitsprake aangemerk word, en oor die appelleerbaarheid daarvan hoef óók nie getwyfel te word nie. Hierdie punt is duidelik genoeg wanneer bedoel word dat die interlokutore beslissing die voornemende appellant se eis in hoof vooruitgeloop het – en dit dus as appelleerbaar aangemerk moet word. Sodanige beslissings veroorsaak naamlik dat die gevraagde regshulp geheel of gedeeltelik slaag of afgewys word, en skep dus vir die saak van 'n party wat nie met die beslissing tevrede is nie, 'n hindernis wat nie meer in daardie hofverrigtinge reggestel kan word nie.

Waar 'n argument deur 'n verweerder geopper is wat wesenlik op 'n spesiale verweer neerkom, en die hof dit verwerp, kan die eiser/applikant steeds met sy eis/aansoek in hoof voortgaan; dit beteken dat die beslissing nie die eiser se saak onherstelbaar geraak het nie en dat dit dus uit sy oogpunt beskou nie appelleerbaar sal wees nie. Uit die verweerder se oogpunt mag die verwerping van sy spesiale verweer egter die uitwerking hê dat hy heeltemal van só 'n verweer ontneem word. Sy regsposisie word dan wesenlik geraak deur die interlokutore beslissing aangesien hy hom nou verder op die meriete teen die hoofvordering moet probeer verweer – uit sy oogpunt behoort die beslissing dus as appelleerbaar aangemerk te word. Terloops kan daarop gewys word dat die voordeel van die wyer benadering, ingevolge waarvan daar gekyk word na die uitwerking van die beslissing op *albei partye* (sien weer *Priday t/a Pride Paving v Rubin* 1992 3 SA 542 (K) 547G–H) hier duidelik na vore kom.

Die onderhawige gevalle was volgens die appèlafdeling van die pasgemelde aard: die afwysing van die spesiale verweer dat die aanhoor van die likwidasie-aansoeke weens die uitreiking van die sertifikate nie kon voortgaan nie, het die verweerders voor die hof *a quo* heeltemal van daardie verweer ontneem en hulle weerloos gelaat teen die voortgang van die likwidasie-aansoeke (415A).

5 Watter regshulp moes vooruitgeloop geword het?

Die verdere kwessie is of dit, by die toepassing van die vereiste dat die betrokke beslissing moet gehandel het oor regshulp wat pertinent aangevra is (hetsy dit formeel in 'n aansoek gegiet hoef te gewees het of nie), nou moes gehandel het oor 'n beslissing wat die meriete van die saak in hoof geraak het. Is dit dus die *regshulp in hoof* wat deur die interlokutore beslissings benadeel moet gewees het, of die *interlokutore versoek om regshulp* waaroor die hof se beslissing op daardie oomblik gevra is? Hieroor beslis appèlregter Hefer dat dit handel oor die betrokke versoek om regshulp wat op daardie tydstip, in die loop van die

hofsaak, pertinent aan die hof gerig is – en nie oor die regshulp wat in die hoofsaak gevra is nie (416C–D).

Appèlregter Hefer beperk sy beslissing weliswaar tot gevalle waar dit handel oor die houdbaarheid van 'n spesiale verweer wat deur die verweerder/respondent geopper is en afsonderlik verhoor is (416C). 'n Mens sou dus nie sonder meer verder kon gaan, en die *ratio* van sy beslissing gaan toepas op interlokutore kwessies wat nie as spesiale verwere aangemerk kan word nie. As 'n mens dit anders sou benader, sou dit 'n vraag laat ontstaan oor die mate waartoe appèlregter Hefer se uitspraak te versoen is met die uitspraak van die appèlafdeling (by monde van Corbett HR) in *Marsay v Dilley* 1992 3 SA 944 (A) 962C–E, waar hy beklemtoon dat dit by die oorweging van die appelleerbaarheid van 'n interlokutore beslissing gaan oor die vraag of daardie beslissing 'n nadelige uitwerking gehad het op die regshulp wat deur die eiser in hoof aangevra is. Op die oog af is appèlregter Hefer se siening strydig hiermee. Dit hoef egter nie so verstaan te word nie. Hoofregter Corbett verwys in sy uitspraak na die betrokke benadering as die "algemene beginsel" (962C–D) en appèlregter Hefer stel dit uitdruklik dat hy slegs oor die situasie in verband met spesiale verwere praat. As die aangeleentheid so verstaan word, word die algemene beginsel nie weerspreek deur die besondere toepassing daarvan in die geval van spesiale verwere nie. Waar die grondtoon in ons reg ten opsigte van die onderhawige kwessies hedendaags een van soepelheid is, kan bogenoemde twee sienings myns insiens met mekaar versoen word sonder om van onaanvaarbare pragmatisme verdink te word.

Sonder om in woordespel te verval, kan daarop gewys word dat daar immers 'n verskil is tussen: (i) 'n beslissing oor 'n verweer op die meriete van die hoofsaak (wat kennelik appelleerbaar is); (ii) 'n beslissing oor 'n spesiale verweer (wat potensieel die hoofsaak kan verongeluk as dit slaag, of onomkeerbaar verbeur is as dit afgewys word; daarom is dit, soos hier, appelleerbaar); en (iii) 'n beslissing wat net die voortgang van die regsproses kan bevorder (dws 'n reëling wat nie appelleerbaar is nie).

Die appèlafdeling bevind dan in die onderhawige gevalle dat die beslissing wat van die hof *a quo* oor die spesiale verweer van die respondente gevra is, wat sowel die vorm as die uitwerking daarvan betref, die spesiale verweer heeltemal uitgeskakel het. Gevolglik was daardie beslissing 'n bevel wat vatbaar is vir appèl (416E–F). Die appèl teen die beslissing van regter Berman word dus van die hand gewys.

6 Slotsom

Met hierdie uitspraak van die appèlafdeling is, in opvolging van die groter soepelheid wat op die onderhawige terrein veld gewen het, duidelikheid gebring oor nog 'n aspek van die reg in verband met die appelleerbaarheid van interlokutore beslissings ten opsigte van spesiale verwere. Dit kan verwelkom word.

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DIE HEROORWEGING VAN KORREKTIEWE TOESIG

S v Dreyer 1994 2 SASV 300 (T);
S v Jacobs 1994 2 SASV 326 (K)

Dit is nie buitengewoon nie dat twee regsprekers dieselfde statutêre bepaling beoordeel en dan die mening huldig dat die bepaling ondubbelsinnig is en dat slegs een interpretasie daarvan moontlik is. Dit is ook nie ongewoon dat hulle dan uiteenlopende beslissings gee nie. Die statutêre bepalings oor korrektiewe toesig het al tot enkele sodanige situasies gelei waarvan hierdie twee beslissings 'n onlangse voorbeeld is.

In die *Dreyer*-saak het die beskuldigde artikel 122(2)(*a*) van die Wet op Padverkeer oortree, deurdat hy 'n voertuig op 'n openbare pad bestuur het terwyl sy bloedalkoholkonsentrasie 0,15 gram per 100 ml was. Aangesien dit nie sy eerste oortreding was nie, is hy gevonnis tot twaalf maande korrektiewe toesig plus 'n opgeskorte termyn van agtien maande gevangenisstraf. Hy het hom egter nie by die voorwaardes van die vonnis gehou nie, met die gevolg dat die korrektiewe toesig in 'n vonnis van ses maande gevangenisstraf omskep is.

Jacobs se feite is analoog: die beskuldigde is weens roof gevonnis tot twaalf maande korrektiewe toesig plus ses maande opgeskorte gevangenisstraf. Ook hy het die voorwaardes van sy korrektiewe toesig verbreek, en dit is in agt maande gevangenisstraf omskep.

Die vraag wat die hooggeregshof in beide uitsprake moes beantwoord, is of die hof tydens die heroorweging van die korrektiewe toesig die volledige vonnis moet heroorweeg wat aan die beskuldigdes opgelê is, of slegs die gedeelte wat uit korrektiewe toesig bestaan. 'n Antwoord op hierdie vraag vereis 'n noukeurige oorweging van artikel 276A(4) van die Strafproseswet 51 van 1977.

In *Dreyer* het die hof, nadat dit die magtigende bepalings in artikel 276A(4)(*a*) en 276A(3)(*d*) en (*e*) aangehaal het, tot die slotsom gekom dat die samehang van die bepalings dit duidelik maak dat

> "wanneer 'n hof 'n vonnis op aansoek van die Kommissaris heroorweeg, hy beklee is met dieselfde mag as die hof wat die beskuldigde in die eerste instansie gevonnis het" (302*d-e*).

Dit beteken dat, indien 'n opgeskorte vonnis saam met korrektiewe toesig opgelê word, die opgeskorte vonnis (gevangenisstraf) ook heroorweeg mag word. Hierdie gevolgtrekking blyk op 'n uitleg van artikel 276A(3) gebaseer te wees. (Artikel 276A(3) handel oor die prosedure wat gevolg moet word, *en die magte van 'n hof*, in gevalle waar die Kommissaris van Korrektiewe Dienste by die hof aansoek doen dat 'n vonnis van gevangenisstraf heroorweeg moet word.) Ek sê "blyk" omdat dit uit die samehang afgelei moet word. Die hof verwys dan na subartikel (4) wat spesifiek voorsiening maak vir die heroorweging van korrektiewe toesig indien dit nie 'n geskikte vonnis blyk te wees nie en noem dat subartikel (4)(*b*) uitdruklik bepaal dat by die heroorweging van vonnis die *prosedure* van subartikel (3) van toepassing sal wees (my beklemtoning). Die slotsom is:

> "Met ander woorde, die hof sal eweneens by magte wees om die hele vonnis die beskuldigde opgelê, te heroorweeg en nie net die korrektiewe toesig nie" (302*g*).

Daarmee is die beslissing in wese gevel, al word daar nie verduidelik hoekom die statutêre gelykstelling van prosedures ook tot die gelykstelling van bevoegdheid moet lei nie. Die hof vind egter verdere ondersteuning vir sy standpunt in die volgende:

• Enige ander uitleg sou die onhoudbare resultaat hê dat 'n vonnis net gedeeltelik hersien word (die hof blyk 'n onderskeid te maak tussen "straf" en "vonnis" deurdat straf slegs verwys na 'n enkele straftipe, terwyl vonnis verwys na die totale vonnis wat opgelê word).

• 'n Ongerapporteerde beslissing uit die Kaapse Provinsiale Afdeling (*S v De Kock* 1992-12-18 saakno A631/92 (K)) bied direkte ondersteuning vir die beslissing en beklemtoon ook dat 'n vonnis 'n eenheid vorm.

Die eerste faktor, naamlik die onhoudbare situasie dat slegs 'n gedeelte van die vonnis hersien word, is nogal 'n enigma. Die hof verwys glad nie na die lang gevestigde beginsel dat 'n hof van eerste instansie normaalweg nie die bevoegdheid het om eie vonnisse te hersien nie, en dat artikel 276A(4) eintlik vir 'n dramatiese verskuiwing weg van hierdie beginsel voorsiening maak nie. Die hof verduidelik ook nie hoekom dit so onhoudbaar is om slegs daardie gedeelte van die vonnis wat onuitvoerbaar blyk te wees, te heroorweeg nie. Ek sal aan die einde van hierdie bespreking weer na hierdie aspek verwys.

Wat die tweede argument betref, het die Kaapse Provinsiale Afdeling in die *Jacobs*-beslissing besluit dat die *De Kock*-uitspraak heroorweging verg as gevolg van 'n afwykende uitspraak in *S v Lackay* 1993-06-09 saakno A366/92 (K). Volgens die volbank in *Jacobs* lê die antwoord op hierdie vraag hoofsaaklik in 'n behoorlike uitleg van die bepaling in artikel 276A(4)(*a*) dat die hof "daardie straf" kan heroorweeg (330*b*). Die bepaling in artikel 276A onderskei tussen straf ("punishment") en vonnis ("sentence") deurdat straf deurgaans met korrektiewe toesig verbind word terwyl daar slegs van vonnis melding gemaak word wanneer 'n "vonnis" van *gevangenisstraf* deur die hof heroorweeg word (a 276A(3)). Gevolglik is die verwysing in artikel 276A(4)(*a*) na "daardie straf" beperk tot korrektiewe toesig en niks anders nie (330*f*).

Die enigste beperking wat in die heroorwegingsproses op die hof geplaas word, is die gewone jurisdiksieperke van die howe. Gevolglik mag 'n landdroshof se totale vonnis van gevangenisstraf, indien die korrektiewe toesig deur gevangenisstraf vervang word, nog steeds nie twaalf maande oorskry nie. Die feit dat 'n hof wat 'n termyn korrektiewe toesig plus 'n opgeskorte tydperk van twaalf maande gevangenisstraf opgelê het, die korrektiewe toesig dan nie deur gevangenisstraf sal kan vervang nie, is 'n anomalie wat moontlik wetswysiging verg (331*i*): "This potential anomaly . . . does not, however, . . . justify a departure from the plain meaning of the words used in s 276A(4)(*a*)."

Verderaan wys die hof ook daarop dat die verwysing in artikel 276A(4)(*b*) na die prosedure wat in subartikel (3) bedoel is, onderskei moet word van die *magte* wat die hof het in geval van 'n heroorweging van 'n straf van korrektiewe toesig. Myns insiens is hierdie beoordeling korrek. Die prosedure waarvolgens 'n hof 'n vonnis heroorweeg, kan tog nie dieselfde wees as die bevoegdhede wat 'n hof verkry wanneer daardie prosedure toegepas is nie.

Na my beskeie mening is daar geen twyfel dat die *Jacobs*-beslissing die regsvraag wat hier ter sprake is, korrek beantwoord nie. 'n Mens kan argumenteer oor die beperking van die begrip "vonnis" tot 'n vonnis van gevangenisstraf, maar dit is nie werklik hier ter sake nie.

Duidelikheidshalwe is dit nodig om artikel 276A(4) weer eens aan te haal:

> "(*a*) 'n Hof wat aan 'n persoon 'n straf bedoel in subartikel (1) of (2) opgelê het of sy vonnis omskep het kragtens subartikel (3)(*e*)(ii), hetsy anders saamgestel al dan nie, kan te eniger tyd, indien dit op grond van 'n gemotiveerde aanbeveling deur 'n proefbeampte of die Kommissaris bevind word dat daardie persoon nie geskik is om aan korrektiewe toesig onderworpe te wees nie of die opgelegde straf uit te dien nie, daardie straf heroorweeg en 'n ander gepaste straf oplê.
>
> (*b*) Die prosedure in subartikel (3) bedoel, is *mutatis mutandis* van toepassing by die heroorweging van 'n straf kragtens hierdie subartikel."

Wanneer subartikel (*a*) mooi bekyk word, kan die volgende daaruit afgelei word:

• Eerstens bied dit aan "'n hof" 'n bepaalde bevoegdheid. Sonder hierdie bepaling sou "'n hof" hierdie bevoegdheid nie gehad het nie. Dit is dus 'n bemagtigende bepaling.

• Die magtiging wat "'n hof" verkry, is om "'n straf" te heroorweeg.

• Die hof wat sodanig bemagtig word, is egter nie enige hof nie. Dit is slegs 'n hof wat aan 'n persoon 'n *straf* opgelê het soos bedoel in subartikel (1) of (2), of wat ingevolge subartikel (3)(*e*)(ii) opgetree het. Subartikel (1) en (2) verwys slegs na twee strafvorme, naamlik (in suba (1)) korrektiewe toesig soos bedoel in artikel 276(1)(*h*), en (in suba (2)) gevangenisstraf waaruit die kommissaris die gevangene uit eie beweging op korrektiewe toesig kan vrylaat soos beskryf in artikel 276(1)(*i*)). Subartikel (3)(*e*)(ii) handel weer oor 'n vonnis van gevangenisstraf wat deur die hof in korrektiewe toesig omskep is. Die enigste straf anders as korrektiewe toesig wat dus hoegenaamd deur hierdie artikel geraak kan word, is gevangenisstraf wat kragtens artikel 276(1)(*i*) opgelê word. Dit is dus slegs 'n hof wat een van hierdie beperkte aantal strawwe opgelê het (wat almal met korrektiewe toesig te make het), wat 'n straf mag heroorweeg.

• Hierdie hof wat die bevoegdheid verkry om die straf te heroorweeg, mag ook nie enige straf heroorweeg nie, maar slegs "daardie straf". Uit die konteks van artikel 276A(4) kan dit tog sekerlik nie enige ander straf beteken as juis een van hierdie strawwe waaroor daar net hierbo uitgewei is nie. Indien die onbelangrike bysinne weggelaat word, staan daar tog duidelik:

> "'n Hof wat aan 'n persoon 'n *straf* bedoel in subartikel (1) of (2) opgelê het of sy vonnis omskep het, . . . kan te eniger tyd . . . *daardie straf* heroorweeg en 'n ander gepaste straf oplê."

In effek beteken dit dat die hof net die straf van korrektiewe toesig mag heroorweeg, want volgens die Strafproseswet kan 'n toesiggeval wat deur die kommissaris op korrektiewe toesig vrygelaat is kragtens 'n vonnis ingevolge artikel 276(1)(*i*) opgelê, bloot weer in aanhouding geneem word om die res van die gevangenisstraf uit te dien.

Die res van die vonnis mag nie verander word nie. Dit hoef egter nie 'n probleem te wees nie. Wanneer die hof oorweeg waardeur die korrektiewe toesig vervang moet word, moet dit die res van die vonnis wat in stand gebly het, by die heroorwegingsproses in ag neem. Die nuwe deel van die vonnis moet dus by die res daarvan inpas. Indien die hof dan vind dat die beskikbare gevangenisstraf reeds met die aanvanklike vonnisoplegging uitgeput is, lê die probleem nie by 'n leemte in die wetgewing nie, en behoort dit ook nie as 'n anomalie gesien te word nie. Dit is in werklikheid net die oorspronklike vonnisoplegger wat daarvoor te blameer is. Hierdie probleem sal in elk geval iets van die verlede wees indien die reg gevestig word, want die verhoorhof sal dan besef dat dit onwys sal

wees om al die gevangenisstraf binne die hof se jurisdiksie met die aanvanklike vonnisoplegging uit te put, juis omdat daar dan min te doen is indien die korrektiewe toesig om een of ander rede nie slaag nie. 'n Mens kan darem van ons vonnisopleggers verwag om bewus te wees van die implikasies van die vonnisse wat hulle oplê.

'n Mens kan die saak ook uit 'n ander hoek bekyk. Die insluiting van korrektiewe toesig tot die lys van strawwe wat 'n hof mag oplê, het plaasgevind omdat daar 'n leemte was in die keuses wat 'n hof by vonnisoplegging mag maak. Korrektiewe toesig het nie op die wetboek verskyn sodat die landdroshowe nou swaarder mag vonnis as wat in die verlede moontlik was nie. Die oplegging van 'n vonnis wat al die beskikbare gevangenisstraf opgebruik, met die byvoeging van korrektiewe toesig, lei inderdaad tot 'n baie swaarder straf as wat in die verlede moontlik was. Vonnisopleggers wat hulle bevoegdhede op hierdie wyse uitput, kan nie werklik kla indien so 'n uitputting van bevoegdhede hulle later inhaal nie.

Hiermee het slegs 'n enkele van die potensiële probleme wat in artikel 276A(4) opgesluit is, aandag geniet. In twee ander artikels oor hierdie onderwerp, naamlik "The unfit probationer" 1994 (7) *Consultus* 53–56 en "Die toesiggeval" 1994 (29) *Die Landdros* 57–64, verwys ek na 'n paar verdere probleme. 'n Mens hoop net dat die howe in hulle beoordeling van hierdie bepalings versigtige en weldeurdagte beslissings sal gee, want daar is min dinge wat howe van eerste instansie soveel sal laat huiwer om korrektiewe toesig te gebruik as onsekerheid oor die korrekte regsposisie rakende verskeie aspekte van hierdie strafvorm.

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MEANING OF THE CONCEPT "MINERAL"

Rand Mines Ltd v Potgieter 1994-09-19 case no 93/9540 (T)

1 This decision related to the meaning of the concept "mineral" in the context in which it had been used in a Certificate of Rights to Minerals No K711/1919S (the "certificate"). In terms of the certificate the applicant, Rand Mines Limited, was the holder of the "full free and sole right and interest in and to all minerals, mineral substances and metals, oils, precious stones and coal . . . without any exception" (3–4) in respect of three farms, namely portions 1, 2 and the remainder of the farm Hugomond 118 LS ("the farms").

2 The applicant sought a declaratory order that, by virtue of the certificate, it was the holder of the right in and to all forms of granite, and all forms of marble suitable for use as dimension stone in or under the farms (2). A declaration was sought by the applicant because it intended entering into an agreement with Keeley Group Holdings Limited ("Keeley"), in terms of which it intended selling to Keeley dimension stone (3). The applicant maintained that dimension

stone, because of its intrinsic value, was a mineral, and contended that the judgment of the Appellate Division in *Finbro Furnishers (Pty) Limited v The Registrar of Deeds, Bloemfontein* 1985 4 SA 773 (A) was decisive of the issue in the case (14). The respondents, the respective owners of the farms, denied that dimension stone was a mineral within the meaning of the certificate (4). The respondents argued, first of all, that the *ratio* in the *Finbro* decision was limited to the interpretation of statutes and did not apply to ordinary agreements, and secondly, that the test formulated by Botha J (as he then was) in *Loubser v Suid-Afrikaanse Spoorweë en Hawens* 1976 4 SA 589 (T) was binding on the court, and that there was nothing contained in the *Finbro* judgment which derogated from what had been stated in *Loubser's* case (16).

At issue, therefore, was whether the applicant was vested with the right to mine dimension stone (4). According to Fine AJ the determination of the issue entailed both an interpretation of the applicant's rights as evidenced by the certificate and the determination of whether or not dimension stone was a mineral (5).

3 The court accepted that the expert evidence (see 5–13) was overwhelming that dimension stone had an intrinsic value apart from its bulk and weight (13 25) and was therefore a mineral. The court held that the concept "mineral", as it occurred in the certificate, in its ordinarily grammatical sense included dimension stone (25). The application therefore succeeded (26).

4 In arriving at his decision, Fine AJ elevated the intrinsic or individual value of a mineral to the decisive test or criterion for determining whether or not a particular substance is a mineral in the popular sense of the word:

> "It seems to me therefore that, in all the cases referred to above, the all-important if not decisive issue in determining the common sense or popular meaning of the word 'mineral' was whether or not the substance had an intrinsic value apart from its bulk and weight" (24).

The decisions relied on by Fine AJ were: the *Finbro* decision *supra* (19), *Marshall v Registrar of Mining Rights* 1904 TH 210, *New Blue Sky Gold Mining Co Ltd v Marshall* 1905 TS 363 (22), *Glencairn Lime Company (Pty) Ltd v Minister of Labour and Minister of Justice* 1948 3 SA 894 (T) (23) and *Belville Inry (Edms) Bpk v Continental China (Pty) Ltd* 1976 3 SA 583 (C) (24). The reliance on the *Finbro* decision was based upon a thorough analysis of this decision of the court *a quo* (1983 1 SA 191 (O) 16–17) and the Appellate Division (14–16 17–18 29–20). The court also held that not even the *Loubser* decision *supra* excluded the use of the intrinsic value criterion in the determination of the popular meaning of the concept "mineral".

In the *Finbro* decision Hoexter AJ clearly distinguished between the meaning of the concept "mineral" for purposes of the particular cession (the so-called "contractual meaning of the concept mineral": 802A–I) and the meaning of the concept "mineral" for the purposes of section 3(1)(m) of the Deeds Registries Act 47 of 1937 (the so-called "statutory meaning of the concept mineral": 802J–808D; Radesich and Trichardt 1986 *THRHR* 113–116; Badenhorst and Van Heerden "Betekenis van die woord mineraal" 1989 *TSAR* 454–455, "Weer eens die betekenis van die woord mineraal" 1991 *TSAR* 183 188–190; Badenhorst 1990 *TSAR* 242–243 247–248; Badenhorst *Die juridiese bevoegdheid om minerale te ontgin in die Suid-Afrikaanse Reg* (LLD thesis UP 1993) 269–271 291–295). At the outset of the decision Hoexter AJ stated clearly:

> "This appeal involves the interpretation of a clause in a contract and a subsection of a statute. The contract concerned is embodied in a notarial deed of cession of mineral rights and the relevant statute is the Deeds Registries Act 47 of 1937. The first question is whether the 'rights to minerals' ceded in terms of the notarial deed include rights to stone. Should that question be affirmatively answered the further question arises whether in terms of s 3(1)(m) of Act 47 of 1937 the Registrar of Deeds has a legal duty to register such notarial cession" (748H–I).

It is submitted that even from Fine AJ's analysis of *Finbro* one can still implicitly distinguish between the contractual and statutory meaning of the concept "mineral" (14–15). It is submitted that if such a distinction is not made, the two views in the *Finbro* decision are incorrectly perceived as being irreconcilable (see eg the initial view of Dale in *Elliot The South African notary* by Lowe *et al* (1987) 214). Because of this distinction, the said decision may be restrictively interpreted as being a consideration of "the customary meaning of the word 'mineral' in the context of the use of the word in the Deeds Registries Act 47 of 1937 in which there was no express or implied meaning" (Kaplan and Dale *A guide to the Minerals Act 1991* (1992) 31) or so-called statutory meaning of the concept "mineral".

It is submitted that the parameters of the contractual meaning in *Finbro* were narrower than the parameters of the statutory meaning. First of all, the ordinary and grammatical meaning of the contract included stone (802F–G 802I–J), whereas the statutory meaning included stone if it had a value apart from its mere bulk and weight, and if it had been obtained from the crust of the earth for purposes of profit (808D). Secondly, sand and clay as base minerals were excluded for purposes of the contractual meaning (see 802F–G), whereas the statutory meaning would be wide enough to include *inter alia* sand and clay, if these substances had an intrinsic value and could be commercially exploited (see 808D).

With reference to the above-mentioned *dictum* of Fine AJ about intrinsic value, it should, however, be noted that: (a) as already indicated, not only the intrinsic value of the substance but also its profitability formed part of the test accepted by the Appellate Division in the *Finbro* decision for determining the statutory meaning of the concept "mineral" (808D; see 15); (b) in determining either the statutory or contractual meaning of the concept "mineral", the legislature or parties to the agreement may not necessarily have intended the popular meaning of the word mineral; other meanings, such as a geological (or scientific) meaning, or a wider (or narrower) meaning than the popular meaning may also be possible; (c) apart from intrinsic value, other factors such as the scientific development over time, impact of legislation (see 16) and policy considerations may also influence the popular meaning of the concept "mineral" (see Badenhorst "Towards a theory on mineral rights" 1990 *TSAR* 240–241); (d) intrinsic value (and profitability) to test whether or not a substance should be regarded as a mineral in a statutory context at a particular point in time, makes good sense, since it accords recognition to the dynamic development of the meaning of the concept in a statutory context. Whether the same test can be applied to determine the intention of parties to an agreement entered into seventy-five years ago, is a different question. It is conceivable that evidence of the fact that a particular substance on a particular property had a value apart from its mere bulk and weight, and that it could be obtained from the crust of the earth for purposes of profit at the time when the contract was concluded, would suffice to indicate the probable intention of the parties; and (e) the concept "intrinsic value" is a

confusing concept. The only things inherent to a mineral substance are its characteristics which are meaningless until exposed to people whose reactions to it may find ultimate expression in value (Van der Vyver *'n Teoretiese beskouing van die bepaling van die markwaarde van mineraalregte as 'n komponent van die vergoeding betaalbaar ingevolge die Onteieningswet, 63 van 1975* (LLM dissertation Wits 1986) 55).

With reference to the aforesaid *dictum* of Fine AJ, it should be noted further that the judgment in *Finbro* did not deal only with the "popular" or "usual" meaning, in common parlance, of the word "minerals" (803E–H) but also with other meanings. For instance, Hoexter AJ clearly stated with reference to decided cases:

> "As a prelude to the consideration of the problems of interpretation which arise in the present case it is necessary to examine a number of decided cases in our Courts over the past 90 years in which, in a diversity of contexts, the meaning of the word 'mineral' in scientific, popular and legal language has been discussed" (791H–I).

It is submitted that, subject to the above-mentioned qualifications, the aforegoing *dictum* of Fine AJ is correct for the purposes of determining the popular meaning of the concept "mineral". To the extent that the thrust of the decision is that the popular meaning of the concept "mineral" is to be equated with the contractual and statutory meaning of the concept "mineral" (see 5 below), the *dictum* is incorrect as a general rule.

5 The respondents' first contention (see 2 above) was based upon the distinction made in the *Finbro* decision between the contractual and statutory meaning of the concept "mineral" (see 4 above). However, Fine AJ was of the following opinion:

> "I do not think that the Respondent's contention that the test formulated by Hoexter AJ, in the *Finbro Furnishers* case, *supra*, should be confined to the interpretation of a statute. There is no warrant for limiting the *ratio* of the judgment to the interpretation of statutes only. To apply one test to the interpretation of a statute, and another to the interpretation of a contract would be subversive and inimical to the concept of certainty and uniformity, something which each of the Courts has greatly emphasised" (25).

It is submitted that the test formulated by Hoexter AJ applies to the popular meaning of the concept "mineral" in the context of section 3(1)(m) of the Deeds Registries Act. (The "popular" meaning (803E–I) is discussed as part of the examination of the statutory meaning (802J); it is conceded that expressions such as "colloquial speech", "colloquial sense" and "common parlance" do occur in the discussion of the contractual meaning of the concept "mineral" (802D–E 802H).) Even if the statements of Hoexter AJ about the popular meaning of the concept "mineral" were not restricted to its statutory meaning, he clearly stated:

> "The fact that common parlance assigns a restricted meaning to the word 'mineral' does not give the Court a licence to go behind the clear language of a particular contract" (802E).

In other words, the popular (or statutory) meaning cannot necessarily be equated with the contractual meaning, if the contractual language indicates the contrary. As mentioned earlier, either or both the legislature and the parties to an agreement can attach a popular meaning to the concept as their intention. It seems as if Fine AJ equated the popular meaning of the concept "mineral" for purposes of section 3(1)(m) in *Finbro* with the popular meaning of the concept "mineral" for

the purposes of the particular cession in *Finbro*. Even if it is true that both the parties to the cession in *Finbro*, and the legislature for purposes of the Deeds Registries Act, intended a popular meaning of the concept "mineral" (which we doubt) the respective parameters differed (see 4 above). It is only in that sense that the *Finbro* test should not be confined to the meaning of the concept "mineral" for purposes of the Deeds Registries Act. Our reading of the test is that in each instance the substance under consideration should have a value apart from its mere bulk and weight, and that it should be obtained from the crust of the earth for purposes of profit before it can be regarded as a mineral for statutory purposes. If the test is to be extended not only to determine the statutory meaning of the concept "mineral", but also its contractual meaning, then at least the test should be applied correctly. Even if only the first leg of the test (that the substance has an intrinsic value) is used as a starting point, the enquiry should not stop there. Thereafter the contractual and statutory meaning must still be determined by making use of the applicable principles of interpretation (Fine AJ did indeed make a determination as to the ordinary and grammatical meaning of the certificate (25)). If it is not, how then can it be explained that the contractual meaning in the *Finbro* decision was narrower than the statutory meaning of the concept "mineral" even though the same test of intrinsic value had supposedly been used (see 4 above)? And if not, it could even be argued that, because a substance has intrinsic value, the parties to an agreement or the legislature must have intended it to be a mineral (perhaps unfairly, as such a deduction can be made from Fine AJ's finding on 25). If the contractual meaning of the concept "mineral" is not determined carefully, this could amount to an *ex post facto* supplementing of the intention of parties or the legislature by an intention based upon a determination of intrinsic value.

6 The second contention by the respondents (see 2 above) was based on the following concluding remarks of Botha J in the *Loubser* case *supra*:

> "Die vernaamste oorweging wat uit die genoemde Transvaalse beslissing blyk, vir doeleindes van die huidige saak, is dat die gewone of populêre betekenis van die woord 'minerals' nie stowwe omvat soos gewone baksteenklei, sand of klip nie" (598H).

After a review of the cases referred to in the *Loubser* decision (21–22), Fine AJ held that: (a) the remarks of Botha J would no longer apply in the case of stone, regard being had to the *Finbro* decision (in other words, "mineral" in the popular sense of the word does include stone, if it has an intrinsic value); (b) nothing in the *Loubser* case subverts the common sense or popular meaning of the concept "mineral"; and (c) nothing precludes the use of the intrinsic value criterion in the determination of the common sense or popular meaning of the concept "mineral" (23).

Regarding statement (a), Fine AJ did not find it necessary for purposes of his judgment to hold that the *Finbro* decision overruled the *dictum* in the *Loubser* case (25). His reasons were that each case was concerned with a different substance and that there was nothing in the *Loubser* case which limited the applicability of the test of intrinsic value (25). However, by holding that the *Loubser dictum* no longer applied to stone because of the *Finbro* decision, Fine AJ in effect held that the *Finbro* decision overruled *Loubser*.

It is submitted that the court itself had in effect overruled the *Loubser dictum* because the popular meaning of the concept "mineral" was enlarged by implication to include a substance such as rock if it has an intrinsic value apart from

bulk and weight (and if it is capable of commercial exploitation). If this were not so, the court could not have held that dimension stone is a mineral in the popular sense of the word. By analogy, the popular meaning of the concept would also then include brick, clay or sand if those substances had an intrinsic value (and are capable of economic exploitation).

It is not altogether clear what the court meant by statement (b).

Regarding statement (c), even though it is true that intrinsic value was not rejected outright in the *Loubser* decision, Botha J held the following about expert evidence (including evidence as to economical exploitability):

> "Maar vanselfsprekend verskaf hierdie getuienis nog geensins 'n antwoord op die ondersoek na die betekenis van die serwituut nie: wat uitdrukkings soos 'minerals' en 'mineral substances' in die serwituut beteken, moet nog bepaal word, want *non constat* dat die partye hierdie uitdrukkings in 'n geologiese-tegniese sin gebruik het" (597G).

The fact that a mineral means *inter alia* substances in exceptional use and with exceptional value, did not, according to Botha J, contribute to the attempt to give a positive content to the ordinary meaning of the concept "mineral" (603C). On the other hand, the following statement by Botha J again supports the said statement (c):

> "Dit mag so wees dat die gewone betekenis van 'mineraal' hier by ons ter land die gedagte van 'n besonder waardevolle stof in die aardkors inhou" (608A).

7 Because the *Loubser* decision was not overruled, it is submitted that the court should (expressly or by implication) have followed the interpretation adopted in the said decision of the clause with exactly the same wording. For purposes of the interpretation of the meaning of the concept "minerals", the *Loubser* decision held the following:

(a) The use of the accompanying phrase "all . . . without exception" did not warrant the deduction that the parties did not intend to use the concept "mineral" in the ordinary sense of the word (603G). The phrase refers to that which actually occurred in the land and not the different meanings of the language used in the agreement (604F).

(b) The use of the word "on" refers to the intention to include substances on the surface of the land but does not amount to an intention to use the word in an unusual sense (603H).

(c) The use of the phrase "mineral substance" together with "mineral" amounts to a contrast in the sense that "minerals" refers to separately identified minerals whereas "mineral substances" refers to a conglomeration of minerals (604D).

(d) The expression "mineral, mineral substances" does not indicate an intention to use the concept "mineral" in an abnormal or unusual sense (604E–F).

As indicated previously, it was held in the *Loubser* decision that the normal or popular meaning of the concept "mineral" did not include substances such as ordinary brick, clay, sand or stone (598H 599D 602A–B). In both decisions it was held that the concept "mineral" in the particular agreement was used in the ordinary sense of the word, the only difference being that in the *Loubser* decision stone *inter alia* was excluded from such a meaning (even if it had intrinsic value) whereas in the *Rand Mines* decision dimension stone was included because it had intrinsic value.

For the purposes of the meaning of the concept "mineral" in the Deeds Registries Act, dimension stone is a mineral because it has intrinsic value and is capable of commercial exploitation, according to the expert evidence.

8 The implications of the *Rand Mines* decision for South African law are the following:

(a) The criterion of intrinsic value of a substance (and profitability) is decisive in determining whether or not the substance is a mineral in the popular sense of the word.

(b) The concept "mineral" in the popular sense of the word includes rock if such rock has an intrinsic value (and is capable of commercial exploitation).

(c) The concept "mineral" in the popular sense of the word could even include substances such as sand, gravel and clay, if these substances do have an intrinsic value (and are capable of commercial exploitation).

(d) Different (and differing) tests need not be applied to determine the contractual and statutory meaning of the concept "mineral".

The enlargement of the popular meaning of the concept "mineral" raises the question whether it is still possible to distinguish the popular (or narrow) meaning from the wide meaning of the concept "mineral" (namely, any portion of the earth's crust, not being animal or vegetable). Even if one accepts that after the *Finbro* decision the parameters of the popular meaning of the concept "mineral" have been enlarged (in respect of valuable stone only), it is submitted that great care should be exercised in establishing the intention of parties to an agreement. What should be guarded against in future is the danger of reasoning that, merely because a substance has intrinsic value, the parties must have intended it to form part of the subject matter of the particular agreement. The parties could have intended something different from the (new) popular sense of the concept "mineral".

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UITBREIDING VAN DIE TOEPASSINGSGEBIED VAN DIE *CONDICTIO INDEBITI* EN DIE ONTWIKKELING VAN 'N ALGEMENE VERRYKINGSAKSIE

Kommissaris van Binnelandse Inkomste v Willers 1994 3 SA 283 (A)

1 Inleiding

Die meerderheid moderne Suid-Afrikaanse juriste was voor 1966 van mening dat ons reg inderdaad 'n algemene subsidiêre verrykingsaksie erken het, wat naas die klassieke aksies bestaan en gevalle gedek het wat nie onder die klassieke aksies tuisgebring kon word nie (Wessels *The law of contract in South*

Africa (1951) par 3501 3515; Wille *Principles of South African law* (1961) 473–474; Joubert 1959 *SALJ* 472; Scholtens 1956 *Annual Survey of South African Law* 185, Scholtens 1960 *Annual Survey of South African Law* 152; Olivier "Die Aedilisiese aksies weens verborge gebreke" 1963 *THRHR* 190; Van der Walt "Die condicto indebiti as verrykingsaksie" 1966 *THRHR* 220; sien verder De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (1987) 304 vn 1; *contra* John 'n *Oorsig van ongeregverdigde verryking as gedingsoorsaak in die Suid-Afrikaanse reg* (LLD-proefskrif Leiden 1951) 140). Die erkenning van sodanige subsidiêre verrykingsaksie sou die weg baan vir die ontwikkeling van 'n allesomvattende algemene verrykingsaksie wat nie benewens die verskeie individuele aksies sou bestaan nie maar die hele gebied van ongeregverdigde verryking sou dek.

Wat die regspraak voor 1966 betref, was daar sake wat die indruk geskep het dat 'n subsidiêre algemene verrykingsaksie wel ontwikkel het (sien die gewysdes bespreek deur De Vos 244–303) terwyl ander die teenoorgestelde aangedui het of selfs uitdruklik die bestaan van sodanige aksie ontken het (sien die sake bespreek deur De Vos 304–305) – 'n ontkenning wat sy finale beslag in *Nortje v Pool* 1966 3 SA 96 (A) gekry het. Die uitspraak het skerp kritiek ontlok en juriste was dit feitlik eens dat die appèlhof die bestaan van so 'n aksie moes erken het (sien bv Van der Walt 1966 *THRHR* 374; Scholtens 1966 *SALJ* 391; Zimmermann 1985 *CILSA* 1; De Vos 311).

2 *Blesbok Eiendomsagentskap v Cantamessa* 1991 2 SA 712 (T)

Alhoewel die beslissing in *Nortje v Pool* nie die moontlike ontwikkeling van 'n algemene verrykingsaksie heeltemal uitgesluit het nie (vgl die opmerking van Botha AR 139H–140A), het die appèlhof, ondanks spesifieke ontwikkelings op die gebied van die verrykingsreg, nie veel aandag daaraan geskenk nie. Spesifieke ontwikkelings sluit onder andere in die onlangse erkenning in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 4 SA 202 (A) van aanwending van die *condictio indebiti* ook in die geval van regsdwaling (sien Visser se bespreking in 1992 *SALJ* 177). Die uitspraak van regter Van Zyl in *Blesbok Eiendomsagentskap v Cantamessa* het egter opnuut die aspek van 'n algemene verrykingsaksie aangeroer. In hierdie verband het die regter hom onomwonde soos volg uitgelaat (719D–F):

> "Ek is eerbiedig van mening dat die tyd inderdaad aangebreek het om aan 'n algemene verrykingsaksie erkenning te gee. Nie slegs is daar 'n mate van kunsmatigheid verbonde aan die vaskleef aan sogenaamde 'erkende verrykingsaksies' wat vir 'bepaalde omstandighede' daargestel is nie, maar die voortdurende uitbreiding van die verrykingsbeginsel om *ad hoc* vir nuwe gevalle voorsiening te maak, laat duidelik blyk dat daar 'n behoefte aan 'n algemene verrykingsaksie is. Trouens, die blote feit dat daar sulke uitbreiding plaasgevind het, is aanduidend van die bestaan van 'n algemene verrykingsaksie gegrond op die algemene beginsel teen ongeregverdigde verryking. Daarbenewens het gemeenregtelike navorsing sowel vóór as sedert die *Nortje*-saak onteenseglik die bestaan van 'n algemene verrykingsaksie in ons gemenereg bewys, soos duidelik uiteengesit deur De Vos *Verrykingsaanspreeklikheid in die Suid Afrikaanse Reg* (3de uitg 1987)."

(Sien ook Van Zyl R se bespreking van 'n algemene verrykingsaksie in 1992 *Acta Juridica* 115; vir vonnisbesprekings van hierdie gewysde sien Eiselen 1992 *THRHR* 124 en Sonnekus 1992 *THRHR* 301.)

Juriste het hulle ook sedert die *Nortje*-beslissing sterk uitgelaat ten gunste van die erkenning van 'n algemene verrykingsaksie (sien bv De Vos 328–329;

Zimmermann 1985 *CILSA* 18–20; Sonnekus 1992 *THRHR* 308–309; Eiselen 1992 *THRHR* 124–128; Malan 1992 *Acta Juridica* 131–135) alhoèwel hulle verskil wat betref die presiese implementering en toepassingsgebied van sodanige aksie. Enersyds is daar voorstanders van 'n aanvanklik subsidiêre verrykingsaksie wat uiteindelik sal ontwikkel tot 'n volkome algemene verrykingsaksie wat die tradisionele aksies sal verdring (sien bv De Vos 358–361 371–372; Van der Walt 1966 *THRHR* 377); andersyds word voorgestel dat 'n algemene verrykingsaksie deur die appèlhof erken of deur middel van wetgewing geskep moet word wat die bestaande tradisionele aksies vervang en waarvolgens alle vorme van verrykingsaanspreeklikheid dan opgelos kan word (sien bv Eiselen 1992 *THRHR* 127–128; Eiselen en Pienaar *Unjustified enrichment – a casebook* (1993) 22–23; Sonnekus 1992 *THRHR* 308–309).

3 *Kommissaris van Binnelandse Inkomste v Willers*

Met hierdie beslissing is die appèlhof opnuut die geleentheid gebied om uitsluitsel te gee oor die erkenning van 'n algemene verrykingsaksie. Die appellante was onderskeidelik die Kommissaris van Binnelandse Inkomste (eerste eiser) en die likwidateur (tweede eiser) van die maatskappy Bergbries (Edms) Bpk wat in vrywillige likwidasie geplaas is. Die eerste vier respondente (verweerders) was voormalige aandeelhouers en/of direkteure van hierdie maatskappy terwyl die vyfde respondent (verweerder) die voormalige likwidateur van die maatskappy was. Die sesde respondent (verweerder) was die Meester van die Hooggeregshof. Die eerste appellant se tweede alternatiewe eis het beweer dat die vyfde respondent in sy hoedanigheid van likwidateur van Bergbries (Edms) Bpk, sekere oorbetalings aan die eerste vier respondente gemaak het in die *bona fide* en redelike, maar foutiewe geloof dat laasgenoemde geregtig was om die volle bedrae te ontvang terwyl sodanige oorbetalings inderdaad onbetaalde inkomstebelasting ingesluit het wat die maatskappy aan die eerste appellant verskuldig was – die eerste vier respondente is gevolglik na bewering ongeregverdig teenoor die eerste appellant verryk. Die respondente het eksepsie hierteen opgewerp op grond daarvan dat die eis op die *condictio indebiti*, alternatief verryking, gebaseer is, omdat die *condictio* in die omstandighede nie aanwending vind nie en ook omdat daar geen algemene verrykingsaksie in die Suid-Afrikaanse reg bestaan nie. Hierdie eksepsie is deur die Transvaalse Provinsiale Afdeling gehandhaaf waarteen die appellante geappelleer het.

4 *Condictio indebiti*

Die uitspraak in die appèlhof is deur appèlregter Botha gelewer. Hy bevind dat die kern van die eksepsie gegrond is op die beslissing in *Rapp and Maister Holdings Ltd v Ruflex Holdings (Pty) Ltd* 1972 3 SA 835 (T) (wat ook inderdaad deur die hof *a quo* nagevolg is). In daardie geval weier die hof om die erkende aanwending van die *condictio indebiti* in die erfreg uit te brei na 'n soortgelyke geval as die onderhawige. In geval van bestorwe boedels kan 'n onbetaalde boedel-skuldeiser van 'n erfgenaam of legataris daardie bedrag eis wat laasgenoemde meer ontvang het as wat hy sou ontvang het indien die skuldeiser betaal was. In die *Rapp*-gewysde weier die hof om hierdie verrykingsaksie uit te brei na die geval waar 'n skuldeiser van 'n maatskappy wat vrywillig deur sy lede gelikwideer is, se eis nie in die finale likwidasie- en distribusierekening gereflekteer is nie, met gevolg dat sy eis onbetaald gebly het en 'n aandeelhouer in die maatskappy meer ontvang het as wat hy sou indien die skuldeiser wel uitbetaal is. In hierdie saak is eweneens 'n eksepsie teen die eiser se

besonderhede van vordering gehandhaaf. Die *ratio* vir die beslissing word vervat in die volgende *dictum* van regter Galgut (837F–838):

> "I cannot accept these submissions by counsel. Firstly, it is established under the common law that an action will lie at the instance of an unpaid creditor of a deceased person against an heir or legatee who has been paid more than he should have been paid out of the assets of the estate. Whether that action is described as a *condictio indebiti* or whether it is based upon the principle of unjust enrichment, does not matter. It is an action granted by the common law. See the remarks of *Broome, J.P.*, in *Prinsloo v* [*Woolbrokers*] *Federation, Ltd., supra* at p.299. There is no such common law action available to an unpaid creditor of a company against a shareholder who has received more on dissolution of the company than he would have received, had the creditor been paid. Secondly it has been held that there is no general action for enrichment in our law. Before a plaintiff can succeed on a claim based on unjust enrichment he must show that his cause of action falls within the scope of one of the recognised actions for enrichment in our law. The dicta in *Nortje en 'n Ander v Pool, N.O.*, 1966 (3) S.A. 96 (A.D.) at pp. 139 and 140, leave one in no doubt that our law does not regard the rule against unjust enrichment as creating a legal obligation independently of one or the other recognised enrichment actions and regardless of particular circumstances. As plaintiff has no common law action to assist it and as the alleged enrichment does not arise from one of the recognised enrichment actions it must fail unless the Companies Act assists it."

Wat betref die aanwending van die *condictio indebiti* binne die kader van die erfreg besluit appèlregter Botha dat dit uiters twyfelagtig is of die appèlhof bereid sou wees om oorweging te skenk aan die verwerping van 'n reël wat lank reeds in die regspraktyk gevestig is (330E–F). Die hof is inderdaad ook nie gevra om dit te doen nie. Die reël word al langer as 'n eeu deur ons howe toegepas (sien bv die sake genoem deur De Vos 172 vn 10) en word in die algemeen deur skrywers aanvaar (sien bv *idem* 172–174; De Vos 1968 *Acta Juridica* 220; Eiselen en Pienaar 212; *contra* Van der Walt 1966 *THRHR* 220).

5 Algemene verrykingsaksie

Appèlregter Botha kom tot die gevolgtrekking dat die meerderheidsuitspraak in *Nortje v Pool* geen gesag vir die benadering in die *Rapp*-gewysde *supra* is nie en laat hom soos volg hieroor uit (331A–D):

> "Die feite in *Nortje en 'n Ander v Pool NO* is te welbekend om weer hier uiteengesit te word. Vir huidige doeleindes hoef slegs gemeld te word dat een van die argumente wat namens die appellant aangevoer was, was dat die vergoedingsaksie van 'n *bona fide possessor* vir nuttige verbeterings, wat reeds in die regspraak uitgebrei was tot *bona fide* okkupeerders, by wyse van analogie verder uitgebrei moes word om ook die eis te omvat van 'n *bona fide* okkupeerder vir nuttige uitgawes waardeur die waarde van die grond verhoog is sonder dat tasbare verbeterings daarop aangebring is. In die meerderheidsuitspraak is hierdie betoog verwerp, maar daar is nêrens in die uitspraak, soos ek dit verstaan, enige aanduiding dat die voorgestelde uitbreiding *in beginsel* onmoontlik sou wees nie. Die teendeel blyk trouens duidelik. Met verwysing na uitbreiding in die verlede, word daar gesê (op 133F–G): 'Dat die gemeenregtelike *condictiones sine causa* 'n ontwikkeling in die Suid-Afrikaanse reg ondergaan het ten einde ongeregverdigde verryking ten koste van 'n ander meer effektief teen te werk, en dat verrykingsaanspreeklikheid om dieselfde rede deur ons Howe erken is waar die omstandighede nie streng binne die aanwendingsgebied van bedoelde *condictiones* geval het nie, maar tog analogies daaraan was, val nie te ontken nie."

In sy verdere bespreking van die uitspraak in *Nortje v Pool* kom regter Botha tot die slotsom dat analogiese toepassing van die bestaande aksie (die vergoedingsaksie van die *bona fide* okkupeerder) in daardie saak slegs verwerp is omrede die feite van die geval dit nie regverdig het nie (331H).

Volgens appèlregter Botha is daar twee uitlatings in die meerderheidsuitspraak van die *Nortje*-saak wat aanleiding tot misverstand kon gegee het. Die eerste is dat die hof gevra is om 'n nuwe aksie te skep wat nie voorheen in ons reg bestaan het nie, en dit het die hof geweier om te doen. Hierdie uitlating word oënskynlik aangegee as 'n rede waarom die appellant se betoog ten gunste van die voorgestelde uitbreiding nie aanvaar kon word nie. Regter Botha meen egter dat die uitlating slegs beskrywend was van die meerderheid se beskouing van die aard van die voorgestelde uitbreiding met verwysing na die feite van daardie geval en sê voorts dat die weiering van die hof om 'n nuwe aksie te skep nie beskou moet word as aanduidend van 'n algemene reël teen die erkenning van verrykingsaanspreeklikheid in gevalle waar dit voorheen nog nie erken is nie. Tweedens is beslis dat ongeregverdigde verryking nêrens as 'n verbintenisskeppende feit los van bepaalde omstandighede aanvaar is nie. Wat dit betref, beslis regter Botha dat die hof in die *Nortje*-saak wel teruggedeins het van die beeld van 'n algemene verrykingsaksie bestaande uit reëls wat in die algemeen geformuleer is en bepalend is van die bestaan van verrykingsaanspreeklikheid al dan nie in enige omstandighede, en wat uit *ad hoc*-beslissings van die verlede geëkstraheer kan word. Dit beteken egter nie, meen hy, dat 'n hof nie die bevoegdheid het om verrykingsaanspreeklikheid te aanvaar in gevalle waar dit nog nie voorheen erken is nie (332A–G). As voorbeeld van die pasvermelde bevoegdheid verwys die appèlregter na die uitbreiding van die aanwendingsgebied van die *condictio indebiti* deur die appèlhof in die *Willis Faber Enthoven*-gewysde *supra* (332H).

Regter Botha kom tot die volgende slotsom (333C–E):

> "Die aangehaalde woorde van Innes HR [in *Blower v Van Noorden* 1909 TS 890 op 905] gee aanleiding tot die gedagte dat die meerderheid van die Hof in *Nortje en 'n Ander v Pool NO (supra)* moontlik gekant was teen die erkenning van 'n algemene verrykingsaksie omdat die vasstelling en neerlegging van algemene en universeel-geldende norme om aanspreeklikheid te vestig en begrens, beskou is as 'n onderneming van wetgewende eerder as regsprekende aard. So 'n beskouing kan egter nie beteken dat die Hof daarvan weerhou word om in 'n bepaalde geval verrykingsaanspreeklikheid te aanvaar bloot omdat dit nog nie vantevore in dieselfde, of soortgelyke, omstandighede erkenning gevind het nie. In so 'n geval sal daar natuurlik aandag geskenk moet word aan die vraag of uitbreiding of nuwe ontwikkeling nodig of wenslik is, en daarby sal daar gekyk moet word na die bestaande presedente, sowel oud as jonk, en vanselfsprekend ook na die bydraes van akademiese skrywers wat voorstelle uitgewerk het van algemene maatstawwe om aanspreeklikheid te vestig en te begrens (sien veral De Vos (op cit hoofstuk VII op 328 ev))."

Gevolglik word bevind dat *Rapp and Maister Holdings Ltd v Ruflex Holdings (Pty) Ltd supra* verkeerd beslis is (333F) en dat die *condictio indebiti* in beginsel wel deur die appellante *in casu* aangewend kon word. Gevolglik is die eksepsie afgewys (333G–H).

6 Gevolgtrekkings

In die eerste plek bring die beslissing 'n verandering in die regsposisie mee deurdat die *condictio indebiti* in beginsel nou ook na gevalle soos die onderhawige

uitgebrei is. Alhoewel die appèl slegs gehandel het met 'n eksepsie en daar dus nie oor die meriete van die saak beslis is nie, is dit duidelik dat die appèlhof ten gunste van so 'n uitbreiding is. In beginsel behoort die *condictio indebiti* in alle analogiese gevalle toepassing te vind. Hierdie moontlike uitbreiding van verrykingsaanspreeklikheid word soos enige regsuitbreiding waar daar behoefte ontstaan, verwelkom.

Meer belangrik is die houding wat die appèlhof ingeneem het ten opsigte van die uitbreiding van verrykingsaanspreeklikheid in die algemeen. Appèlregter Botha se uitspraak kan ten minste gesien word as 'n aanmoediging tot uitbreiding van verrykingsaanspreeklikheid waar die behoefte bestaan. Hierdie benadering is te verwelkom aangesien die howe veral op die gebied van ongeregverdigde verryking regskeppend sal moet optree omdat die wetgewer sedert die beslissing in *Nortje v Pool* nie veel aandag aan die skepping van 'n statutêre algemene verrykingsaksie verleen het nie.

Daar is egter enkele punte van kritiek wat uitgelig moet word. Die uitspraak doen nie veel afbreuk aan die beslissing in *Nortje v Pool* en die effek daarvan nie. In laasgenoemde saak is die bestaan van 'n algemene verrykingsaksie ontken (133G 139F–140A) alhoewel daar toegegee is dat die *condictiones sine causa* 'n ontwikkeling in die Suid-Afrikaanse reg ondergaan het en dat verrykingsaanspreeklikheid as gevolg daarvan uitgebrei is (133F). Die hof was egter nie gekant teen verdere regsontwikkeling op hierdie gebied nie anders sou beslissings soos *Willis Faber supra* nie moontlik gewees het alvorens die appèlhof besluit het dat die *Nortje*-saak op hierdie punt verkeerd is nie. Daarin lê die haakplek met die *Willers*-saak: instede daarvan dat die hof 'n algemene subsidiêre verrykingsaksie erken en gevolglik die *Nortje*-saak op daardie punt omvergewerp het, word slegs bevind dat *Nortje* nie verdere ontwikkelings uitgesluit het nie en dat 'n hof dus steeds die bevoegdheid het om verrykingsaanspreeklikheid in gepaste gevalle uit te brei. Die howe is egter stadig om regshervorming te bewerkstellig.

Die uitspraak skep dus 'n mate van verwarring aangesien 'n subsidiêre verrykingsaksie nie erken word nie – trouens die teendeel blyk waar te wees want die *Nortje*-beslissing is nie op hierdie punt omvergewerp nie – maar uitbreiding van verrykingsaanspreeklikheid tog aangemoedig word met inagneming van presedente en die bydraes van akademiese skrywers aangaande algemene maatstawwe om aanspreeklikheid te vestig en te begrens. Wat laasgemelde betref, verwys appèlregter Botha na De Vos hoofstuk VII waarin die skrywer die reëls van 'n *algemene verrykingsaksie* bespreek. Dit skep die indruk dat die hof niks anders nie as 'n algemene subsidiêre verrykingsaksie in gedagte gehad het wat naas die tradisionele aksies aanwending vind.

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MIDDELLIKE AANSPREEKLIKHEID VAN DIE MOTORVOERTUIGEIENAAR: TERUGKEER NA DIE TRADISIONELE BESKOUING?

Pretorius v Claasen 1994-02-10 saakno A520/93 (T)

1 Die feite

Die tersaaklike feite is soos volg: Pretorius en Pienaar het in Pretorius se voertuig op die nasionale pad tussen Potchefstroom en Johannesburg gery. Pienaar het bestuur. Die rede waarom hy bestuur het, is nie duidelik nie. Op die versekeringseisvorm beweer Pretorius dat hy en Pienaar op pad was om een van hulle motors, wat te Westonaria gestaan het, te gaan haal. Die hof *a quo* (landdroshof) bevind dat hulle op pad na 'n ete en dat Pienaar 'n kliënt van Pretorius was. Die rede waarom Pienaar bestuur het, is egter nie belangrik nie: 'n mens kan aanvaar dat Pienaar nie in diens van Pretorius was toe hy die motor bestuur het en dat daar ook nie 'n prinsipaal-verteenwoordiger-verhouding tussen hulle bestaan het nie.

Claasen, bestuurder van die ander voertuig, het vanaf Carletonville gekom en die Potchefstroom-Johannesburg nasionale pad by 'n stopteken binnegegaan – 'n botsing het plaasgevind tussen die voertuig bestuur deur Pienaar en dié bestuur deur Claasen.

2 Beslissing

Die beslissing van die hof *a quo* op die meriete is vir doeleindes van hierdie bespreking nie tersake nie; die bespreking word dus tot die beslissing oor die middellike aanspreeklikheidskwessie beperk. Landdros Vermeulen beslis dat daar drie vereistes vir middellike aanspreeklikheid is: (a) daar moet 'n versoek wees en die eienaar moet tot die bestuur van die voertuig toestem; (b) die bestuur moet in belang van die eienaar wees; en (c) die eienaar moet 'n reg van beheer hê oor die wyse waarop die voertuig bestuur word.

Wat die eerste vereiste betref, bevind die landdros dat Pienaar vir Pretorius gevra het of hy sy motor mag bestuur en dat Pretorius daartoe ingestem het. In verband met die tweede vereiste bevind die landdros dat Pienaar in belang van Pretorius bestuur het. Hy sê dat die gesag daarop dui dat die belang nie vermoënsregtelik hoef te wees nie, alhoewel daar in hierdie geval sprake van 'n vermoënsregtelike voordeel kon wees aangesien Pienaar 'n kliënt van Pretorius was en hulle 'n ete-afspraak gehad het.

Betreffende die derde vereiste verwys die landdros na *Roman v Pietersen* 1990 3 SA 350 (K) 356 en *Du Plessis v Faul* 1985 2 SA 85 (NK) 93–94. Hier word beslis dat die teenwoordigheid van die eienaar in die voertuig 'n *prima facie* afleiding van beheer regverdig en dat die eienaar nie net 'n reg van beheer het oor die wyse waarop die bestuurder die voertuig bestuur nie maar ook 'n *plig* daartoe.

In die lig hiervan bevind die hof *a quo* dat Pretorius middellik aanspreeklik is vir die nalatige wyse waarop Pienaar die motor bestuur en die ongeluk veroorsaak het.

Die hooggeregshof het die hof *a quo* se uitspraak op die middellike aanspreeklikheidskwessie ondersteun. Die volgende *dictum* uit die Engelse saak *Awnrod v The Crosswell Motor Services* [1952] 2 All ER 755, waarna regter Weyers met goedkeuring verwys, kan egter die indruk laat dat die enigste vereiste vir middellike aanspreeklikheid is dat die voertuig in belang van die eienaar bestuur moet gewees het:

> "The law puts a special responsibility on the owner of the vehicle who allows it to go on the road in charge of someone else. No matter whether it is his servant, his friend or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver."

Hierop word later ingegaan.

3 Beginsel van middellike aanspreeklikheid van die motorvoertuigeienaar

3 1 Algemene bespreking

Die beginsel van middellike aanspreeklikheid is in ons reg vanuit die Engelse reg oorgeneem en vorm deel van ons positiewe reg (Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 508 ev; Neethling, Potgieter en Visser *Law of delict* (1994) 352 ev; Burchell *Principles of delict* (1993) 217 ev). In *Estate Van der Byl v Swanepoel* 1927 AD 141 word die beginsel onomwonde tipeer as 'n "exception to the general rule that every man is liable for his own negligence only".

Die beginsel dat iemand vir 'n ander se handelinge aanspreeklik kan wees, geld ook by die bestuur van 'n motorvoertuig. Waar 'n voertuig in 'n ongeluk betrokke raak omdat dit op 'n nalatige wyse deur iemand anders as die eienaar daarvan met laasgenoemde se verlof bestuur is, kan die eienaar aanspreeklik gehou word (sien Van der Merwe en Olivier 523 ev; Neethling, Potgieter en Visser 358–359).

Tradisioneel is daar by middellike aanspreeklikheid van die eienaar altyd gekyk of daar 'n werkgewer-werknemer- of 'n prinsipaal-verteenwoordiger-verhouding tussen die eienaar en bestuurder was (sien Scott *Middellike aanspreeklikheid in die Suid-Afrikaanse reg* (1983) 236 ev). Soos bekend, is daar by die vasstelling van 'n werkgewer-werknemer-verhouding tradisioneel gelet op die feit of die werkgewer beheer en kontrole oor die handelinge van die persoon wat gehandel het, kan uitoefen of nie (Van der Merwe en Olivier 510). Die prinsipaal-verteenwoordiger-verhouding impliseer ook dat die prinsipaal beheer oor die optrede van die verteenwoordiger kan uitoefen. Die posisie van die motorvoertuigeienaar het mettertyd verander maar selfs vandag nog speel beheer by die vasstelling van die eienaar se aanspreeklikheid 'n groot rol.

3 2 Menings van skrywers

Boberg ("A new head of vicarious liability" 1962 *SALJ* 235, waar hy *Masinda v Tower Typewriter Co* 1961 1 SA 795 (N) bespreek) gaan so ver as om te sê dat 'n reg van beheer *per se*, in die afwesigheid van persoonlike nalatigheid of van 'n werkgewer-werknemer- of prinsipaal-verteenwoordiger-verhouding, nie 'n basis vir die werking van die middellike aanspreeklikheid van die motorvoertuigeienaar is nie. Waar beheer betrokke is maar vermelde verhoudings afwesig is, kan middellike aanspreeklikheid volgens hom (237) nie sonder meer toegepas word nie. Sy uiteindelike gevolgtrekking is dat daar nie twee basisse vir middellike aanspreeklikheid – een gebaseer op vermelde verhoudings en een gebaseer

op beheer alleen – kan wees nie maar dat die twee basisse inderdaad een is. Hy verklaar:

> "There is no reason of policy or justice which requires a right of control to entail vicarious liability . . . It is therefore submitted that the existence of a right of control is relevant in delict in two ways: (a) in an inquiry as to personal negligence; and (b) in determining whether a master-and-servant relationship exists. It is not, however, either on authority or on principle, a sound basis *per se* for the imposition of vicarious liability."

JBT ("Car owner's liability for friend's driving" 1964 *SALJ* 73, waar hy *Manickum v Lupke* 1963 2 SA 344 (N) bespreek) verskil met Boberg. Hy (74) beweer dat beheer wel die basis vir middellike aanspreeklikheid is, maar stel as kwalifikasie dat die eienaar in die voertuig teenwoordig moet wees. Daarom is die eienaar se aanspreeklikheid direk en nie middellik nie. JBT sê:

> "If, however, he hires out or lends his vehicle to another and is not present in it, then, at any rate in our law, it seems that he cannot be said to be in control and so cannot be held liable for negligent driving" (met verwysing na McKerron 1953 *SALJ* 313 waar hy *Ormrod v Crosville Motor Services Ltd* 1953 1 All ER 711 bespreek).

3 3 Howe se hantering

Wat die regspraak aanbetref, is reeds gesê dat tradisioneel vereis is dat daar een van die vermelde verhoudings, wat beheer oor die wyse van bestuur impliseer, moet wees voordat die eienaar middellik aanspreeklik kan wees. Reeds in 1962 het die hof in *Paton v Caledonian Insurance Co* 1962 2 SA 691 (D) egter afgewyk van die tradisionele standpunt. Regter Henning beslis:

> "There is another basis upon which the plaintiff's liability is, in my opinion, established. Rabie drove the car on her behalf as well as his own" (697).

Hierdie stelling moet egter saamgelees word met die regter se vroeëre stelling, naamlik dat die eienaar in besit en beheer gebly het terwyl Rabie bestuur het.

In *Manickum v Lupke supra* word beslis dat indien die eienaar in die motor teenwoordig is terwyl dit deur 'n ander bestuur word, die eienaar nie net die *reg* het om die motor te beheer nie, maar ook die *verpligting* om dit te doen (sien ook *Roman v Pietersen supra* 356; *Du Plessis v Faul supra* 93–94; Neethling, Potgieter en Visser 359 vn 144). Tog beslis regter-president Jacobs in *Du Plessis v Faul supra* 93 dat teenwoordigheid net 'n *prima facie* afleiding van middellike aanspreeklikheid daarstel.

In *South African General Investment & Trust Co Ltd v Mavaneni* 1963 4 SA 89 (D) 91 word die huidige vereistes vir die motorvoertuigeienaar se aanspreeklikheid soos volg saamgevat:

> "In South Africa the owner of a motor car is liable for the negligent driving of it by another person authorised by him to drive it if:
>
> (a) the vehicle is being driven on behalf of the owner, and
>
> (b) the relationship between the owner and the driver is such that the former retains the right to control the manner in which the car shall be driven" (sien ook Neethling, Potgieter en Visser 359; Scott 243).

3 4 Kritiese beskouing van die regspraak, veral Pretorius v Claasen

Ek ondersteun die tradisionele siening van die middellike aanspreeklikheid van die motorvoertuigeienaar, naamlik dat daar óf 'n werkgewer-werknemer- óf 'n prinsipaal-verteenwoordiger-verhouding, plus beheer oor die wyse van bestuur,

moet wees. Verder ondersteun ek ook die beginsel waarvolgens 'n eienaar middellik aanspreeklik kan wees waar die tradisionele verhoudings nie bestaan nie, maar waar die eienaar in die voertuig teenwoordig is en redelikerwys in staat is om werklike beheer oor die bestuur van sy voertuig uit te oefen.

Wat ek egter nie kan onderskryf nie, is die beginsel, soos blyk uit onder andere *Manickum v Lupke supra*, dat daar 'n (absolute?) *verpligting* op die eienaar rus om beheer uit te oefen en dat 'n afleiding van beheer uit die eienaar se teenwoordigheid in die motor gemaak kan word. Wat die verpligting om te beheer betref, kan ek aan baie voorbeelde dink waar uitoefening daarvan nie (redelikerwys) moontlik sou wees nie. Waar die eienaar (A) byvoorbeeld saam met sy vriend (B) in A se motor ry en B strydig met A se opdragte tog onverskillig ry en 'n ongeluk maak, kan A sekerlik nie middellik aanspreeklik gehou word vir B se optrede nie. Wat moes die eienaar gedoen het? Die stuur vasgryp; die handrem teen 120 kpu vastrek, en so 'n ongeluk veroorsaak? Die plig om beheer uit te oefen, wat spruit uit die *regsoortuiging van die gemeenskap* (*Du Plessis v Faul supra* 94), impliseer sekerlik dat dit net ontstaan indien daar *redelikerwys* van die eienaar *verwag* kan word om op te tree, en dat dié plig dan boonop op 'n *redelike wyse* uitgeoefen moet word – 'n absolute plig om beheer uit te oefen is dit ten ene male nie.

Boberg gaan myns insiens te ver waar hy beweer dat 'n reg van beheer net relevant is by die bepaling of 'n werkgewer-werknemer-verhouding bestaan het of nie. JBT is nader aan die waarheid waar hy sê dat beheer wel die basis vir middellike aanspreeklikheid kan wees mits die eienaar in die voertuig teenwoordig is. Dit kom my voor of die hof in *Du Plessis v Faul supra* die spyker op die kop slaan waar gesê word dat teenwoordigheid net 'n *prima facie* afleiding van middellike aanspreeklikheid daarstel. Daarom bestaan daar geen rede waarom ek middellik aanspreeklik gehou moet word indien 'n vriend wat my motor bestuur, daarmee 'n delik pleeg en ek, alhoewel ek in die motor teenwoordig was, redelikerwys niks kon doen om hom tot die besef te bring dat hy versigtig moet bestuur nie. In hierdie geval het ek die reg van en plig tot beheer, maar omdat ek my plig op 'n redelike wyse uitgeoefen het, is ek nie middellik aanspreeklik nie.

My belangrikste punt van kritiek is egter die indruk wat regter Weyers se uitspraak in *Pretorius v Claasen* laat dat die enigste vereiste vir middellike aanspreeklikheid is dat die voertuig in belang van die eienaar bestuur moet gewees het. Indien sodanige belang voldoende is, kan 'n mens die volgende absurde gevolg kry: Ek en vriende hou 'n braai by my huis. Ek gee my sleutels aan een van my vriende wat nog niks gedrink het nie en van wie ek weet dat hy 'n goeie en versigtige bestuurder is, met die opdrag om nog vleis te gaan koop want die vleis is te min. Op pad na die slaghuis ry hy nalatig oor 'n rooi verkeerslig en bots met 'n voertuig wat reg van weg het. Is ek, wat staan en vleis braai, nou middellik aanspreeklik? Die rit was sonder twyfel in my belang. Myns insiens sal die regsgevoel van die gemeenskap in opstand kom teen so 'n bepaling van middellike aanspreeklikheid.

Om op te som, sal ek graag wil sien dat ons howe middellike aanspreeklikheid by die bestuur van 'n motor net sal vestig in die volgende gevalle:

(a) waar een van die erkende verhoudings bestaan en die werknemer of verteenwoordiger binne die bestek van daardie verhouding die voertuig bestuur het;

(b) waar die eienaar in die motor teenwoordig is, hy redelikerwys beheer moet uitgeoefen het en versuim het om dié plig op 'n redelike wyse na te kom.

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ARTIKEL 2(3) VAN DIE WET OP TESTAMENTE 7 VAN 1953

Horn v Horn 1995 1 SA 48 (W)

Die applikante het ingevolge artikel 2(3) van die Wet op Testamente 7 van 1953 aansoek gedoen om 'n bevel wat verklaar dat die Meester 'n bepaalde dokument as die testament van die oorledene moet aanvaar en dat hierdie dokument 'n testament herroep wat in 1986 opgestel is. Die betrokke dokument is 30 November 1993 gedateer en deur die erflater alleen onderteken. (Geen getuies het daarby geteken soos vereis word deur a 2(1)(a)(ii) van die wet nie.) Dit is op dieselfde dag gevind op die toneel waar die oorledene homself en sy twee kinders om die lewe gebring het.

Artikel 2(3) lui soos volg:

> "Indien 'n hof oortuig is dat 'n dokument of die wysiging van 'n dokument wat opgestel of verly is deur 'n persoon wat sedert die opstel of verlyding daarvan oorlede is, bedoel was om sy testament te wees, gelas die hof die Meester om daardie dokument, of die dokument soos gewysig, vir doeleindes van die Boedelwet, 1965 (Wet No 66 van 1965), as testament te aanvaar ofskoon dit nie aan al die vormvereistes vir die verlyding of wysiging van testamente bedoel in subartikel (1) voldoen nie."

Die doel van die artikel is om probleme veroorsaak deur die streng formalistiese benadering van die verlede te ondervang (sien *Jeffrey v The Master* 1990 4 SA 759 (N); *Gantsho v Gantsho* 1986 2 SA 321 (TR); *Kidwell v The Master* 1983 1 SA 509 (OK); *Tshabalala v Tshabalala* 1980 1 SA 134 (O); *Philip v The Master* 1980 2 SA 934 (D); *Radley v Stopforth* 1977 2 SA 516 (A); Cronjé en Roos "Een en ander oor testamentsformaliteite" 1984 *De Rebus* 257; Sonnekus "'n Sertifiserende beampte se hoedanigheid by testamente, die gesloer met wetswysiging en favor testamenti" 1991 *SALJ* 13; Roos "Hersiening van die erfreg" 1993 *THRHR* 108; Jamneck "Die invloed van artikel 2(3) van die Wet op Testamente 7 van 1953 op die erkende beginsels van rektifikasie en interpretasie van testamente" 1994 *THRHR* 597). Artikel 2(3) is dus daarop gemik om regskrag te verleen aan 'n dokument wat *ex facie* nie 'n geldige testament is nie. Die hof moes beslis of artikel 2(3) aan die hof 'n diskresie verleen om die Meester te beveel om 'n dokument as testament te aanvaar, indien hy oortuig is dat die testateur bedoel het dat dit as sy testament moet geld. Soos die hof tereg opmerk (50), is dit jammer dat die Afrikaanse teks van die wet nie duideliker gestel is nie. Die taalstyl wat deur die wetgewer gebruik word, is die vertellende trant en daar word nie uitdruklik gesê dat die hof so 'n bevel "mag" of "moet" verleen nie. Die ondertekende Engelse teks laat die hof egter geen keuse nie. Dit bepaal

dat "The court *shall* order the Master to accept that document". Die hof is dus verplig om die bevel te verleen indien hy oortuig is dat die testateur bedoel het dat die dokument as sy testament moet geld. Die hof verleen wel ingevolge artikel 2(3) 'n bevel *nisi* aan die applikante, maar spreek bedenkinge uit oor die gepastheid van die gevraagde regshulp. Dit wil voorkom of die hof die invoeging van artikel 2(3) in die wet wil kritiseer. Die wyse waarop die hof te werk gaan, kan moontlik wat die toepassing van artikel 2(3) betref verwarring skep. Hoewel die uiteindelike beslissing van die hof dus nie te betwis is nie, behoef 'n gedeelte van die uitspraak nadere beskouing.

Adjunk regter-president Flemming maak die volgende (moontlik verwarrende) stelling (49):

> "Ek was geneig om te dink dat getuies nie net die rol speel om die identiteit van die persoon wat as erflater geteken het, te bevestig nie. (In moderne tye waar handskrif deskundiges baie kan doen, is dit soms 'n misbare funksie.) Getuies sou ook kon getuig oor die gemoedstoestand van die erflater desnoods tot die mate dat beoordeling daarvan of hy voldoende by sy volle positiewe was, moontlik is. Tydens hierdie gesinsmoord was daar klaarblyklik aansienlike emosionele opwelling wat dalk 'n ondersoek kon regverdig daarna of die oorledene so irrasioneel was op die gegewe oomblik dat hy hetsy testeerbevoegdheid hetsy die kompetensie om 'n vorige testament te herroep ontbeer het."

Die hof skep dus die indruk dat hy graag die testateur se emosionele toestand en gevolglik sy testeerbevoegdheid by die kwessie sou wou betrek. Hoewel die emosionele toestand van die testateur in hierdie feitestel ongetwyfeld nie misken kan word nie, moet gewaak word teen die versoeking om testeerbevoegdheid by 'n artikel 2(3)-aansoek in gedrang te bring. Die doel van artikel 2(3) is uitsluitlik om aan die hof die bevoegdheid te verleen om gebreke in die testamentsformaliteite te kondoneer. Die testateur se testeerbevoegdheid behoort dus streng (teoreties-suiwer volgens uitleg van die wet) gesproke nie by 'n artikel 2(3)-aansoek ter sprake te kom nie. Dit behoort slegs in gedrang te kom nadat die hof die Meester gelas het om die dokument as geldige testament te aanvaar.

Prakties gesproke kom 'n mens egter voor 'n probleem te staan. In die verlede kon 'n testateur se testeerbevoegdheid slegs aangeveg word wanneer met 'n dokument gewerk is wat *ex facie* 'n geldige testament was. Die Meester het 'n testament aanvaar wat aan alle formaliteite voldoen, waarna enige belanghebbende die testament op grond van die testateur se gebrek aan testeerbevoegdheid in die hof kon aanveg. 'n Testament wat nie aan die formaliteite voldoen het nie, sou, vanweë die gebiedende aard van artikel 2, nie deur die Meester of die hof aanvaar word nie (sien bv *Kidwell v The Master* 1983 1 SA 509 (OK); *Jeffrey v The Master* 1990 4 SA 759 (N)). Die testeerbevoegdheid van die testateur het gevolglik nie eens ter sprake gekom waar nie aan alle formaliteite voldoen is nie. Die vraag ontstaan nou wat die posisie is na die wysiging van die wet deur Wet 43 van 1992, omdat dit nou moontlik is dat sowel die geldigheid van die testament as gevolg van die gebrek aan formaliteite, as geldigheid as gevolg van die gebrek aan testeerbevoegdheid, gelyktydig ter sprake kan kom. Aangesien artikel 2(3) slegs op die formaliteite betrekking het, kan 'n aansoek ingevolge daarvan nie teengestaan word met bewerings aangaande die testateur se testeerbevoegdheid nie. Gevolglik ontstaan die volgende vrae: Moet die hof eers die Meester gelas om die dokument as geldige testament te aanvaar, waarna opponerende belanghebbendes by wyse van 'n nuwe proses moet poog om te bewys dat die testateur nie oor die nodige testeerbevoegdheid

beskik het nie; of kan die teenparty by wyse van 'n teenaansoek tydens dieselfde proses 'n bevel aangaande die testateur se testeerbevoegdheid aanvra?

Eersgenoemde benadering sou in ooreenstemming met die praktyk voor wysiging van die wet wees. Ten einde tyd en koste te bespaar, lyk laasgenoemde prosedure egter verkieslik. Wanneer 'n aansoek kragtens artikel 2(3) gebring word, sal die teenparty dus 'n teenaansoek vir 'n bevel aangaande die testateur se testeerbevoegdheid moet aanvra. (Dié party sal natuurlik enige bewerings oor testeerbevoegdheid moet bewys – a 4 Wet 7 van 1953.) Dit sal ook dienlik wees indien die hof in so 'n geval eers die teenaansoek oorweeg, omdat 'n bevinding dat die testateur nie testeerbevoeg was nie enige verdere vrae na die geldigheid van die dokument uitskakel. Indien wel bevind word dat 'n testateur nie ten tyde van die maak van sy testament oor die nodige testeerbevoegdheid beskik het nie, is die testament *ab initio* nietig (Van der Merwe en Rowland *Die Suid-Afrikaanse erfreg* (1990) 185 205). Gevolglik sal geen verdere ondersoek na die vraag of die testateur bedoel het dat die dokument sy testament moet wees, nodig wees nie. Daar moet egter benadruk word dat die hof nie, by gebrek aan 'n teenaansoek, *mero motu* die vraag na testeerbevoegdheid kan opper wanneer 'n artikel 2(3)-aansoek beoordeel moet word nie aangesien dié artikel nie oor testeerbevoegdheid handel nie.

Ten slotte moet die feit dat die hof in die *Horn*-saak testeerbevoegdheid geopper het, miskien gesien word in die lig van die feit dat daar slegs 'n bevel *nisi* verleen is. Dit is moontlik dat die hof net aan die partye 'n idee van 'n grond vir die bring van 'n teenaansoek wou voorstel.

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JURIDIESE KOUSALITEIT BEREIK VOLLE WASDOM

Smit v Abrahams 1994 4 SA 1 (A);
Standard Chartered Bank of Canada v Nedperm Bank Ltd
1994 4 SA 747 (A)

1 Die soepele benadering tot juridiese kousaliteit wat deur appèlregter Van Heerden in die *locus classicus* op hierdie gebied, *S v Mokgethi* 1990 1 SA 32 (A) 39 ev, aangevoer en beskryf en daarna deur hoofregter Corbett in *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700–701 bevestig is (sien Neethling, Potgieter en Visser *Law of delict* (1994) 191 ev), het nou in die *Smit*- en *Nedperm*-saak volle wasdom bereik.

In *Smit* is die voertuig waarmee die eiser 'n marskramersbedryf beoefen het, in 'n botsing met die verweerder se voertuig onherstelbaar beskadig. Beide partye was nalatig. Die eiser slaag in die hof *a quo* (1992 3 SA 158 (K); sien Neethling en Potgieter "Aspekte van die delikselemente nalatigheid, feitelike en juridiese kousaliteit (insluitend die sogenaamde eierskedelgevalle)" 1993

THRHR 157–161) met sy eis om skadevergoeding vir die markwaarde van die voertuig. Omdat die voertuig noodsaaklik was vir die beoefening van sy bedryf en hy dit weens sy finansiële onvermoëndheid nie kon vervang nie, eis hy voorts die bedrag wat hy moes betaal vir die huur van 'n plaasvervangende voertuig. Hierteenoor voer die verweerder aan dat laasgenoemde eis nie verhaalbaar is nie omdat die skade deur die eiser se eie geldelike onvermoëndheid veroorsaak is. In sowel die landdroshof as die Kaapse Provinsiale Afdeling (per Farlam Wn R) word die verweer van die hand gewys en slaag die eiser gevolglik ook met sy eis om die huurgeld van die plaasvervangende voertuig. Teen laasgenoemde bevinding word geappelleer – die appèl wentel uiteindelik dus net om die verweer teen die tweede eis.

Die verkorte feite van *Nedperm*, vir sover dit nou vir ons van belang is, was dat die verweerder op navraag van die eiser op 'n nalatige wyse foutiewe inligting aangaande die kredietwaardigheid van 'n kliënt van die verweerder aan die eiser verskaf het. As gevolg van die verkeerde bankverslag het die eiser 'n wissel, getrek op bedoelde kliënt van die verweerder, verdiskonteer. Die eiser ly skade toe die wissel gedishonoreer word en die volle bedrag daarvan nie van die kliënt verhaal kon word nie. Alhoewel die hele eis gegrond op nalatige wanvoorstelling in geskil was, beperk ons ons bespreking tot die kwessie van juridiese (en feitelike) kousaliteit.

2 In beide sake was die uiteindelike vraag of vermelde skadeposte aan die verweerders toegereken kon word, dan wel of dit nie "too remote" was nie, of, soos appèlregter Botha dit in *Smit* 16H stel, of daar "'n genoegsame noue verband bestaan tussen die verweerder se onregmatige daad en die skade wat die eiser gely het". In *Nedperm* 764I verwoord hoofregter Corbett dit soos volg:

> "It is still necessary to determine legal causation, ie whether the furnishing of the untrue report was linked sufficiently closely or directly to the loss for legal liability to ensue, or whether the loss is too remote."

Ter beantwoording van die juridiese kousaliteitsvraag maak albei regters gebruik van die soepel benadering wat die appèlhof sedert *Mokgethi* en *Bentley* volg. Hiervolgens is die kernvraag of daar 'n genoegsaam noue verband tussen die dader se handeling en die gevolg bestaan dat die gevolg die dader, met inagneming van beleidsoorwegings op grond van billikheid, redelikheid en regverdigheid, toegereken kan word. Die bestaande juridiese kousaliteitsmaatstawwe (soos "direct consequences", adekwate veroorsaking en redelike voorsienbaarheid) het hiervolgens nie 'n deurslaggewende betekenis nie maar kan wel 'n subsidiêre rol speel by die bepaling van juridiese kousaliteit aan die hand van die elastiese benadering (sien *Mokgethi* 40–41; *Bentley* 700–701; Neethling, Potgieter en Visser 192–193).

Die soepelheid van die toets vir juridiese kousaliteit word deur appèlregter Botha beklemtoon (18E–G):

> "Die belangrikheid en die krag van die oorheersende maatstaf om vrae van juridiese kousaliteit op te los . . . lê juis in die soepelheid daarvan. *Dit is my oortuiging dat enige poging om aan die buigsaamheid daarvan afbreuk te doen, weerstaan moet word.* Vergelykings tussen die feite van die geval wat opgelos moet word en die feite van ander gevalle waarin daar alreeds 'n oplossing gevind is, of wat hipoteties kan ontstaan, kan vanselfsprekend nuttig en waardevol, en soms miskien selfs deurslaggewend, wees, maar 'n mens moet oppas om nie uit die vergelykingsproses vaste of algemeen-geldende reëls of beginsels te probeer distilleer nie. Die argument dat die eiser se eis 'in beginsel' verwerp moet word, is misplaas. Daar is net een 'beginsel': om te bepaal of die eiser se skade te ver

> verwyderd is van die verweerder se handeling om laasgenoemde dit toe te reken, moet oorwegings van beleid, redelikheid, billikheid en regverdigheid toegepas word op die besondere feite van hierdie saak" (ons kursivering; vgl ook die *Nedperm*-saak 765A).

In die lig van hierdie "beleidsverklaring" oor die buigsaamheid van die toets vir juridiese kousaliteit, bevraagteken regter Botha tereg die verhoorhof se siening waarvolgens redelike voorsienbaarheid van die skade die enkele, deurslaggewende maatstaf is om aanspreeklikheid te bepaal. Volgens hom kan redelike voorsienbaarheid as 'n ondergeskikte toets gebruik word by die toepassing van die soepele maatstaf maar dit kan die soepele maatstaf nie verdring nie (17E–F). Trouens, volgens sy beskouing kon die onderhawige saak sonder verwysing na redelike voorsienbaarheid afgehandel gewees het. Hy sou naamlik op die feite, bloot as 'n kwessie van beleid, die skade veroorsaak deur die huur van die plaasvervangende voertuig (weens die eiser se onvermoëndheid), die verweerder toegereken het – en dit selfs al sou die skade so uitsonderlik gewees het dat dit nie as redelikerwys voorsienbaar aangemerk sou kon word nie (19C–D):

> "Die eiser is in 'n verleentheid geplaas wat veroorsaak is deur die handeling van die verweerder. Sy optrede in reaksie daarop was in alle opsigte redelik. Om sy tekort aan geld en gevolglike onvermoë om 'n bakkie te koop, te beskou as 'n beletsel om sy uitgawe aan huur te verhaal, sou onbillik en onregverdig wees teenoor hom. Die tydperk van drie maande waartydens die eiser met 'n gehuurde bakkie sy besigheid aan die gang gehou het, is nie onredelik lank teenoor die verweerder nie. Dit is nie onbillik of onregverdig om die verweerder verantwoordelik te hou vir die onkoste wat die eiser oor daardie tydperk aangegaan het om sy inkomste te behou nie. As 'n kwessie van beleid, behoort hierdie skade van die eiser die verweerder toegereken te word" (19B–D).

Volgens die regter moet ook die vraag na die *omvang* van die skade – dit wil sê of 'n verweerder in 'n geval soos die huidige aanspreeklik gehou moet word vir al die skade wat sedert deliksspleging opgeloop het tot die verhoor van die saak plaasvind – deur middel van die soepel maatstaf bepaal word. Hy is van mening dat die toepassing van die maatstaf in die huidige verband veral toegespits sal wees op die redelikheid van die eiser se optrede en die billikheid en regverdigheid teenoor die verweerder. Appèlregter Botha is oortuig dat die toets van redelike voorsienbaarheid geen nuttige funksie hier kan vervul nie.

3 Hoe dit ook al sy, nieteenstaande regter Botha se bevinding dat juridiese kousaliteit as beleidskwessie besleg sou kon word sonder gebruikmaking van die subsidiêre toets van redelike voorsienbaarheid, ondersoek hy nogtans die vraag of die (intrede van die) onderhawige skade ook redelikerwys voorsienbaar was (soos wat die hof *a quo* inderdaad bevind het – 165H–I). Hy verduidelik dit soos volg (18H–19B):

> "Ons het te doen met die onbemiddelde eienaar van 'n motorvoertuig wat dit gebruik in 'n eenmansbesigheid waaruit hy sy lewe moet maak. Daar is derduisende sulke mense in ons land – huurmotorbestuurders, smouse, kleinbouers, kleinboere, verkoopsagente, en wat nog. Om te dink, in die sosio-ekonomiese toestande wat in ons land heers, dat sulke mense reserwefondse aanhou of versekering uitneem om hulle te beskerm teen die verlies van hulle voertuie, is gewoon onwerklik. Na my oordeel is dit vir elkeen wat op 'n openbare pad ry redelik voorsienbaar dat hy die risiko loop dat die eienaar van 'n voertuig waarmee hy bots, 'n onbemiddelde persoon is wat die voertuig gebruik om 'n lewe mee te maak, dat hy geldelik nie in staat sal wees om dadelik 'n ander voertuig te koop nie (selfs nie met 'n deposito nie), en dat hy 'n ander voertuig sal moet huur

> om nie sy inkomste te verloor nie. Daarmee wil ek egter geensins te kenne gee dat ek redelike voorsienbaarheid as beslissende toets sien nie."

Hoofregter Corbett sluit in *Nedperm* in 'n sin by hierdie siening van die rol van redelike voorsienbaarheid aan alhoewel dit voorkom of hy minder klem op die subsidiêre aard daarvan plaas. Hy beskou dit naamlik as een van vele faktore wat 'n rol by die juridiese kousaliteitsvraag kan speel (765A–C):

> "[T]he test to be applied is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play their part . . . In applying this general test there are two matters on which I propose to concentrate: firstly [sekere feite van die saak] and, secondly, the question of reasonable foreseeability."

Na 'n ondersoek van die feite bevind die hoofregter dat die skade wat as gevolg van die nalatige wanvoorstelling gely is, redelikerwys voorsienbaar was (766–668).

Uit bostaande blyk duidelik dat of 'n mens redelike voorsienbaarheid (of welke ander juridiese kousaliteitsteorie ook al – soos "direct consequences") as 'n ondergeskikte toets vir of bloot as 'n faktor by die bepaling van juridiese kousaliteit beskou, dit hier bloot gaan om hulpmiddele om die kernvraag na die toerekenbaarheid van skade te help beantwoord. Redelike voorsienbaarheid staan dus in diens van die toerekenbaarheidsvraag en nie andersom nie. 'n Hof behoort dus nie vooraf aan 'n enkele ondergeskikte maatstaf gebonde te wees nie, maar die vryheid te hê om in elke gegewe geval in die lig van die omstandighede en met inagneming van beleidsoorwegings die maatstawwe te volg wat redelikheid en billikheid die beste kan dien (sien Neethling, Potgieter en Visser 194–195). Daarom is die klemverskil oor die rol van redelike voorsienbaarheid soos dit in die onderhawige twee sake na vore gekom het, heeltemal aanvaarbaar aangesien geregtigheid klaarblyklik in beide gevalle geskied het.

4 Die regspraak bied geen duidelike beeld oor die inhoud van die voorsienbaarheidsmaatstaf by juridiese kousaliteit nie. Gewoonlik word die voorsienbaarheidstoets nie gepresiseer nie maar word eenvoudig beslis dat 'n bepaalde geval voorsienbaar was of nie, en daarmee uit en gedaan (sien Van Rensburg *Normatiewe voorsienbaarheid as aanspreeklikheidsbegrensingsmaatstaf in die privaatreg* (1972) 48–49). Oor die vraag wat presies voorsienbaar moet gewees het om aanspreeklikheid te vestig, bestaan daar nie algehele duidelikheid nie. Soos appèlregter Botha dit in die *Smit*-saak stel (19B–C):

> "Die voorsienbaarheidstoets is 'n oneksakte maatstaf en geleerde mense kan verskil oor die uitslag van die toepassing daarvan op bepaalde feite, soos byvoorbeeld in verband met die sogenaamde *talem qualem* 'reël' of die sogenaamde 'eierskedelgevalle' (vgl die uitspraak *a quo* op 180B; en Neethling en Potgieter in 1993 *THRHR* 157 op 161)."

In die algemeen vertolk hoofregter Corbett in die *Nedperm*-saak die regspraak se benadering soos volg (768F–G):

> "In delict, the reasonable foreseeability test does not require that the precise nature or the exact extent of the loss suffered or the precise manner of the harm occurring should have been reasonably foreseeable for liability to result. It is sufficient if the general nature of the harm suffered by the plaintiff and the general manner of the harm occurring was reasonably foreseeable" (sien Burchell *Principles of delict* (1993) 92 ev; Neethling, Potgieter en Visser 186; Van der Walt *Delict: principles and cases* (1979) 100; Boberg *The law of delict: Vol I Aquilian liability* (1984) 443).

Van Rensburg 56 doen tot tyd en wyl die regspraak konkrete riglyne vir die bepaling van juridiese kousaliteit volgens hierdie maatstaf neergelê het, die volgende algemene kriterium aan die hand:

> "[W]as die gevolg, asook die kousale verloop tussen die handeling en die gevolg, vanuit die tydstip van die handeling met so 'n graad van waarskynlikheid voorsienbaar dat die gevolg, in die lig van die omstandighede, redelikerwys aan die dader toegereken kan word?"

By die toepassing van hierdie maatstaf kan volgens hom as algemene reël geld "dat 'n dader normaalweg vir al die gevolge van sy skuldige, onregmatige handeling aanspreeklik is, buiten die gevolge wat besonder onwaarskynlik was", of, in appèlregter Botha se woorde in die *Smit*-saak (19C), "so uitsonderlik is dat dit nie redelikerwyse voorsienbaar was nie".

5 In beide sake word die onderskeid tussen feitelike en juridiese kousaliteit gemaak. In *Nedperm* is feitelike kousaliteit oënskynlik aan die hand van die "but for"- of *conditio sine qua non*-toets vasgestel (764A–C H). Soos by herhaling aangetoon is, kan vermelde "toets" nie goedgepraat word nie. Die toets is in werklikheid geen kousaliteitstoets nie maar hoogstens 'n *ex post facto* wyse om 'n voorafbepaalde kousale verband uit te druk (sien oa Neethling, Potgieter en Visser 164–165; Snyman *Strafreg* (1992) 81–81; Neethling en Potgieter 1993 *THRHR* 158). Hierdie siening word inderdaad deur die volgende woorde van hoofregter Corbett bevestig (764H):

> "My conclusion is that the untrue report issued by Nedbank was a factual cause of Stanchart's loss. In other words, it was a *conditio sine qua non* of such loss."

Die bestaan van 'n kousale verband sal van die feite van 'n bepaalde geval afhang en word daardeur gekenmerk dat een feit uit 'n ander volg (Neethling, Potgieter en Visser 167–168). Of dit die geval is, moet bepaal word deur middel van menslike ervaring en kennis in die algemeen en dié van die beoordelaar van die feite in die besonder. Dié benadering blyk uit die uitspraak van appèlregter Botha in *Smit* 13I–14A:

> "Die vraag na feitelike kousaliteit verskaf nie probleme in hierdie saak nie (soos meestal die geval is in die praktyk, waar die kwessie van veroorsaking ter sprake kom). In 'n feitlike sin is die eiser se skade ongetwyfeld veroorsaak deur die verweerder se optrede. Dat die eiser nie in staat was om 'n plaasvervangende bakkie te koop nie, beteken dat sy onbemiddeldheid in 'n feitlike sin mede-oorsaak van die skade was."

Anders gestel, die regter bevind dat die feit dat die eiser nie 'n bakkie kon koop nie, (deels) uit sy onvermoëndheid gevolg het. Dit is opmerklik dat die regter tot hierdie slotsom geraak het sonder om hoegenaamd na *conditio sine qua non* te verwys of dit by implikasie toe te pas.

6 In die *Smit*-saak het dit gegaan oor 'n suksesvolle eis gegrond op skade weens die huur van 'n voertuig in die plek van 'n beskadigde voertuig wat vir besigheidsdoeleindes gebruik is. Dit is gemeensaak dat skade in die algemeen verhaalbaar is waar 'n beskadigde saak deur die eiser gebruik word om geld te verdien (bv *Shrog v Valentine* 1949 3 SA 1228 (T); *Zweni v Modimogale* 1993 2 SA 192 (BA)). In die loop van sy uitspraak maak appèlregter Botha egter in hierdie verband die volgende opmerking (21C–D):

> "'n Ander moontlikheid is dat in die ontwikkeling van ons reg 'n eis erken mag word vir die vergoeding van uitgawes om 'n beskadigde of ontneemde artikel deur 'n gehuurde artikel te vervang selfs waar eersgenoemde nie in die produksie van inkomste gebruik word nie, soos deur verskeie skrywers voorgestel word."

Hierdie moontlikheid het intussen reeds in *Kellerman v South African Transport Services* 1993 4 SA 872 (K) gerealiseer, 'n tendens wat in die algemeen verwelkom word (sien Visser en Potgieter "Skadevergoeding vir gebruiksverlies: 'n welkome nuwe ontwikkeling" 1994 *THRHR* 312–317).

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There may be a few exceptions, but in general no politician should be permitted to silence his or her critics. It is a matter of the most fundamental importance that such criticism should be free, open, robust and even unrestrained. This is so because of the inordinate power and influence which is wielded by politicians, and the seductive influence which these attributes have upon corrupt men and women. The most appalling crimes have been committed by politicians because their baseness and perversity was hidden from public scrutiny (*per* Van Schalkwyk J in *Mandela v Falati* 1995 1 SA 251 (W) 260).

BOEKE

HIEMSTRA: SUID-AFRIKAANSE STRAFPROSES

deur J KRIEGLER

Vyfde uitgawe; Butterworths Durban 1993; 1008 bl

Prys R182,40 (sagteband) R270,18 (hardeband)

Inleiding

"'Hiemstra' het in die kwarteeu van sy bestaan 'n instelling geword". So begin die voorwoord tot die vyfde uitgawe van hierdie boek. Anders as die voorgangers is die skrywer egter nou regter Johann Kriegler, wat nie net bekend is as regter en waarnemende appèlregter nie, maar dalk veral as voorsitter van die veelbesproke Onafhanklike Verkiesingskommissie. En nou ook as regter van die Konstitusionele Hof.

In die voorwoord stel die skrywer sy gevoel van onbekwaamheid om "die grootste van Oom Victor se vele monumente" te help in stand hou. Hy verwys ook na die belangrikheid daarvan om 'n Afrikaanse standaardwerk in hierdie tye op datum te hou; en dat die ware beeld van 'n gemeenskap in die strafhof vertoon word. Die vraag is natuurlik hoe die betrokkenheid van 'n nuwe skrywer hierdie standaardwerk geraak het. Hopelik sal hierdie resensie begin om 'n antwoord te bied.

Uitleg

Anders as voorheen word die voorwoord nou basies opgevolg met die lyf van die boek, naamlik die teks van en kommentaar op die Strafproseswet 51 van 1977. Dit maak die boek veel makliker om te hanteer, want in die vorige uitgawe is die voorwoord gevolg deur die sestig bladsy-lange alfabetiese sakelys. In die verlede moes 'n mens nogal soek na die begin van die boek se inhoud. Die sakelys verskyn nou aan die einde van die boek, wat alreeds verduidelik waar 60 van die ekstra 127 bladsye heengegaan het (die nuwe boek beslaan 1 008 bl teenoor die vorige se 881, plus sowat 70 bl met Romeinse nommers). Al die aanhangsels aan die einde van die vorige uitgawe, soos die appèlhofreëls vir strafappèlle, bepaalde artikels uit die Wet op Landdroshowe ensovoorts is weggelaat, met die enkele uitsondering van die bepalings van die 1955-Strafproseswet wat nie herroep is nie. Volgens die skrywer het sommige aanhalings uit wette en regulasies en praktyksvoorbeelde ook in die slag gebly. Desnieteenstaande het *Hiemstra* se teks met minstens 67 bladsye gegroei.

'n Mens mis nog steeds 'n behoorlike inhoudsopgawe. Hoewel dit maklik genoeg is om volgens die indeling van artikels te bepaal in watter hoofstuk bepaalde artikels sal verskyn, is dit steeds onmoontlik om dadelik na die regte bladsy te blaai. Die inhoudsopgawe heel aan die begin van die boek het net vyf inskrywings en dui bloot daarop dat die Strafproseswet van bladsy 1 tot bladsy 898 strek. Dié bladsy het eintlik, net soos die voorganger, weinig praktiese nut.

Inhoud

Met 'n boek van hierdie omvang is dit nie prakties om die hele werk deur te gaan en te soek na die gedeeltes wat oorgeskryf is nie. Ek het gevolglik besluit om enkele hoofstukke te kies, dit deeglik deur te gaan en na verskille (en die effek daarvan) te soek. Die eerste waarop my keuse geval het, was hoofstuk 9: Borgtog. Hierdie veld van die strafprosesreg het in die onlangse verlede taamlik ontwikkel.

Regter Kriegler begin met 'n heeltemal nuwe inleiding tot die hoofstuk. Die klem word hierin geplaas op die belangrikheid daarvan dat die besluit oor borgtog nie ligtelik deur die howe geneem durf word nie. Die beskuldigde word tog immers vermoed onskuldig te wees en aanhouding moet vermy word indien dit hoegenaamd moontlik is. Aan die ander kant moet die reg daarin kan slaag om die beskuldigde met die aanklagte te konfronteer en moet stappe teen ontvlugting gedoen word. Die standpunte word gestaaf met navorsing uit boeke soos die onlangse Steytler *The undefended accused*, maar ook die ouer werk van Olmesdahl en Steytler *Criminal justice in South Africa*. Hierdie uitgangspunte weerspieël 'n klemverskuiwing vir hierdie werk – wat ook elders daarin te vind is – waarvolgens die regte van individue meer erkenning geniet. Die skrywer verwys ook, vir diegene wat verder oor die onderwerp wil nalees, na die twee handboeke wat spesifiek oor borgtog handel, naamlik die boeke van Nel en Van den Berg.

Die kommentaar onder artikel 58 oor die uitwerking van borg is slegs effens aangepas, maar die verlening van borgtog deur die polisie (a 59) is heelwat gewysig om dit op een lyn te bring met die inleiding tot die hoofstuk, en om weer eens daarop klem te lê dat verdagte mense vrygelaat moet word indien dit enigsins moontlik is.

Die kommentaar by artikel 60 is basies oorgeskryf (en beslaan nou 9 bl in vergelyking met die vorige uitgawe se 4). Elke aspek van borgtog word hierin aangeraak, veral teen die agtergrond van die belangrike verandering wat die beslissing in *Twayie v Minister van Justisie* 1986 2 SA 101 (O) in die praktyk teweeggebring het. Hierdie beslissing is slegs in 'n kort paragraaf in die vorige uitgawe genoem, waarskynlik omdat dit pas voor die afsnydatum vir nuwe gesag gerapporteer was.

Artikel 61 se kommentaar is bygewerk deur nuwe gesag. Die algemene benadering tot die prokureur-generaal se magte om die verlening van borgtog te voorkom, het egter dieselfde gebly. Die kommentaar by die daaropvolgende artikels is feitlik onveranderd gelaat. Min regsontwikkeling het sedert 1986 oor daardie aspekte van borgtog plaasgevind. Ook die kommentaar by artikel 66 is hoofsaaklik dieselfde, hoewel die paragraaf oor appèl by die bespreking van

Pillay v Regional Magistrate, Pretoria 1977 1 SA 533 (T) verkort is deur die vergelyking met die 1955-Strafproseswet weg te laat. In die proses word verwys na hersiening deur die hooggeregshof, maar die bladsyverwysing (701) is nie vir die nuwe uitgawe van die boek aangepas nie. Ook by artikel 67 is die kommentaar hoofsaaklik dieselfde, maar heelwat nuwe gesag is bygewerk oor die vraagstuk of 'n nuwe aansoek om borgtog kan volg indien 'n verdagte reeds 'n keer nagelaat het om die borgvoorwaardes na te kom. Die ander kommentaar in die hoofstuk is hoofsaaklik net so gelaat, behalwe dat hofuitsprake wat bepaalde punte by artikels 68 en 70 duideliker maak, ingevoeg is.

In die geheel bied hierdie hoofstuk 'n veel beter basis as sy voorganger vir die veranderde posisie wat nou onder die bepalings van die Grondwet tegemoetgegaan word.

'n Afdeling van die werk wat in die onlangse verlede omvangryk ontwikkel het, is bystand aan die beskuldigde. Die hele hoofstuk 11 is dan ook basies oorgeskryf ten einde hiervoor voorsiening te maak. Die bespreking is nuttig en helder met die regte klem op die regte plekke.

'n Verdere hoofstuk wat lukraak uitgekies is vir vergelyking met die vorige uitgawe, is hoofstuk 18 wat oor onskuldig-pleite handel. 'n Mens sou dink dat hierdie hoofstuk grootliks onveranderd gelaat sou kon word omdat die reg daaroor teen 1986 al grootliks gevestig was. Die kommentaar by artikel 115 sien egter heeltemal anders daar uit as in die vorige uitgawe. Dit begin met iets oor die geskiedenis van hierdie bepaling, gevolg deur die prosedure wat daarvolgens gevolg moet word. Materiaal wat wel uit die vorige uitgawe kom, is rondgeskommel om nou in 'n meer logiese volgorde te verskyn. Die gevolg is een van die duidelikste, kernagtige besprekings van artikel 115 wat ek nog gelees het. 'n Ander duidelike verandering is 'n grootskaalse afskaling van die vermaning in die vierde uitgawe teen té versigtige hantering van die ondervraging van die beskuldigde tydens die pleitproses. Daar word ook uitdruklik van die vorige uitgawe verskil oor die vraag of die hof die regsverteenwoordiger of die beskuldigde self moet aanspreek tydens die stel van vrae. Ook in hierdie bespreking is die groter gebruik wat die skrywer van ander bronne (veral handboeke) maak as sy voorganger, duidelik.

Die ontleding van artikel 118 is ook kernagtiger, maar tog met verwysing na heelwat meer gesag omdat die omvangryke verwysings na die feite van die toepaslike sake verminder is.

Foute

In 'n boek van hierdie omvang is foute waarskynlik onvermydelik. 'n Fout wat toevallig na vore gekom het en deurgeglip het vanuit vorige uitgawes, is die verwysing by artikels 171 en 179 na die Wet op Getuienis vir Buitelandse Howe as die Wet op Getuienis *van* Buitelandse Howe. Dit is nie 'n ernstige fout nie, maar op 436 word belowe dat hierdie wet meer volledig by artikel 180 bespreek sal word, terwyl dit eintlik onder artikel 179 gebeur. Oor die algemeen is die tegniese versorging van die boek egter so goed en taalfoute so skaars dat dit amper kleinlik is om op die uitsonderings klem te lê.

Die ernstigste kritiek wat teen die werk geopper kan word, is dat dit nie oral op datum is nie. Die afsnydatum vir wetgewing is volgens die voorwoord Julie 1993, maar sommige wysigings wat voor hierdie datum voorgekom het, is nie ingesluit nie. In hoofstuk 25 word die Wet op die Voorkoming en Behandeling van Dwelmafhanklikheid 20 van 1992 behandel, maar in die kommentaar by artikel 35 oor die beslaglegging op dwelmmiddels is die nuwe wet nie bespreek nie – daar word steeds volstaan met die bespreking van die Wet op die Misbruik van Afhanklikheidsvormende Stowwe en Rehabilitasiesentrums 41 van 1971 (vgl bv ook 370 en 710). By die nagaan van hierdie materiaal kom 'n mens dan ook agter dat die indeks van die boek heelwat meer verwysings na laasgenoemde wet het as wat daar in die teks verskyn, omdat die veranderinge wat deur eersgenoemde wet teweeggebring is nie uit die indeks verwyder is nie.

In hoofstuk 28 oor vonnis verskyn daar ook 'n paar sulke foute. Op 663 word genoem dat die maksimum gevangenisstraf wat die streekhof vir moord mag oplê 15 jaar is. Hoewel so 'n verandering in 'n stadium oorweeg is, is die stelling verkeerd. Op 710 word genoem dat die "huidige" maksimum boete wat deur 'n landdroshof opgelê mag word R4 000 is. Dit was egter sedert 1 Mei 1992 al op R20 000 vasgepen (vgl GK R1275). Die laaste sodanige fout wat hier genoem sal word, is die volgende: op 662 word gemeld dat daar geen bepaling is wat daarvoor voorsiening maak dat korrektiewe toesig vir enige (statutêre) misdaad opgelê mag word nie. Vanweë hierdie leemte is paragraaf 276(3)(b) egter deur Wet 139 van 1992 in die Strafproseswet ingevoeg. In hierdie verband moet lesers my 'n persoonlike nota vergun. Ek is gedeeltelik vir die foute aanspreeklik weens 'n bydrae tot die hoofstuk oor vonnisoplegging. My bydrae is egter nie so groot soos wat die skrywer, baie vrygewig, in die voorwoord te kenne wil gee nie.

Slotsom

Regter Kriegler se voorwoordelike besorgdheid was onnodig. *Hiemstra* is, volgens die konsensus van meeste ingeligte mense, 'n beter boek as wat dit voorheen was. Veral die vierde uitgawe het wat die toevoeging van nuwe gesag betref, 'n aansienlik aangelaste voorkoms begin kry. Daardie probleem is nou heeltemal uit die weg geruim. Wat veral beïndruk is die feit dat die boek nêrens saamgeflans voorkom nie, al is dit die werk van meerdere skrywers. Verder het die skrywer goed daarin geslaag om 'n meer menseregtelike benadering te laat deurkom, terwyl die voorganger waarskynlik meer op "crime control" as "due process" ingestel was. Diegene wat met die strafprosesreg (of bewysreg of die ander vakgebiede wat daarmee verband hou) werk en hierdie boek nie het nie, sit met 'n wesenlike bronleemte.

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ARBITRATION IN SOUTH AFRICA
deur D BUTLER en E FINSEN
Juta Kaapstad Wetton Johannesburg 1993; 374 bl
Prys R112,50 (plus BTW en hanteringsgelde) (sagteband)

Daar is nie veel Suid-Afrikaanse handboeke oor hierdie onderwerp nie – veral nie handboeke wat spesifiek gemik is op die behoeftes van nie-regsgeleerde arbiters nie. Die outeurs dui hierdie mikpunt in die voorwoord aan maar spreek ook die hoop uit dat die werk regspraktisyns sal help om die potensiaal van arbitrasie as wyse van dispuutbeslegting te ontgin.

Die werk is in agt hoofstukke verdeel. Ter inleiding word arbitrasie omskryf, die geskiedkundige ontwikkeling daarvan kortliks aangedui en die voor- en nadele van arbitrasie asook die rol van arbitrasie-organisasies uitgelig. Afsonderlike hoofstukke word gewy aan die arbitrasie-ooreenkoms, die arbiter, die verloop van die prosedure voor en tydens die verhoor, die toekenning en internasionale arbitrasie. Hierbenewens word 'n hoofstuk ook gewy aan bewysregtelike aangeleenthede wat seer sekerlik van groot waarde sal wees vir nie-regsgeleerde arbiters aangesien nie alleen sekere basiese begrippe (byvoorbeeld getuienis en bewys) behandel word nie, maar ook aspekte soos die kwessie van toelaatbaarheid en die bewyslas. 'n Paar bladsye word selfs gewy aan praktiese advies ten aansien van die evaluering van getuienis.

Wat opval by die lees van die werk is die sterk praktiese inslag daarvan. Gevolglik is dit nie alleen geskik vir gebruik deur arbiters nie maar sal ook regspraktisyns veel kan leer van die praktiese werking van arbitrasie, hetsy hulle as arbiters of voor arbiters optree. Ook behoort dit 'n uiters nuttige handboek te wees vir studente wat gedurende hul studies met arbitrasie te doen kry. Die onderwerp word omvangryk behandel maar ten spyte daarvan word die regsbeginsels ter sprake duidelik en kernagtig weergegee.

Die werk bevat 'n volledige bibliografie, vonnis- en woordregister asook 'n afsonderlike afdeling waarin verskeie aanhangsels voorkom. Hierdie sluit onder andere in die Arbitrasiewet 42 van 1965, die reëls wat deur die Vereniging van Arbiters gepubliseer is vir die voer van arbitrasieverrigtinge, enkele standaard arbitrasieklousules wat in die konstruksiebedryf gebruik word asook besonderhede van liggame wat gemoeid met arbitrasie is. 'n Tabel waarin teksverwysings na huidige Suid-Afrikaanse arbitrasiewetgewing voorkom, behoort ook byval te vind by gebruikers.

Hoewel die werk hoofsaaklik verwysings na die konstruksiebedryf bevat, moet dit nie gesien word as 'n handboek wat slegs in hierdie veld gebruik kan word nie. Die beginsels wat uiteengesit en behandel word en praktiese wenke wat aan die hand gedoen word, is net so toepaslik in enige ander veld van arbitrasie. Vir diegene wat 'n behoefte ondervind om 'n werk te raadpleeg met sowel 'n goeie teoretiese onderbou as 'n praktiese inslag, kan hierdie publikasie

aanbeveel word. Trouens, dit sal heel waarskynlik deel van die toerusting van baie arbiters word, veral dié met 'n nie-regsgeleerde agtergrond.

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THE EFFECTS OF ELECTRONIC MAIL ON LAW PRACTICE AND LAW TEACHING
Transcript of an electronic conference held 20 July – 7 August 1992
Edited by I TROTTER HARDY
William S Hein Buffalo, New York 1994; vii and 109 pp
Price R115,70

This book is an edited transcript of an unusual conference. In July and August of 1992, sixteen top American lawyers and legal academics who regularly use electronic mail ("e-mail") met for a three-week conference to assess the impact of e-mail on law, legal practice, and legal education. The entire conference was conducted by electronic communication over a variety of communications networks, including Internet and Compuserve.

To the editor's knowledge, this sort of conference has not been tried before, at least not in legal circles. Albeit an experiment, it proved to be an extremely successful one. The conference started off with the question: what is e-mail and what use is it? An interesting response came from the law firm McCarter and English, Newark: "[W]e have watched e-mail steadily mature from a gossip novelty into a serious practice tool" (2).

The response to this introductory question led to the following questions:

- Will e-mail affect the attorney-client relationship?
- How is e-mail actually used in practice?
- How can e-mail be used to interact with law students?
- How does e-mail handle privacy and privileged information?
- Should e-mail be regulated?
- How can e-mail be applied in contracts and dispute resolution?
- What happens to intellectual property ownership and the choice of law?
- How will e-mail affect the authentication of documents?

The responses to subjects like privacy and e-mail legal advice, in particular, are extremely interesting. It seems that more and more people are making contact with lawyers in America by means of e-mail. More people are able to have access to legal advice. Thus: e-mail may be changing the basic definition of what is an attorney-client relationship. Those in law practice and teaching who are

contemplating greater reliance on the use of electronic mail will find much to learn here. Helpful hints are given on how to use e-mail in the firm or law faculty and, for the real computer boffins, a description of how to run an e-mail conference is provided. The biographical appendix of all the conference participants is also of interest.

The book aims to be an edited transcript of a conference and succeeds admirably in doing just that. It is not an in-depth discussion of privacy, the lawyer-client relationship or confidential communication. This easy-to-read book gives the legal practitioner some background on what e-mail is and how to apply it successfully in practice. For the lawyer/lecturer who is hesitant to take the first step into the e-mail world, this is a must to read.

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INDIGENOUS LAW 32 *LAWSA*
WA JOUBERT (founding ed); TJ SCOTT (ed)
Butterworths Durban 1994; 1 and 280 pp
Price R290,70 (hard cover)

The law of South Africa is well known to the legal profession, academics and law students as a concise synopsis of current South African law. Volume 32 features an exposition of indigenous law in force on the 31 March 1994, that is to say, before the present Constitution came into effect.

The contributors to this volume are well-known authors on indigenous law. The Olivier trio, father and two sons, are the authors of *Die privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989). JC Bekker is the author of *Seymour's customary law in Southern Africa* (1989). Volume 32 is largely an abridged and integrated version of these two sources.

The work is divided into six main parts as follows: law of persons (NJJ Olivier), civil marriages (JC Bekker), law of delict and application of customary law (NJJ Olivier (jnr)), law of succession and law of contract (WH Olivier). Each part is divided into numbered paragraphs, each containing a concise heading in bold print, and, where applicable, footnotes at the end of paragraphs. The text is further supplemented by a list of contributors, table of contents, bibliography, table of statutes, table of cases and a well-documented index. The reference in the bibliography to Church, NS (222) should read Church, J.

Part one (Law of Persons) deals with a number of factors determining personal status, rights and obligations (par 1–7) as well as the customary marriage (par 8–67). The latter section covers prohibited and preferential marriages, steps

to initiate marriage proposals, customary engagement, legal requirements, *lobolo*, consequences and effects of customary marriage, and dissolution.

Part two (par 68–77) discusses civil marriages and the important changes brought about by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. The latter act came into effect on the 2 December 1988 and amended section 22 of the Black Administration Act 38 of 1927, section 7 of the Divorce Act 70 of 1979, and the Matrimonial Property Act 88 of 1984. For example, chapters 1, 2 and 3 of the latter act now also apply to black marriages. The current position is that civil marriages between Blacks are the same as any other civil marriage. It is not clear why the customary marriage is dealt with under the law of persons and civil marriages in a separate section. It would seem better to deal with these under family law and marriage.

Part three (par 78–141) covers the law of delict and deals with sexual wrongs (seduction, adultery), damage to property, *ukuthwala*, libel, theft, abduction and harbouring, other delicts such as assault and the negligent causation of death, and also the co-liability of the kraalhead. Although specific delictual conduct is discussed, no attempt is made to formulate general principles. For example: is intent required for liability for damage to property or is negligence sufficient? Are there any grounds of justification that exclude unlawfulness?

Part four (par 142–158) deals with the law of succession and distinguishes between customary law and statutory provisions. Customary law of succession includes general principles, succession to a monogamous and polygamous family, *inter vivos* disposition of assets, illegitimate children, disinheritance, rights and duties of the successor, succession to chieftainship, and customs relating to substitution in order to beget a successor. The section on statutory provisions gives a background to current legislation, testate and intestate succession, succession to immovable property and the winding up of an estate. The recent LLD thesis of Watney *Beginsels van die opvolgingsreg van die Bapedi van Sekwati en Noord-Sothosprekendes in Vosloorus* (RAU 1993), would have provided valuable insights into the perceptions and interpretations of what Northern Sotho speakers of Vosloorus perceived their law of succession to be.

Part five (par 159–172) covers the law of contract and deals with phenomena such as sale and exchange (barter), donation, loan, contract of service, pledge, suretyship, mandate or agency, liability resulting from *lobolo*, the *ukufakwa* custom, *isondlo*, the *sisa* custom, cession of *lobolo* rights and prescription. Again there is no attempt to formulate the general principles of an indigenous contract (cf eg *The indigenous contract of Bophuthatswana*, Centre for Indigenous Law (1990) and Whelpton *Die inheemse kontraktereg van die Bakwena ba Mogopa van Hebron in die Odi I distrik van Bophuthatswana* (LLD thesis Unisa 1991) for attempts in this regard). Paragraph 159 is somewhat confusing. It is supposed to state general principles with regard to contracts, but refers rather to ownership and property, aspects which should have been dealt with under a separate section on property law. This paragraph concludes with the following statement:

> "It seems to be more appropriate to speak of 'liability law' instead of contract law, because the traditional customary law also acknowledges the liability to pay debt or to perform which does not result from consensual contract."

This is debatable, since it assumes that consensus forms the basis of contractual liability in indigenous law. Recent research supports the finding that a mere agreement does not result in contractual liability in indigenous law. Liability stems from agreement followed by performance or part performance, which implies a form of real contract. Moreover, "liability law" would per definition also include debts and liability arising from delictual actions. This would then imply that the section on the law of delict should be included in a discussion of "liability law". It is also not clear from the discussion whether the *ukufakwa* custom (par 168) and the *sisa* custom (par 170) are indeed contracts or mere customs. The question whether cession (par 171) is known to indigenous law, is also arguable (cf Whelpton 129–131).

Part six (par 173–215) deals with the application of customary law and covers topics such as internal conflict of laws, the court structure, and recognition of customary law. Paragraph 173 (187) contains a section on terminology, suggesting a strong preference for the term customary law to indigenous law. The reader is, however, left in the dark as regards the question why this volume is then titled indigenous law. The last paragraph (215) deals with the future of indigenous law, identifying various approaches in which the problem of legal pluralism can be addressed. It is concluded that the absence of constitutional guarantees about its existence may result in the gradual phasing out of indigenous law. One may add that this will depend largely on the way in which chapter 3 of the Constitution of the Republic of South Africa Act 200 of 1993 will be applied to indigenous law (cf also Bekker "How compatible is African customary law with human rights? Some preliminary observations" 1994 *THRHR* 440–447).

Although the legal profession, academics and law students will certainly find this work a useful source on indigenous law, they should keep in mind that this specific portrayal of indigenous law reflects "official" or "lawyer's" law since it is largely based on decisions of non-indigenous courts and on statutory provisions promulgated without consultation with the people whose lives were significantly influenced by these provisions. To regard these statutes and non-indigenous court decisions as "customary" in the ordinary sense of the word, is perhaps far-fetched. Recent research in the field of indigenous law reflects a conflict between what the law is formally stated to be and what the people perceived "their law" to be; in other words between "official" law and "living" law at grassroots level.

It is further unfortunate that the results of recent research were not taken into account in compiling this volume. In this regard a number of LLD-theses should be mentioned, namely those of Van den Heever *'n Sistematiek vir die inheemse deliktereg van die swartman* (UP 1984); Church *Marriage and the woman in Bophuthatswana: an historical and comparative study* (Unisa 1989); Whelpton (above) and Whatney (above). There are also a number of recent PhD theses in anthropology which could have been consulted. (See in this regard for instance De Beer *Groepsgebondenheid in die familie, opvolgings- en erfreg van die Noord-Ndebele* (UP 1986) and Boonzaaier *Die familie-, erf- en opvolgingsreg van die Nkuna van Ritavi met verwysing na ander aspekte van die privaatreg* (UP 1990), to name but two.) While Schapera's *Handbook of Tswana law and*

custom (1979, original edition 1938) is much referred to as authority for the "Tswana", it should be remembered that this work deals mainly with the people of Botswana and reflects the position as it was during the 1930s. It cannot be used without reservation as reflecting the position of the Tswana-speaking people of the Northwest Province.

In conclusion, one wonders whether it is correct to limit indigenous law to aspects of private law and matters relating to the courts. The research of Prinsloo on indigenous public law in the former Lebowa (*Inheemse publiekreg in Lebowa* (1993)) and of Myburgh and Prinsloo in the former KwaNdebele (*Indigenous public law in KwaNdebele* (1985)) suggests that this branch of indigenous law should also have been dealt with. At present, the position and role of traditional leaders is very topical, and these are matters of public law. Over the years, succession to chieftainship was and still is a greatly contested issue, and cannot be limited to one paragraph (149) on succession to chieftainship.

Despite these comments, this volume should be accepted as a significant step towards the recognition and acceptance of indigenous law as part of the law of South Africa. To a greater or lesser extent, indigenous law is still valued by the majority of people in South Africa, especially in rural areas. In this regard such law still has social legitimacy.

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CANEY'S THE LAW OF SURETYSHIP
by CF FORSYTH and JT PRETORIUS
Fourth edition; Juta Cape Town Wetton Johannesburg 1992; xxi and 216 pp
Price R104,60 (soft cover)

This work has become the authoritative textbook on the law of suretyship since its first publication in 1936 and needs no further introduction. It sets out the current law clearly and criticises case law where necessary. The footnotes contain a veritable gold mine of authority and very often a further discussion of the text and controversial theoretical issues as well.

Many new decisions on suretyship have appeared since the previous edition in 1982. The writers of this new edition have avoided the trap of simply updating and thus expanding the work and have thoroughly revised it. This is borne out by the fact that no chapter has been left untouched by revision. The bigger format in which the new edition is now printed, has concealed the growth in length which shows only a marginal increase from 206 to 216 pages.

It is impractical to describe all the changes, but I will outline the major aspects of the revision. As a whole, the changes are not due to the fickleness of the writers, but are well substantiated. Certain sections of the text in the previous edition have been completely left out, while others have been relegated to

footnotes. For example, the old chapter 8 on bail and fidelity bonds has been left out completely. The writers have sometimes rewritten the text in order to expand and update it and sometimes to condense it. The discussion of continuing suretyships in chapter 7 (94–98) has, for example, been rewritten to expand and update it. The systematic approach of the previous edition in the use of subheadings has been extended by adding even more subheadings: for example, the discharge of the surety (ch 13) has been rewritten and subdivided under new subheadings. Related themes that were fragmented in the previous edition are now grouped together. An example of this is the shortening of the discussion of the historical development of women's suretyship benefits in the old chapter 15 and its transfer to chapter 1, which contains an historical overview of the development of suretyship. Another example is the discussion of whether an undertaking amounts to suretyship in the old chapter 5. This discussion which deals with an aspect of the interpretation of contracts, has been correctly moved to chapter 6 in the new edition. Many footnotes have been expanded to include additional citations of authorities (eg fn 29 on 31, fn 41 on 38, fn 8 on 48 and fn 5 on 55). The main body of the work, however, has been left unchanged. Readers who are familiar with the previous edition will consequently have no real difficulty in finding their way around in the new edition.

The law of contract has had a turbulent history and suretyship has been at the heart of that turbulence. The Appellate Division has been reforming the law of contract in a series of far reaching judgments to give effect to the eighteenth century ideal of freedom of contract. The *exceptio doli generalis* has been disposed of and is no longer a possible defence against an unconscionable contract, while public policy has been pressed into service to provide a limit to freedom of contract. The writers show an awareness of the role that *bona fides* play in the law of contract and have included a thought provoking section on the demise of the *exceptio doli generalis* and an exploration of the limits of public policy as a potential restriction of freedom of contract (190–196). The writers have also examined the interpretation of the contract as a means used by our courts to limit the consequences of an unconscionable contract of suretyship (see ch 6). This has led to an expansion of the discussion of the general principles of interpretation as applied to contracts of suretyship.

There are, however, a few minor points of criticism. The discussion of the *exceptio doli generalis* and public policy (190–196) does not fit systematically into the chapter on the discharge of the surety. It can also be questioned whether the term "cession of actions" used in chapter 10 correctly reflects our law of cession, since the claims and not merely the actions are ceded (see in this regard Scott *The law of cession* (1991) 12–22). Furthermore, it is not certain that the security for the payment of the debt (especially in the form of a pledge or hypothecation) is transferred when the creditor cedes the claims to the surety who pays the principal debt (136; see the discussion in Scott 129–131).

In conclusion, it may be said that the new edition is an improvement and update of an already good textbook. Everyone interested in suretyship will most definitely continue to use this indispensable and erudite work.

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The psychological fault concept versus the normative fault concept: *Quo vadis* South African criminal law?

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OPSOMMING

Die psigologiese skuldbegrip versus die normatiewe skuldbegrip: *Quo vadis* Suid-Afrikaanse strafreg?

Daar het die afgelope vyftien jaar herhaaldelik stemme in strafreggeledere opgegaan vir die vervanging van die sogenaamde psigologiese skuldbegrip (wat skuld as 'n gesindheid sien en tans in Suid-Afrika die septer swaai) deur die sogenaamde normatiewe skuldbegrip (wat skuld as verwyt(baarheid) of blaam(waardigheid) sien en tans in Duitsland meerderheidsteun geniet). Omdat die voorgestelde verandering verreikende praktiese en dogmatiese konsekwensies vir die Suid-Afrikaanse strafreg behels en 'n verandering sonder 'n verbetering 'n sinlose en selfs skadelike oefening is, word die voordele en nadele daarvan en die argumente daarvoor en daarteen onder die soeklig geplaas en krities ontleed. Dit geskied teen die agtergrond van 'n bondige uiteensetting en bespreking van die Duitse en Suid-Afrikaanse skuldbegrippe, asook 'n oorsig van die ontwikkeling en inhoud van die Duitse misdaadbegrip waarmee die Duitse skuldbegrip intiem verweef is en waarsonder dit moeilik verstaanbaar is.

Die gevolgtrekking waartoe daar gekom word, is dat wat ook al die gewaande tekortkominge van die psigologiese skuldbegrip, die normatiewe skuldbegrip geen aanvaarde alternatief daarvoor bied nie. Die normatiewe skuldbegrip is nie alleen in hoë mate ingewikkeld, omstrede, vaag en teenstrydig nie, maar ook onversoenbaar en strydig met die grondbeginsels van die Suid-Afrikaanse strafregspraktyk vir sover dit onder meer, eerstens, skuld en die onderskeie ander elemente van die misdaad asook skuld en die oogmerke van straf met mekaar verwar en vereenselwig; tweedens, skuld en aanspreeklikheid met mekaar verwar en vereenselwig en sodoende nie alleen van die skuldvereiste 'n toutologie en oortolligheid maak nie, maar ook opset en nalatigheid in die lug laat hang; derdens, opsetmisdade na nalatigheidsmisdade relegeer en uitbrei en opset en nalatigheid as spesifieke skuldbegrippe deur 'n algemene oorkoepelende skuldbegrip vervang; en ten slotte, die skuldvereiste ondergrawe en prysgee deur die gedeeltelike of algehele vervanging daarvan deur beleidsoorwegings en algemene afskrikking.

> "*Speziell der deutsche Gelehrte vergisst in seinem Idealismus so leicht, dass die von ihm zutage geförderten Sätze nicht absolute Geltung, sondern bestenfalls Allgemeingültigkeit beanspruchen können. d.h. Gültigkeit für uns Menschen mit unserer relativ niedrigen geistigen Organisation*" – Alexander Hold von Ferneck.[1]

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1 "Die Schuld im Rechte und in der Moral" 1911 *ZStW* 270.

1 INTRODUCTION

During the past fifteen years a gradually increasing support has manifested itself in some quarters in South African criminal law for the abolition of the so-called "psychological" concept of fault (in terms of which fault is a state of mind) and the adoption of the so-called "normative" concept of fault (in terms of which fault is blame(worthiness)/culpa(bility)) which currently enjoys majority support in German criminal law. Since such a step could have far-reaching implications not only for the concept of fault but also for the concept of crime and the other elements of and some defences to criminal liability, a critical examination of the proposed substitution and its logical consequences appears to be indicated. Before a radical change of this nature is introduced into South African criminal law, it seems appropriate to ascertain its prospective benefits and disadvantages *vis-à-vis* the current position. A change which is not also an improvement may be a rather futile or even damaging exercise, with little to gain and much to lose.

The aim and object of this article is to expound, discuss and weigh and balance the arguments for and against both the psychological and normative concepts of fault as presented by leading proponents in South Africa and in Germany. In order to keep them within reasonable limits, however, the exposition and discussion of the South African and German positions will, as far as possible, be conducted within the confines of the psychological versus normative fault debate and will endeavour to avoid fault issues not specifically related to it. Moreover, the vast German literature on the present topic over the past nine decades renders a complete survey which registers and highlights each and every detail and nuance impossible within the framework of a single article. Hence, the present survey concentrates mainly on the major contributions of prominent authorities during the formative period of the psychological and normative concepts of fault and on the current position as expounded and discussed in leading textbooks and commentaries.

The systematic approach of the article is as follows: Since the development of the normative concept of fault in Germany is closely associated with the development of the German concept of crime over the past century, it commences with a cursory overview of the development of the concept of crime. During this period both concepts not only underwent several fundamental changes, but a change in the one concept virtually invariably impacted on the other to such an extent that an exposition and discussion of the development of the concept of fault without reference to the development of the concept of crime would make little sense. This is followed by a brief outline of the concept of fault as such and of the basic tenets of the psychological and normative concepts of fault against the backdrop of the various concepts of crime in which they originated and developed. Next there is an exposition and discussion of the main points of criticism to which the psychological and normative concepts of fault have been subjected, and an evaluation of such criticism. Some conclusions bring the article to a close.

2 THE CONCEPT OF CRIME

The developments in the German concept of crime over the past hundred years may broadly be divided into three phases. In each phase, the spotlight falls on

the developments that were specifically relevant to the development of the concept of fault.

2 1 The classic concept of crime

The classic concept of crime was preceded by the distinction made by the Humanist School (Tiberius Decianus, Petrus Theodoricus, Samuel Pufendorf and Christian Wolff) between objective imputation (*imputatio facti, imputatio physica*) and subjective imputation (*imputatio juris, imputatio moralis*)[2] and the subsequent development of the concepts of an act, *Tatbestandsmässigkeit*,[3] unlawfulness and fault (initiated by Albert Berner, Ernst Beling, Rudolf von Ihering, and Adolf Merkel, respectively).[4]

The natural law conception of fault was rooted in the doctrine of imputation and the doctrine of freedom of will. A free act constituted the moral basis on which criminal imputation and, hence, the accused's responsibility rested.

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2 See Jescheck *Lehrbuch des Strafrechts* AT (1988) 179–180.

3 A somewhat complex and controversial concept in modern German criminal law, which may perhaps best be explained as compliance with the elements of the definition of the offence in question. The concept of *Tatbestand* differentiates between (a) objective and subjective, (b) descriptive and normative and (c) positive and negative elements of the definition of a crime: see Senge in *Lexicon des Rechts Strafrecht/Strafverfahrensrecht* (ed Ulsamer) (1989) 860 ff (see also Lemke *Lexicon* 700; Fahrenhorst *Lexicon* 826), who refers to a variety of diverging and conflicting meanings currently attributed to the *Tatbestand* concept, and who states that the various *Tatbestandslehren* have not only had no influence at all on criminal practice, but have also had no impact at all on the eventual conviction or acquittal of the accused; Roxin *Strafrecht* AT I (1992) 107; Badenhorst *Die inhoud van die misdaadbegrip in die Suid-Afrikaanse strafreg* (LLD thesis RAU 1982) 321 fn 2 358 ff. See also fn 12 *infra*. The introduction of the *Tatbestand* concept into South African law has been advocated by Snyman *Strafreg* (1992) 69 ff, who translates the term into English as "the contents of the proscription" and "the definition of the proscription" (see Snyman *Criminal law* (1989) 79 ff, and into Afrikaans as "die verbodsinhoud" and "die verbodsbeskrywing": *Strafreg* 70 fn 4)), stating that "the word 'proscription' is wide enough to *encompass both prohibitions and commands*" (*Criminal law* 80 fn 4, italics supplied). Not only are these statements contradictory, but the Afrikaans terminology is also inconsistent in so far as a prohibition may, in the wide sense, include a prohibition and an injunction as words with dissimilar meanings, and in the narrow sense may refer to a prohibition only (cf Badenhorst 231 fn 2). It is submitted that the terms "daadsinhoud" or "daadsbeskrywing" are preferable as translations of *Tatbestand*. Snyman *Strafreg* 70 fn 4 rejects the term "daadsomskrywing" (see Badenhorst 231 ff) as having a much narrower meaning than *Tatbestand*. If anything, this indicates that the term *Tatbestand*, rather than the equivalent Afrikaans terms "daadsinhoud" and "daadsbeskrywing", is inaccurate (*Tat* = "daad"), for if the term *Tatbestand* actually denotes "verbodsinhoud/(gebodsinhoud)" or "verbodsbeskrywing/(gebodsbeskrywing)", one would have expected the terms *Verbotsbestand*/(*Gebotsbestand*) as their German equivalents ("verbod" = *Verbot* and "gebod" = *Gebot*). *Tatbestandsmässigkeit* is, in the absence of an equivalent English term, circumscribed by Snyman *Criminal law* 80 fn 4 as "the requirement that X's act correspond to the definition of the proscription", but no Afrikaans equivalent or circumscription is furnished. It is submitted that perhaps the nearest equivalent Afrikaans words are "daadsinhoudsmatigheid" or "daadsbeskrywingsmatigheid" (cf Badenhorst 231 ff: "daadsomskrewenheid").

4 See Jescheck 180–181; Roxin 109.

However, with the decline of the doctrine of freedom of will during the second half of the nineteenth century, the natural law conception of fault reached the end of the road.[5]

Its successor, the psychological concept of fault (with Gustav Radbruch as its chief protagonist),[6] was a product of the classic concept of crime (with Franz von Liszt and Ernst Beling as its main founders), which held sway in Germany at the turn of the century. The classic concept of crime, which was apparently rooted in the naturalistic and positivistic schools of thought[7] and closely linked to the rule of law ideal, differentiated sharply between the act, *Tatbestandsmässigkeit*, unlawfulness and fault as elements of a crime. The act,[8] *Tatbestandsmässigkeit* and unlawfulness constituted the objective, external or physical elements of a crime and fault the subjective, internal or psychological element (hence the term "psychological" concept of fault):[9]

> "Unterschieden wurde zwischen der naturalisch verstandenen Handlung, dem objektiv-deskriptiv aufgefassten Tatbestand, der objektiv-normativ abgegrenzten Sphäre der Rechtswidrigkeit und der subjektiv-deskriptiv begriffenen Schuld."[10]

Simplicity, clarity and compelling construction being the hallmarks of the classic concept of crime, its lasting influence not only on German criminal law, but also on foreign criminal law[11] comes as no surprise.

2 2 The neoclassic concept of crime

The successor of the psychological concept of fault, the normative concept of fault (with Reinhard Frank as its foremost founder), was a product of the neoclassic concept of crime which became fashionable in Germany, apparently under the influence of the value judgment philosophy of Neo-Kantianism, during the first decade of the present century. The neoclassic concept of crime

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5 See Jescheck 377; cf Badenhorst 394.

6 "Wenn die deutsche Strafrechtsgeschichte das 19. Jhdt. als Epoche des psychologischen Schuldbegriffes charakterisiert . . . so ist das dem Inhalt nach zutreffend, sprachlich jedoch nicht ganz richt, weil diese vom naturalistischen Denken getragene Periode . . . in Wirklichkeit einen materiellen Schuldbegriff nicht kannte oder, sofern sie ihn ausnahmsweise verwendete . . . mit ihm praktisch nichts anzufangen wusste": Maurach/Zipf *Strafrecht* AT (1987) 405; see also Badenhorst 233: "Daar kan nie met suiwerheid van 'n eenduidige klassieke *skuldbegrip* gepraat word nie. 'n Skuldbegrip wat logies by ander misdaadelemente aansluit was in die tyd nog onbekend."

7 Which confined the study of law to the formal rules and sources of law, adopting an empirical, factual, neutral and unprejudiced approach in the observation and description of the law, and eschewing influences from other disciplines in the humanities and moral and ethical value judgments: see Maurach/Zipf 193–194; Jescheck 181–182 377–378; Roxin 111–112 537–538; Badenhorst 227 ff; Snyman *Strafreg* 52 152.

8 In terms of the causal or naturalistic conduct concept.

9 See Jescheck 181 ff 377–378; Roxin 110 111–112 537–538; Badenhorst 225 226 ff 394; cf Maurach/Zipf 402–403 405 ff; Jakobs *Strafrecht* AT (1991) 129–130 470–471; Snyman *Strafreg* 52–53 73 105 151 ff. The differentiation between an act, unlawfulness and fault as elements of a crime preceded the classic concept of crime by some six decades, however: see Jescheck 180.

10 Jescheck 182.

11 See *idem* 181 182 fn 26 183 fn 27; Maurach/Zipf 395 406–407; Roxin 110.

developed from the criticism levelled at the largely formalistic classic concept of crime. The main thrust of the shortcomings ascribed to the classic concept of crime was that the element of *Unrecht*[12] could not be defined in terms of mere objective criteria, nor could the element of fault be defined in terms of mere subjective criteria. The recognition, by supporters of the distinction between purely objective and purely subjective elements of a crime, of exceptions to the distinction, was seen by its opponents as proof of its untenability. The concepts of an act, *Tatbestandsmässigkeit*, unlawfulness and fault all underwent several drastic changes,[13] the most significant of which were the introduction of a value judgment or normative elements in the concepts of *Tatbestandsmässigkeit* and fault,[14] and the introduction of a material content into the concept of unlawfulness. Thus the element of *Unrecht* came to be judged from the point of view of the social harmfulness of the act, while the element of fault came to be judged from the point of view of legal blameworthiness of the act (hence the term "normative" concept of fault):[15]

> "Das wertbezogene System der neoklassischen Verbrechenslehre [wurde] gekennzeichnet durch die Auflösung des Handlungbegriffs, die Neuorientierung der Funktion des Tatbestandes und die inhaltliche Umbildung von Rechtswidrigkeit und Schuld."[16]

2 3 The finalistic concept of crime

The successor to the neoclassic concept of crime, the finalistic concept of crime (with Hans Welzel as its foremost exponent), which apparently had its origins in

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12 Ie a "tatbestandsmässige und rechtwidrige Handlung", thus combining the elements of an act, *Tatbestandsmässigkeit* and unlawfulness: Koch *Lexikon* 670; Roxin 108. Also used in this context are the concepts of *Unrechtstatbestand*, *Gesamttatbestand*, *Gesamtunrechtstatbestand* and a host of others: Senge *Lexicon* 860; Jakobs 155–156. It goes without saying that these concepts are very much part and parcel of the controversy and complexities associated with the *Tatbestand* concept and have equally little practical value: see fn 3 *supra* and the authorities referred to there. Moreover, in modern parlance the term *Unrecht* has systematic implications: While general consensus exists on the definition of a crime as a "tatbestandsmässige, rechtswidrige und schuldhafte Handlung", opinions are divided on whether the concept of crime consists of two or three elements. One construction classifies the elements of a crime as *Tatbestandsmässigkeit*, unlawfulness and fault (*dreistufiger Deliktsaufbau*), the other as *Unrecht* and *Schuld* (*zweistufiger Deliktsaufbau*): see Fahrenhorst *Lexikon* 826 (see also Senge *Lexikon* 860); Jakobs 159–160; Roxin 172 ff. *Unrecht* is easily translated into Afrikaans as "onreg" (see also Snyman *Strafreg* 72 100–101), but the translation of *Unrecht* into English as "wrongdoing" by Snyman *Criminal law* 82–83 88–89 is unsatisfactory since it does not accommodate a "wrongful omission". It is submitted that, if anything, the term "wrongful conduct" or simply "wrong" is perhaps more accurate.

13 The act itself by the introduction of the social conduct concept which only really gained momentum after the Second World War: see Maurach/Zipf 199–200; Jescheck 185 200 fn 23; Jakobs 138 fn 63; Roxin 143; cf Badenhorst 237–238; Snyman *Strafreg* 56.

14 "Damit war die Schuld aus einem subjektiv-psychologischen Vorgang zu einem objektiven Werturteil geworden": Maurach/Zipf 407.

15 See Jescheck 183 ff; Roxin 110–111 112 538–539; Badenhorst 225 233 ff; cf Maurach/Zipf 407–408; Jakobs 471 ff; Snyman *Strafreg* 53–54 73 ff 105 107–108 155 161.

16 Jescheck 186.

the phenomenological-ontological school of thought, emerged in Germany in the early 1930s. The finalistic concept of crime initiated fundamental changes to the concepts of an act, *Tatbestandsmässigkeit*, unlawfulness and fault. The act, in terms of the final conduct[17] concept, acquired a meaning which deviated substantially from the concepts of an act which preceded it, and the same applied to the concept of fault. The major changes, in so far as they pertinently affected the concept of fault,[18] may be summarised as follows:[19]

(a) Awareness of unlawfulness[20] was removed from the sphere of intention and became the central notion of fault.[21]

(b) Intention[22] was removed from the sphere of fault and became the central notion of the act.[23]

(c) Mistake as to the *Tatbestand* (*Tatbestandsirrtum*) came to be regarded as a defence vitiating intention, and mistake as to unlawfulness (*Verbotsirrtum*), provided it was unavoidable or reasonable (*vermeidbar* or *unzumutbar/nichtzumutbar*),[24] came to be regarded as a defence vitiating awareness of unlawfulness.[25]

(d) Negligence[26] acquired a dual role and place, to wit:

(i) As a breach of duty, negligence became part and parcel of the *Unrecht* element; and

(ii) as personal blameworthiness, negligence became part and parcel of the fault element.

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17 On the English terminology, see Snyman *Criminal law* 43–44; who prefers the term "teleological theory of an act" in English; cf, however, Badenhorst 224 fn 2 234 fn 1, who points out that the word "teleological" was also used as a description of the neoclassic concept of crime.

18 "Es ist das grosse Verdienst dieser Lehre, die erste wirklich 'normative' Schuldkonstruktion verwirklicht zu haben": Maurach/Zipf 410.

19 See Jescheck 189 ff 379; Roxin 111 112 539; cf Jakobs 130 ff 474–475; Badenhorst 225 243 ff 396–397; Snyman *Strafreg* 54 ff 73 155 ff.

20 "*Du hast gewusst, dass Dein Handeln rechtswidrig war*" or "*Du hättest wissen müssen, das Dein Handeln rechtswidrig war*": Dreher/Tröndle *Strafgesetzbuch* (1993) Vor Par 13 Rdn 30.

21 The so-called *rein normativer Schuldbegriff*: Jescheck 379; criticized by Schönke/Schröder/Lenckner *Strafgesetzbuch* (1991) Vor Par 13 Rdn 115.

22 Which, in the context of the final conduct concept, means *dolus directus*; cf Dreher/Tröndle Vor Par 13 Rdn 29: "*Du hast gewusst, was Du tatest*."

23 "[Die] subjectiven Elemente (das Objekt der Wertung) schieden auf diese Weise aus dem Schuldbegriff aus, und es bleibe 'allein das Kriterium der Vorwerfbarkeit' (die Wertung des Objekts) zurück": Roxin 539; cf Maurach/Zipf 409.

24 "*Du hättest anders handeln können*": Dreher/Tröndle Vor Par 13 Rdn 30 (cf Schönke/Schröder/Lenckner Vor Par 13 Rdn 118); cf in this context the recent so-called social concept of fault which also ties in with the individual freedom of will problem: Jakobs 484 ff; Schönke/Schröder/Lenckner Vor Par 13 Rdn 109 110 118; Dreher/Tröndle Vor Par 13 Rdn 28; Lackner *Strafgesetzbuch* (1993) Vor Par 13 Rdn 23 26.

25 *Unzumutbarkeit/Nichtzumutbarkeit* is currently rejected as a general defence to fault: see Jescheck 385 454 ff; Schönke/Schröder/Lenckner Vor Par 13 Rdn 116a; Roxin 539 709 ff; cf Maurach/Zipf 408 410 413 ff; Hirsch *Strafgesetzbuch Leipziger Kommentar* (eds Jescheck/Russ/Willms) (1985) Vor Par 32 Rdn 184; Dreher/Tröndle Vor Par 13 Rdn 30.

26 "*Du hättest Wissen müssen, was Du tatest*": Dreher/Tröndle Vor Par 13 Rdn 29.

(e) The process of "subjectivising" the *Unrecht* element of crime continued.[27]

(f) The process of "objectivising" the fault element of crime continued.[28]

The virtues attributed to the finalistic concept of crime are: first, its flexibility, in so far as it has succeeded in mustering support from such opposite sides as proponents and opponents of the final conduct concept;[29] and secondly, its cogency, a claim which is somewhat diminished by the admission that the cause of its eventual downfall is likely to be its failure to impact upon criminal practice rather than novel ideas.[30]

2 4 Neofinalism and current developments

The development of the concept of crime from a classic to a neoclassic to a finalistic one has, however, apparently not resulted in a complete abandonment of the classic and neoclassic concepts of crime. None of the three concepts of crime has succeeded in totally displacing the others and fundamental ideas from each of the three concepts of crime are still alive.[31]

Developments since the finalistic concept of crime include:[32]

(a) The elaboration of the finalistic concept of crime and the *Doppelstellung* of intention, as reflected in the development of the "*Handlungswille als Gegenstand des Rechtswidrigkeitsurteils und des Schuldurteils*" to the "*Tat im Hinblick auf die tadelnswerte Rechtsgesinnung als eigenes Bezugsobjekt des Schuldurteils*".[33]

(b) Efforts to reconcile the conflicts between the classic, neoclassic and finalistic concepts of crime, and particularly efforts to arrive at a synthesis, known as

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27 Which resulted in the development of the controversial *personale Unrechtslehre* at the expense of the earlier *objektive Unrechtslehre*: see Maurach/Zipf 415–416; Jescheck 216 ff; Roxin 198 ff; Lackner Vor Par 13 Rdn 18 ff.

28 Thus (e) and (f) render the finalistic and classic concepts of crime diametric opposites: Roxin 111.

29 Notably opponents who have opted to base their finalistic concept of crime on the *personale Unrechtslehre*: see Jescheck 189 191–192; Roxin 112–113 199; cf Hirsch *LK* Vor Par 32 Rdn 171 172. On the development, in recent times, of the negative conduct concept, see Jakobs 143–144; Roxin 145 ff.

30 See Jescheck 195; cf Snyman *Strafreg* 158.

31 Jescheck 179; Roxin 110 112–113; Badenhorst 223 256 ff; cf Maurach/Zipf 406–407, particularly with regard to the so-called *komplexer Schuldbegriff* (408 ff; cf Schönke/Schröder/Lenckner Vor Par 13 Rdn 114).

32 See Jescheck 193 ff 379–380; Roxin 112 ff.

33 Jescheck 379; cf Hirsch *LK* Vor Par 32 Rdn 172; Schönke/Schröder/Lenckner Vor Par 13 Rdn 119 120: "Ebenso wie es vorsätzliches und fahrlässiges Unrecht gibt . . . gibt es auch *Vorsatz- und Fahrlässigkeitsschuld* . . . [D]er Vorsatz ist im Unrechtsbereich 'Träger des subjektiven Handlungssinns' . . . der die psychische Beziehung des Täters zum äusseren Tatgeschehen umfasst, während er im Schuldbereich als 'Träger des Gesinnungsunwerts', in dem sich die mangelhafte Einstellung zur Rechtsordnung offenbart, in Erscheinung tritt"; Dreher/Tröndle Vor Par 13 Rdn 28a: "Vorsatz oder Fahrlässigkeit können die Schuld allein nicht begründen; wohl aber bestimmen sie die Art der Schuld . . . Insoweit hat der Vorsatz nicht nur für Tatbestand und Rechtswidrigkeit, sondern auch für die Schuld Bedeutung." On the *Doppelstellung*, in the neonormative fault concept, of intention as a non-independent element of *Unrecht* and fault, see also Badenhorst 397–398 399–400 409 ff; Snyman *Strafreg* 161 fn 45.

"neofinalism", between the neoclassic and finalistic concepts of crime:[34] These developments have been summarised as follows:

> "Zwischen Unrecht und Schuld kann man auf der Grundlage der neoklassisch-finalistischen Synthese so unterscheiden, dass das Unrecht den Handlungs- (und ... Erfolgs-) Unwert, die Schuld aber den 'Gesinnungsunwert' ... oder das 'Dafürkönnen' des Täters für die rechtswidrige Tatbestandsverwirklichung bezeichnet. Das aus dem neoklassischen System stammende materielle Verständnis des Unrechts als Sozialschädlichkeit und der Schuld als Vorwerfbarkeit, das auch dem finalistischen System nicht widerstreitet, wird in den modernen Verbrechenslehre beibehalten. Oft wird die Differenz zwischen Unrecht und Schuld auch so erklärt dass das Unrecht ein Unwerturteil über die Tat, die Schuld dagegen ein Unwerturteil über den Täter ausdrücke."[35]

(c) Efforts to align the elements of a crime with criminal policy and to complement the fault requisite with general prevention as a purpose and function of criminal punishment.[36]

(d) The abandonment of the fault requisite by substituting general prevention as a purpose and function of criminal punishment for it.[37]

What the future holds for the development of the concept of crime in Germany is, as can be expected, uncertain. In this regard, it has rightly been remarked: "Es gibt keine Verbrechenslehre, die mehr sein kann als ein vergänglicher Entwurf."[38]

2 5 The South African situation

Although legality (a definition of the crime and a penalty clause), a deed (an act and/or a consequence), unlawfulness, capacity and fault (intention or negligence) are virtually unanimously recognised and accepted[39] as requisites of criminal liability,[40] the concept of crime has been the subject of precious little debate in South Africa.[41] Of the concepts of crime discussed above, the classic and neoclassic concepts probably come closest to the prevailing concept of crime in

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34 With the neofinalistic concept of crime currently enjoying majority support: Jescheck 193; Roxin 112–113; Badenhorst 256 ff 340–341 349 ff.

35 Roxin 113.

36 Referred to as the *zweckrationale* or functional concept of fault, advocated by Roxin 113 ff 536–537 549–550; cf Maurach/Zipf 416–417; Jescheck 193–194; Jakobs 480 ff; Lackner Vor Par 13 Rdn 24.

37 Another variant of the *zweckrationale* or functional concept of fault, advocated by Jakobs 469–470 480 ff; rejected by Maurach/Zipf 417; Jescheck 371; Roxin 546–547; Schönke/Schröder/Lenckner Vor Par 13 Rdn 117 117a; Dreher/Tröndle Vor Par 13 Rdn 28; Lackner Vor Par 13 Rdn 25.

38 Jescheck 195; cf Badenhorst 223–224: "[M]et standpunt en teen-standpunt behou die wetenskaplike gesprek sy momentum ... Die nuwe oplossings wat uitgedink word, laat ... gou weer die opgeloste probleme in onopgelostes verander."

39 Whatever their systematic classification and the terminology employed.

40 See eg Burchell and Milton *Principles of criminal law* (1991) 54 ff 71 ff; Snyman *Strafreg* 27 ff.

41 With the notable exception of the substantial contributions of Badenhorst and Snyman. On the history and development of the South African concept of crime, see Badenhorst 12 ff 59 ff 80 ff, and on the influence of the German concept of crime on the South African concept of crime, see *idem* 94 ff.

South African criminal practice,[42] although it is by no means identical to it. The South African deed concept is in some respects similar to but in others distinct from the causal or naturalistic conduct concept, and the *Tatbestandsmässigkeit* concept has, as such, never formed part and parcel of South African criminal law. In recent times, concepts of crime akin to the finalistic and neofinalistic concepts have been propagated by academic writers in South Africa.[43]

3 THE CONCEPT OF FAULT

The German concept of fault has, like the German concept of crime, developed in the course of time from a fairly simple and lucid notion into a highly complicated and multifaceted creature. Since an exposition and evaluation of the merits and demerits of the psychological and normative concepts of fault[44] would make little sense without a cursory examination of the prevailing views on such concepts at the time of their inception and of the current views on normative fault, a brief overview of the latter is indicated.

3 1 The elements of fault

3 1 1 Classic and neoclassic views

Prominent contributions to the German legal literature on the concept of fault during the classic and neoclassic periods reveal at least three main schools of thought on the elements of fault:

(a) Fault consists of intention and negligence.[45] This view proceeds from the premise that fault must be clearly differentiated from the other elements of crime, to wit an act, unlawfulness and criminal capacity.[46]

(b) Fault consists of an intentional or negligent unlawful act by someone who is criminally capable. This view has been criticised on the basis that it

(i) extends the original meaning of the concept of fault;[47]

(ii) identifies an element of crime with fault;[48]

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42 Cf *R v Mkize* 1959 2 SA 260 (N) 264; *S v Johnson* 1969 1 SA 201 (A) 204; Badenhorst 243 fn 1; Snyman *Strafreg* 53 161.

43 Notably by Badenhorst 340 ff; Snyman *Strafreg* 160.

44 Cf the distinction made between a *formeller Schuldbegriff* and a *materieller Schuldbegriff*: Maurach/Zipf 402; Jescheck 380; cf Schönke/Schröder/Lencker Vor Par 13 Rdn 116 ff.

45 Radbruch "*Über den Schuldbegriff*" 1904 *ZStW* 333: "Ursprünglich ist der Schuldbegriff der die beiden 'Schuldformen' Vorsatz und Fahrlässigkeit in sich fassende Gattungsbegriff "; cf Freudenthal *Schuld und Vorwurf im geltenden Strafrecht* (1922) 5 10; cf, however, Merkel "Die Bestimmungen des Strafgesetzentwurfes von 1919 über die Straftat" 1922 *ZStW* 338 341 ff, who takes the view "dass Vorsatz und Fahrlässigkeit nicht als Schuldarten anzusehen sind, sondern umgekehrt die Schuld als Artmerkmal für Vorsatz und Fahrlässigkeit" (348), and that "Formen der Schuld sind vielmehr Schuldbewusstsein und vermeidbarer Mangel von Schuldbewusstsein" (344).

46 Radbruch 1904 *ZStW* 333 ff 335 ff 342 ff 344 ff.

47 Radbruch 1904 *ZStW* 333–334, who points out that the concept of imputation has undergone the same extension as the concept of fault to the extent that "[d]ie Verantwortung der Schuldfrage nennen wir Zurechnung".

48 Radbruch 1904 *ZStW* 334, who argues that fault should be purged of foreign elements.

(iii) confuses fault with the other elements of crime;[49] and

(iv) differentiates between the "Schuldfrage" and the "Straffrage".[50]

(c) Fault consitsts of criminal capacity (normal mental faculties), intention or negligence (the actual psychological relationship between perpetrator and conduct) and the normality of the circumstances surrounding the accused's conduct (an absence of the defences of self-defence and necessity).[51]

3 1 2 Modern views

Some examples sampled from leading modern German textbooks and commentaries on criminal law demonstrate that modern views on the elements of normative fault are hardly less divergent and conflicting:

(a) Fault consists of the possibility of awareness of unlawfulness (the intellectual element of fault) and the possibility of acting in accordance with such awareness (the voluntative element of fault).[52]

(b) Fault consists of criminal capacity, the possibility of awareness of unlawfulness and the "Zumutbarkeit des normgemässen Verhaltens".[53]

(c) Fault consists of criminal capacity, the possibility of awareness of the unlawfulness and the "Normalität der begleitenden Umstände".[54]

(d) Fault consists of unlawful conduct, criminal capacity, acting in disregard of the "Geltungsgrund von Normen" and the elements of fault required by the definition of the crime in question.[55]

3 2 The South African situation

Fault concepts in South African criminal law may be classified into three broad categories:[56] first, psychological fault; secondly, normative fault;[57] and thirdly a

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49 *Idem* 333 334.

50 *Idem* 334.

51 Frank "Über den Aufbau des Schuldbegriffs" *Festschrift für die Juristische Fakultät in Giessen zum Universitätsjubiläum* (ed Frank) (1907) 528 ff 536–537 545–546: "[D]er Schuldbegriff ist ein zusammengesetzter Begriff, zu dessen Bestandteilen unter anderm auch Vorsatz und Fahrlässigkeit gehören . . . [D]as Verhältnis dieser Begriffe zu dem Schuldbegriff ist nicht das der Art zur Gattung" (528); cf Freudenthal 3 ff 10.

52 Hirsch *LK* Vor Par 32 Rdn 175, who regards criminal capacity as a prerequisite for or an independent component of fault (Rdn 176).

53 Maurach/Zipf 410 413 ff; Dreher/Tröndle Vor Par 13 Rdn 30–31.

54 Jescheck 386–387; Roxin 536; who enumerates these components as elements of *Verantwortlichkeit* which, in turn, depends upon *Schuld* and *präventive Notwendigkeit*.

55 Jakobs 469.

56 Cf Van der Merwe *Die leerstuk van verminderde strafbaarheid* (LLD thesis Unisa 1980) 84.

57 Supporters of the normative fault concept are: Van der Merwe *Leerstuk* 5 131 197 257 290 327 339 342 344 346; "The cumulative effect of 'partial excuse' and error juris – *Ntuli* and *De Blom* revisited' 1982 *SALJ* 435 ff; "Informele strafvermindering by moord" 1982 *THRHR* 146–147; "Die 'psigologiese' v die 'normatiewe' skuldbegrip in die lig van *Bailey* 1982 3 SA 773 (A)" 1983 *SACC* 33 ff; Badenhorst 394 ff; Bergenthuin *Provokasie as verweer in die Suid-Afrikaanse strafreg* (LLD thesis UP 1985) 536 587 ff 601; "Die algemene toerekeningsvatbaarheidsmaatstaf" 1985 *De Jure* 275 ff; "Provokasie in die

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mixed concept of fault[58] which contains elements of both.[59] Although the normative fault concept, albeit sometimes largely undefined and otherwise diversely defined, enjoys fairly substantial support among South African writers, the psychological fault concept continues to retain a strong foothold.[60] In

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Suid-Afrikaanse strafreg" 1986 *De Jure* 104–105 107 272 ff 278; Snyman *Strafreg* 147 ff; "The 'finalistic' theory of an act in criminal law" 1979 *SACC* 136 ff; "Die invloed van die Engelse en die Duitse reg op die Suid-Afrikaanse strafreg" 1981 *De Jure* 75 ff; "The attack on German criminal legal theory – a retort" 1985 *SALJ* 123 ff; "Normatiewe skuld en redelik verwagbare gedrag" 1991 *THRHR* 4 ff; "Confusion concerning the defence of ignorance of the law" 1994 *SALJ* 4–5; "The definition of the proscription and the structure of criminal liability" 1994 *SALJ* 72 ff; Bertelsmann "The essence of *mens rea*" 1974 *Acta Juridica* 35 ff 42 44 50, who relates normative fault to the concepts of *mala in se* and *mala prohibita*; "Noodtoestand: die regverdigingsgrond en die skulduitsluitingsgrond" 1981 *THRHR* 417 ff; Kok "Pogingsmisdade – 'n bewys van '*de minimis lex curat*'?" 1981 *THRHR* 71 ff; "Skuldmetamorfose: *De Blom*, *Dladla* en *Chretien*" 1982 *SACC* 31 ff; "The elements of *injuria*" 1985 *SALJ* 393–394; Van Zyl 1982 *THRHR* 438–439; 1983 *THRHR* 102 ff; cf Stassen 1977 *TSAR* 263 ff. Botha *Wederregtelikheidsbewussyn in die strafreg* (LLD thesis UP 1973) 134 ff 202 ff 273 ff; "*Mens rea* in the form of *culpa* founded upon ignorance of law" 1975 *SALJ* 280 ff; "What precisely does constitute *mens rea*?" 1975 *SALJ* 380 ff; "*Culpa* – a form of *mens rea* or a mode of conduct?" 1977 *SALJ* 29 ff; "Die rol van *dolus* en opset in die strafreg" 1980 *SALJ* 277 ff is frequently cited as a supporter of the normative fault concept (*contra* Rabie *A bibliography of South African criminal law* (1987) 48–49), presumably on the basis of his peculiar constructions and definitions of fault and his conflicting terminology, but he neither pertinently deals with it nor expresses a preference for it.

58 De Villiers *Die strafregtelike verantwoordelikheid van kinders* (LLD thesis UP 1988) 37–38 53 54 58 ff 61 ff 64 ff, who emphasises the normative character of fault, but who prefers a *normative-psychological concept of fault* in terms of which fault is blame in the sense of criminal responsibility, but with a rejection of the final conduct concept, the *Doppelstellung* of intention and an objective test for awareness of unlawfulness; cf Visser and Maré *General principles of criminal law through the cases* (1990) 445 ff; Van der Merwe "Die verband tussen *mens rea* en skuld" 1976 *SALJ* 280 ff 286 ff (cf 1972 *THRHR* 194 ff); cf the contradictory statements by Botha *Wederregtelikheidsbewussyn* 285: "Om *dolus* as 'n gesindheid te beskryf, sal . . . die aard en betekenis daarvan duideliker weerspieël as om dit te bestempel as ''n verwyt wat 'n dader van owerheidsweë tref'"; "Om van *culpa* en *dolus* as skuldverwyte te praat, is nie suiwer nie, maar hou tot 'n sekere mate verband met die werklikheid vir sover *dolus* en *culpa* verskyningsvorms van skuld is en skuld niks anders as verwytbaarheid is nie . . . 'n Dader het skuld *omdat* hy vanweë sy gesindheid verwyt kan word . . . [S]kuld [is] nie 'n verwyt nie, maar verwytbaarheid" (286); and "*Dolus* is 'n skuldverwyt . . . Dieselfde geld vir *culpa*" (287).

59 Van der Merwe 1983 *SACC* 36 ff 39–40 states that there are several versions of both the psychological and normative concepts of fault (cf Du Plessis *The law of culpable homicide in South Africa* (PhD thesis Rhodes 1986) 53 fn 11); that in terms of some versions of the psychological concept of fault the word "psychological" is something of a misnomer and that the term "pre-normative" fault is a better option (*contra* Snyman 1991 *THRHR* 18, who states that the psychological fault concept was not only succeeded but also preceded by a normative fault concept); and that it is an oversimplification to describe the psychological fault concept as "subjective" and the normative fault concept as "objective"; see also De Villiers 52.

60 Opponents of the normative fault concept are: Visser and Maré 451 459–460; Burchell and Milton 89–90 284; Du Plessis *Culpable homicide* 50 ff 58 ff; "Hans Welzel's final conduct doctrine – an importation from Germany we should well do without" 1984 *SALJ* 315 ff; "Skirmishes on the strafregwetenskaplike front: some recent decisions" 1985 *SALJ*

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contradistinction, barring one minority judgment and one possible exception, the South African courts have thus far consistently declined the invitation to import the normative fault concept[61] at the expense of the psychological fault concept.[62]

The concept of fault has variously been defined by South African academic writers in the following terms:

(a) Fault consists of two components: criminal capacity on the one hand and intention or negligence as a state of mind on the other.[63]

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394 ff; "A reply to Professor Snyman's retort: mission accomplished" 1985 *SALJ* 506–507 509–510; Labuschagne "Die normatiewe skuldbegrip" 1985 *De Jure* 383–384; Burchell "Heroes, poltroons and persons of reasonable fortitude – juristic perceptions on killing under compulsion" 1988 *SACJ* 33; Rabie "*Error iuris*: principle, policy and punishment" 1994 *SACJ* 95 ff (cf "Aspects of the distinction between ignorance or mistake of fact and ignorance or mistake of law in criminal law" 1985 *THRHR* 342–343; *Bibliography* 49, which refers to but does not evaluate the psychological-normative fault debate, but cf 72 ff); cf De Wet *Strafreg* (1985) 84 ff 137–138 fn 178 150 ff; Nicholson "*S v Bailey*: an analysis and assessment in the light of the relevant general principles of criminal liability" 1983 *Responsa Meridiana* 267–268 271–272 276–277; Van Warmelo "Die Romeinse en Romeins-Hollandse reg en sommige moderne strafregbegrippe" 1984 *SACC* 45 ff; Maré "Noodtoestand as verweer teen 'n aanklag van moord" 1993 *SACJ* 170 ff 185. Some writers refer to the psychological and normative fault concepts without taking sides: see eg Van der Westhuizen *Noodtoestand as regverdigingsgrond in die strafreg* (LLD thesis UP 1979) 370 696; Verschoor *Die strafregtelike verantwoordelikheid van die psigopaat en ander analoë figure* (LLD thesis UP 1980) 192 ff; Louw "Die algemene toerekeningsvatbaarheidsmaatstaf" 1987 *TSAR* 366–367 369; 1987 *De Jure* 179 ff.

61 See *S v Goliath* 1972 3 SA 1 (A) 11 ff and *S v Bailey* 1982 3 SA 772 (A) 795 ff. The minority judgment is that of Wessels JA in *S v Goliath* 29 ff, where the view taken was that necessity as a defence to murder excludes fault rather than unlawfulness; and the possible exception is *S v Barnard* (*1*) 1985 4 SA 431 (W) 436 ff, where Coetzee J stated that the court's decision may be interpreted by some as a minor inoculation of the normative fault concept, in the specific circumstances and for policy reasons, onto the psychological fault concept, but that it makes no practical difference (438).

62 Conceded by Snyman *Strafreg* 147 158 ff, who valiantly attempts, however, to construe, contrary to Rumpff JA's express refusal in *S v Goliath* 25–26 to take sides in the issue whether necessity is a defence to unlawfulness or a defence to fault on a charge of murder, the judge's decision as being based on the normative fault concept (156 fn 31 (see also Van der Westhuizen 368 ff; Bertelsmann 1981 *THRHR* 421); cf 159 fn 43 in respect of *S v Bailey* and *S v Barnard* (*1*)). See also Badenhorst 395; Visser and Maré 448 450 457 ff 503, who take the view that the decision in *S v Barnard* (*1*) is incompatible with the Appellate Division's decision in *S v Barnard* 1986 3 SA 1 (A); Burchell and Milton 284; cf Van der Merwe 1983 *SACC* 40–41; Bergenthuin 1985 *De Jure* 277; cf, however, De Villiers 53 54, who takes the view that the court in *S v Bailey* and the courts generally have applied neither a pure psychological nor a pure normative fault concept, but a mixed fault concept; Van Zyl 1982 *THRHR* 438, who flies in the face of Jansen JA's explicit statements in *S v Bailey* 799 that it is unnecessary for purposes of the decision to consider the application of the normative fault concept by boldly reading into the judge's decision a recognition and acceptance of the normative fault concept in necessity cases; Du Plessis 1984 *SALJ* 316, who states that the South African courts have followed neither the normative nor the psychological fault concept.

63 De Wet 103–104 137 156 ff, who somewhat inconsistently states: "In engere sin is 'skuld' die laakbare gesindheid waarmee 'n persoon handel" (103); "[L]aakbare gesindhede . . . is . . . kwaadwilligheid en onagsaamheid . . . beter bekend . . . onder hulle Latynse name van *dolus* en *culpa*" (104); and: "Om skuld te hê moet die persoon toerekeningsvatbaar wees

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(b) Fault consists of intention (*dolus*) or negligence (*culpa*).[64]

(c) Fault consists of unlawful conduct, criminal capacity and intention or negligence.[65]

(d) Fault consists of criminal capacity, awareness of the unlawfulness and the normality of all relevant surrounding circumstances (as independent elements) and intention (as a non-independent element).[66]

(e) Fault is present where:

> "(a) [The accused] knew or could have known the circumstances which made his act correspond to the definition of the proscription and rendered it unlawful (awareness of the unlawfulness); (b) he was capable of acting in accordance with the law (freedom of will and criminal capacity . . .); (c) he nevertheless decided to proceed with his act, thereby contravening the law (the decision to act, or intention); (d) in circumstances under which the law could have expected him to act differently, namely to refrain from proceeding with his unlawful act"[67] ["vergbaarheid"].[68]

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en met 'n bepaalde gesindheid handel" (110); cf, however, Du Plessis *Culpable homicide* 33–34: "To say that the requirement of 'skuld' is necessary for criminal liability to be founded, because a person must have a blameworthy state of mind before he can be blamed or reproached for his conduct, tells us nothing about blameworthiness or 'skuld'. It amounts to saying that blameworthiness is blameworthy. To take matters further than this tautology one must determine what constitutes a blameworthy state of mind."

64 Burchell and Milton 243, who take the view that fault and capacity are different and distinct concepts (196 246).

65 De Villiers 37–38: "Skuld word dus nie as voorvereiste vir strafregtelike verantwoordelikheid beskou [nie,] want skuld is strafregtelike verantwoordelikheid . . . Skuld is ook nie verwytbaarheid nie, maar is reeds verwyt . . . [I]ndien 'n persoon wederregtelik gehandel het en hy is verwytbaar (toerekeningsvatbaar) en hy moet verwyt word (want hy het opset of nalatigheid), dan verwyt die reg hom (bevind hom skuldig)" (37; cf 57 fn 94 61 62 64); Visser and Maré 445: "Culpability is the legal blameworthiness for the reprehensible state of mind [intention] or careless conduct [negligence] of a criminally accountable person who has acted unlawfully", adding however: "The fact that an accused is *culpable* does not necessarily mean he is *criminally* liable"; Van der Merwe 1976 *SALJ* 280 ff 286 ff: "[D]ie vraag na skuld . . . [is] nie slegs een na die aan- of afwesigheid van 'n gesindheid nie, maar veral ook na die laakbaarheidskriteria van sodanige gesindheid . . . [D]ie bestaan al dan nie van 'n gesindheid [is] by uitstek 'n feitevraag . . . terwyl die laakbaarheid daarvan 'n regsvraag is" (281); "Skuld is aanwesig wanneer die reg deur sy mondstuk, die hof, 'n persoon verwyt" (287); and: "Om te differensieer tussen 'aanwesigheid van skuld' en 'skuldig' het weinig sin" (287 ff 38).

66 Badenhorst 399 ff.

67 Snyman *Criminal law* 147 (*Strafreg* 156), stating that culpability means "that there must, in the eyes of the law, be grounds for blaming X personally for his unlawful conduct" and that "[t]he whole question of culpability may be reduced to one simple question, namely 'could one in all fairness have expected X to avoid the wrongdoing?'" (*Criminal law* 138); cf Van Zyl 1983 *THRHR* 102 ff: "Feitelikheidsbewussyn", "wederregtelikheidsbewussyn" and "wederregtelikheidsinhibisie" coupled to "verwagbaarheid" (Snyman *Strafreg* 156 fn 30 rejects the term), and excluding criminal capacity on the basis either that the criminally incapable can never be blameworthy or that the blameworthy can never be criminally incapable as well as negligence on the basis that it is accounted for by the unlawfulness element and "feitelikheidsbewussyn"; cf, however, Du Plessis *Culpable homicide* 43 51, who regards this notion of fault as a confusion and identification of the German concept of *Schuld* with the South African concept of *mens rea* in the sense of intention or negligence.

68 For an exposition and discussion of the development, meaning, variations and intricacies of and criticism against the so-called *Zumutbarkeit* doctrine, see Snyman 1991 *THRHR*

continued on next page

3 3 "Psychological" fault

Within the setting of the classic concept of crime in which it originated and the neoclassic concept of crime in which it was debated, psychological fault has been defined as the psychological relationship between perpetrator and deed,[69] or a psychological condition or disposition or function. One such psychological relationship, condition, disposition or function is intention, which consists of foresight or will.[70] Another is negligence, which has two elements: a psychological condition or disposition or function[71] on the one hand and a value judgment on the other. The former consists in a failure to foresee,[72] owing to insufficient effort of will, attentiveness and care, the unlawful consequence while having the intellectual faculties to foresee it. The latter consists in considering whether or not the accused demonstrated less effort of will, attentiveness and care than a normal person[73] in his or her position would have shown.[74]

3 4 "Normative" fault

3 4 1 Neoclassic views

According to the founding fathers of the neoclassic concept of crime and the normative fault concept, fault[75] consists in more than a mere psychological

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9 ff, who strongly advocates the importation of the *Zumutbarkeit* doctrine as part and parcel of the normative fault concept into South African criminal law.

69 Dohna "Die Elemente des Schuldbegriffs" 1905 *GS* 305 306 309–310; "Schuld [ist] die – kriminell relevante – psychische Beziehung des Täters zu seiner Tat" (305); Frank *Festschrift* 521–522; Kohlrausch "Die Schuld" in Aschrott and Von Liszt (eds) *Die Reform des Reichstrafgesetzbuchs* (1910) 183 184; Rosenfeld "Schuld und Vorsatz im v Lisztschen Lehrbuch" 1911 *ZStW* 469 ff: "[D]ie Schuld ist die Relation der ganzen psychologischen Persönlichkeit oder des gesamten Innenlebens eines Menschen zu einer von ihm begangenen Einzeltat" (471); Goldschmidt "Die Notstand, ein Schuldproblem" 1913 *ÖZSt* 130 138 140 147 149 ff; Hegler "Die Merkmale des Verbrechens' 1915 *ZStW* 189 ff: "Immer handelt es sich bei 'Schuld' um die Psyche des Täters als Beziehungspunkt" (189 fn 69); Freudenthal 17.

70 Radbruch 1904 *ZStW* 345; cf Dohna 1905 *GS* 304–305; cf, however, Freudenthal 16, who rejects this concept of intention as both formal and bloodless.

71 "Eine Schulddefinition, welche das psychische Verhalten [des] Täters nicht mitumfasst, muss notwendig falsch sien": Dohna "Zum neuesten Stande der Schuldlehre" 1911 *ZStW* 326.

72 "In psychologischer Hinsicht bezeichnet . . . die Fahrlässigkeit den Mangel alles dessen, was psychologisch das Wesen des Vorsatzes bildet": Dohna "Zur Systematik der Lehre vom Verbrechen" 1907 *ZStW* 348 (cf Dohna 1905 *GS* 305).

73 "[W]eil nur normale Vorsicht vom Rechte geboten, nur übernormale Unvorsichtigkeit rechtswidrig ist": Radbruch 1904 *ZStW* 346.

74 Radbruch 1904 *ZStW* 345–346, who, incidentally, also refers to the existence of a psychological relationship between the accused and his or her unlawful conduct for purposes of criminal capacity as a condition for punishment, but who warns against confusing criminal capacity and fault (343–344); cf Seuffert *Ein neues Strafgesetzbuch für Deutschland* (1902) 46 (quoted by Sturm "Seelenszustand und Schuld" 1909 *GS* 188): "Das Urteil der Vorsätzlichkeit liegt auf dem Gebiete der Psychologie, das Urteil der Fahrlässigkeit auf dem Gebiete der Ethik oder des Rechts" (see also Rosenfeld 1911 *ZStW* 474 ff).

75 And, hence, intention and negligence as forms of fault: Sturm 1909 *GS* 167: "Die vorsätzliche Schuld ist eine Schuld auf dem Gebiete der Moral im engeren Sinne, sie ist eine

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condition and[76] comprises two elements, to wit a psychological element on the one hand and an ethical element on the other.[77] Normative fault has been described variously as an assessment or disapproval of human conduct and the psychological elements which contributed to it, a breach of duty, the avoidability of the deed and a reasonable expectation of lawful conduct: in other words, a value judgment or legal blame.[78] In turn, the value judgment or legal blame,

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Übertretung des Pflichtgebotes: du sollst gut sein; die Fahrlässigkeit ist eine Schuld auf dem Gebiete des verständigen Denkens, sie ist eine Übertretung des Pflichtgebotes: du sollst klug sein" (169).

76 Mittermaier *Kritische Beiträge zur Lehre von der Strafrechtsschuld* (1909) 7 (quoted by Hegler 1915 *ZStW* 197 fn 80) states that fault is "nicht etwas rein psychologisches, auch nicht nur die Bewertung eines Seelenszustandes, sondern sie ist die sozialetisch als unrecht bewertete psychische Beziehung zu einer mit dem Schuldigen irgendwie in adäquatem Kausalzusammenhang stehenden Geschehnis", and that "Schuld sei Objekt des Werturteils, die Beziehung des Seelenszustandes auf ein normwidriges Geschehen" (31); cf, however, Sturm 1909 *GS* 166: "Der Seelenszustand ist eine nackte Tatsache, die mit dem Begriffe der Pflicht und dem daraus folgenden Schuldbegriff nichts zu tun hat . . . Schuld ist das Attribut, welches wir dem Seelenszustande beilegen, sie ist die Beleuchtung, in die wir gemäss unserm subjektiven etischen Urteile den Seelenszustand setzen, und in dem wir ihn nun erblicken. Es liegt ihr also ein Urteil über den Seelenszustand oder eine Bewertung desselben zu Grunde" (cf also 189 196).

77 Dohna 1905 *GS* 314, who favours an "einheitliche Schuldbegriff" with "die Pflichtwidrigkeit des Verhaltens" as the common and constant characteristic of intention and negligence (cf Dohna 1907 *ZStW* 345: "Schuld ist diejenige psychische Disposition des Täters, an welche das Zurechnungsurteil anknüpft", and "Das *genus proximum* zu Vorsatz und Fahrlässigkeit ist . . . die Pflichtwidrigkeit der Willensbestimmung" (348)); Finger "Bemerkungen zum Schuldbegriffe" 1908 *GS* 254–255 258: "Die beiden eine Antithese bildenden Begriffe Schuld und Verdienst bezeichnen nicht nur eine Summe psychischer Voraussetzungen. Die Begriffe sind auch normativ, sie bringen Werturteile zum Ausdruck" (254), and: "Die Behauptung, Vorsatz und Fahrlässigkeit seien Schuldformen, ist daher nur insofern richtig, als man stillschweigend in dieser Behauptung einen pflichtwidrigen Inhalt, auf den sich Vorsatz und Fahrlässigkeit beziehen, supponiert" (264); Freudenthal 6 8 17 21 23 27; Merkel 1922 *ZStW* 340; cf Frank *Festschrift* 530 539 540; Sturm 1909 *GS* 163 ff 188 196; Rosenfeld 1911 *ZStW* 472 ff 477–478; Goldschmidt 1913 *ÖZSt* 139 ff 149 ff.

78 Dohna 1905 *GS* 306 310 311 315: "Enthält nicht das Schuldurteil begrifflich das Moment einer Missbilligung irgend welcher Art? Sagt es uns nicht schon die Gegenüberstellung von Verdienst und Schuld, dass hier ein Beurteilungsmassstab angelegt wird, wonach die menschlichen Handlungen sich ihrem Werte entsprechend als positiv oder negativ ausweisen sollen?" (310); Frank *Festschrift* 529 ff: "Schuld ist Vorwerfbarkeit" (529); Finger 1908 *GS* 254–255 257–258: "Mit dem Worte 'Schuld' wird ein Urteil gefasst" (250); Sturm 1909 *GS* 162 ff 197: "[E]s liegt in der Missbilligung ein Vorwurf, und zwar ein Vorwurf der Pflichtwidrigkeit. Der Begriff der Schuld beruht . . . auf dem Begriff der Pflicht" (163; see also 202); Kohlrausch *Reform* 184–185; Goldschmidt 1913 *ÖZSt* 139 ff 149 ff, who refers to the normative fault element as the "Sitz des 'Vorwurfes' in der Schuld" (139); Hegler 1915 *ZStW* 184 ff, who also uses the term "Bewertungsurteil" (190 ff) and couples blameworthiness with *Tatherrschaft* (185 ff); Freudenthal 2 ff, who uses the terms "Vorwerfbarkeit der Tat", "*Vermeidbarkeit* der Begehung" and "*Zumutbarkeit* des Nichthandelns" (8, italics supplied; see also 16 28); Merkel 1922 *ZStW* 336 ff, who regards fault as "das Unwerturteil . . . das der seelischen Beschaffenheit beigelegt wird, durch die ein Mensch zu einem Tun bestimmt worden ist, dessen Folgen unrechtmässig

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which constitutes the essence of normative fault, has been defined variously as meaning –

(a) what was expected of the accused as opposed to what the accused did;[79]

(b) the accused's real psychological condition as opposed to what it should have been;[80]

(c) a failure by the accused to direct his or her internal conduct in accordance with the legal requirements for his or her external conduct;[81]

(d) that the accused acted while knowing or being capable of knowing, or while he or she should and could have known, the wrongful or immoral consequences of his or her conduct;[82] and

(e) that the accused should and could have acted differently.[83]

Not to be confused and identified with the normative element of intention, however, are the elements of awareness of unlawfulness and/or a breach of duty,

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oder unsittlich sind" (340); cf Rosenfeld 1911 *ZStW* 477–478: "Trotz des normativen Charakters bleibt die Schuld eine Einzelrelation. Sie ist zu bestimmen als der Widerspruch zu einem rechtlich-sozialen Sollen, wie er in einem bestimmten Verbrechen zutage tritt" (478).

79 Finger 1908 *GS* 250: "'Schuld' deutet uns an das Zurückbleiben des Vorgegangenen gegenüber dem Erwarteten, ein Manko."

80 Sturm 1909 *GS* 166: "Wir bewerten den wirklichen Seelenszustand des Täters speziell dahin, dass er nicht so ist, wie er hätte sein sollen. Nicht der Seelenszustand selber, welchen der Täter hat, sondern die 'Abweichung' dieses wirklichen Seelenszustandes von dem, welchen der Täter haben sollte, begründet das Wesen der Schuld."

81 Goldschmidt 1913 *ÖZSt* 145, coining the phrase *Pflichtnorm* (not as a *vox ambigua* but as a "Bewertungsmassstab für pflichtgemässe" or "pflichtwidrige Willensbetätigung"), "die von dem einzelnen ein bestimmtes äusseres Verhalten fordert, unausgesprochen eine Norm, die dem einzelnen auferlegt, sein *inneres* Verhalten so einzurichten, wie es nötig ist, um den vor der Rechtsordnung an sein äusseres Verhalten gestellten Anforderungen entsprechen zu können" (cf 147 ff 149 ff), adding: "Wer sich durch die Erfolgsvorstellung nicht motivieren lässt (Fall des Vorsatzes und der bewussten Fahrlässigkeit), oder wer sich pflichtwidrig nicht selbst vermittels der Erfolgsvorstellung motiviert (Fall der unbewussten Fahrlässigkeit), Verletzt die Pflichtnorm, welche der den Erfolg verbietenden oder gebietenden Rechtsnorm korrespondiert" (161; cf 147–148 149 ff 154–155 160).

82 Merkel 1922 *ZStW* 337 ff 341 ff, who states "dass der Vorwurf der Schuld . . . nicht erst demjenigen gemacht wird, der die Folgen seiner Willensbetätigung als schädlich oder verwerflich beurteilt hat, sondern schon demjenigen, der zu einer solchen Beurteilung imstande war. Etische Indifferenz entschuldigt ebensowenig, wie vermeidbare Unkenntnis der rechtlichen oder sittlichen Pflichten" (337), and: "Vorsatz und Fahrlässigkeit haben, wenn man ihnen das Merkmal der Schuld beifügt, drei Bestandteile aufzuweisen: *die Vorstellung (das intellektuelle Moment), das Einverständnis mit dem Eintritt des Erfolges oder die Hoffnung auf den Nichteintritt (das psychologische oder Gefühlsmoment) und die Beurteilung der Folgen als rechtmässig oder unsittlich (das normative oder etische Moment)*" (342, italics supplied).

83 Freudenthal 6 ff, who regards fault as "die Missbilligung . . . dass der Täter sich so verhalten hat, während er sich anders hätte verhalten sollen und können" (6), adding "dass es an der Schuld fehlt, wo im Zeitpunkte der Tat Sollen oder Können gefehlt hat" (8) and that "should have avoided" presupposes "could have avoided" (11).

which are as indicative of a pure psychological relationship as intention without such awareness.[84]

3 4 2 Modern views

As regards the present position of the concept of fault in general and normative fault[85] in particular, widely divergent and sometimes conflicting opinions are the order of the day. On the one hand, the fault requirement for criminal liability is rejected in its entirety in some quarters,[86] while on the other, supporters of the normative fault concept are, notwithstanding similar points of departure, frequently anything but unanimous about the details. As regards the latter, from the point of view of similarities, there appears to be broad consensus in theory and in practice about the nature of, as opposed to the content of and terminology relating to, the normative fault concept.[87] The issues on which broad consensus has been identified are the following:

(a) A clear differentiation between *Unrecht* and fault remains imperative;

(b) fault as blame is of a highly personal and individual nature; and

(c) fault refers to blaming the perpetrator for making the wrong choice while being capable of making the right choice and not to blaming the perpetrator by judging what others would have done.[88]

From the point of view of the differences between supporters of the normative fault concept, leaving aside the numerous variations, contemporary leading schools of thought on normative fault take the view that the concept of fault denotes[89] –

(a) the possibility of acting differently;[90]

(b) a blameworthy state of mind;

(c) accepting responsibility for one's character;[91]

(d) attribution in terms of general prevention; and

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84 Goldschmidt 1913 *ÖZSt* 140, adding: "Wer den Vorsatz werten will, muss das ihn wertende normative Element neben ihn stellen, nicht es in ihn hineinverlegen, muss die Schuld nicht als Wollen der Pflichtwidrigkeit, sondern als pflichtwidriges Wollen, nicht als 'Wollen des Nicht-Sein-Sollenden', sondern als 'nicht-sein sollendes-Wollen' auffassen" (141); cf Merkel 1922 *ZStW* 336 ff, who takes the view that unlawfulness and awareness of a breach of duty are elements of the concept of fault rather than of the concept of intention: "Dazu kommt noch, dass die Beziehung auf Rechtswidrigkeit allein das Wesen der Schuld nicht erschöpft; deren Wesen ist auch die Beziehung auf die Unsittlichkeit der Folgen einer Willensbetätigung eigentümlich" (336–337); Freudenthal 2: "[Der Täter] kann den Tatbestand in allen seinen Teilen – einschliesslich der Rechtswidrigkeit – wissentlich und willentlich verwirklicht haben, ohne dass sich nach den Umständen etwas anderes als diese Tat hätte erwarten lassen."

85 Inclusive of neonormative fault.

86 See Roxin 550–551.

87 Maurach/Zipf 403 408; cf Jakobs 470 475; Lackner Vor Par 13 Rdn 22.

88 Maurach/Zipf 403 411 ff; cf Hirsch *LK* Vor Par 32 Rdn 174.

89 See Roxin 541 ff; cf Jakobs 475–476.

90 "Andershandelnkönnen" or "Dafür-Können".

91 "Einstehen müssen für den eigenen Charakter".

(e) wrongful conduct notwithstanding the possibility of responding to the dictates of legal norms.[92]

An impression of the multitude of opinions on normative fault may be gained from the following definitions of the concept by leading textbook and commentary writers:

(a) "Der Inhalt des Schuldbegriffs besteht darin, dass dem Täter zum Vorwurf gemacht wird, sich tatbestandsmässig-rechtswidrig verhalten zu haben, obwohl er bei Begehung der Tat die Möglichkeit gehabt hat, sich anders, nämlich zum rechtlich Gesolltes zu bestimmen."[93]

(b) "Das von der unwertigen Tat auf den Täter übergreifende Unwerturteil wird allgemein als *Strafrechtsschuld*, kürzer als *Schuld* bezeichnet" and:[94] "Die entscheidende Wesenzug der Schuld wird ... darin gesehen, dass sie einen *Vorwurf* darstellt, der dem Täter wegen seiner pflichtwidrigen Motivation gemacht wird."[95]

(c) "Schuld bedeutet ... dass die *Maximen, von denen sich der Täter bei der Willensbildung hat leiten lassen, negativ zu bewerten sind und dass ihm die Tat deshalb persönlich zum Vorwurf gemacht werden kann*, oder kurz gesagt: Schuld ist Vorwerfbarkeit der Willensbildung."[96]

(d) "[*Die*] *Zuständigkeit für einen Mangel an dominanter rechtlicher Motivation bei einem rechtwidrigen Verhalten ist die Schuld*."[97]

(e) "Die Verantwortlichkeit hängt von zwei Gegebenheiten ab, die zum Unrecht hinzukommen müssen: der *Schuld* des Täters und der aus dem Gesetz zu entnehmenden *präventiven Notwendigkeit* strafrechtlicher Ahndung. Der Täter handelt schuldhaft, wenn er strafrechtliches Unrecht verwirklicht, obwohl er in der konkreten Situation von der Appelwirkung der Norm (noch) erreicht werden konnte und eine hinreichende Fähigkeit zur Selbststeuerung besass, so dass eine rechtmässige Verhaltensalternative ihm psychisch zugänglich war."[98]

(f) "Was materiell den Schuldvorwurf begründet, ist ... ausschliesslich der *psychische Sachverhalt* in der Person des Täters, der ihn für sein willentliches Handeln verantwortlich erscheinen lässt und seine fehlerhafte Einstellung zum Recht kennzeichnet."[99]

(To be continued)

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92 "[U]nrechtes Handeln trotz normativer Ansprechbarkeit".

93 Hirsch *LK* Vor Par 32 Rdn 170; see also Dreher/Tröndle Vor Par 13 Rdn 28; Lackner Vor Par 13 Rdn 23.

94 Maurach/Zipf 403.

95 Maurach/Zipf 402; cf 408, adding: "Die Schuld hat keinen eigenen Ursprung und keinen von ihrem strafrechtsnormativen Untergrund gelösten selbständigen Gehalt ... Keine Schuld ohne rechtswidrige Tatbestandshandlung" (402; see also Hirsch *LK* Vor Par 32 Rdn 170).

96 Jescheck 363.

97 Jakobs 469, adding that fault consists in "mangelnde Rechtstreue" or "Rechtsuntreue": "Damit ist eine zu verantwortende Untreue gemeint; Rechtsuntreue ist also ein normativ bestimmter Begriff."

98 Roxin 536.

99 Schönke/Schröder/Lenckner Vor Par 13 Rdn 118, adding: "Anknüpfungspunkt für das Schuldurteil ist damit zunächst die *fehlerhafte Willensbildung* des Täters, die darin besteht, dass er sich nicht zu einem rechtmässigen Handeln hat motivieren lassen, obwohl er das Unrecht seines Tuns erkannt hat oder hätte erkennen können und ihm eine entsprechende Steuerung seines Verhaltens möglich gewesen wäre."

Die staat en die universiteitswese in Suid-Afrika: Nuwe wedersydse grondwetlike verantwoordelikhede, regte en verpligtinge

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SUMMARY

The state and the university sector in South Africa: New reciprocal constitutional responsibilities, rights and duties

The new constitutional dispensation and the concomitant political change will undoubtedly lead to changes in the university sector. Tertiary education has now acquired a prominent constitutional dimension. Fundamental rights of individuals and institutions, and the constitutional distribution of authority among the state, universities and the academic community, have become integral aspects of the law relating to universities.

It is not certain how the provisions of the Constitution affecting the public status of universities, academic freedom, institutional autonomy and affirmative action will be interpreted in the long run. It is, however, to be expected that the extreme limits of the relevant provisions will be tested in the process of assailing any form of discrimination.

As regards the question whether universities should be considered to be bound by the Constitution as organs of government, guidance may be sought in Canadian law; academic freedom and institutional autonomy may usefully be construed with reference to German jurisprudence and the provisions relating to affirmative action may best be understood in the light of decisions of the United States Supreme Court.

Die Grondwet van die Republiek van Suid-Afrika 200 van 1993 wat op 27 April 1994 in werking getree het, het 'n grondige verandering, nie net in die sosio-politieke en staatkundige lewe van die mense van die land nie, maar ook in die Suid-Afrikaanse regstelsel in geheel teweeggebring.

Weens die nuutheid van hierdie Grondwet, maar veral ook weens sy aard, kan die toepassing van heelwat van die bepalings daarvan nie presies en met volle sekerheid voorspel word nie. Hier is veral die soort bepalings ter sprake wat nie bloot regulerend nie maar prinsipieel van aard is. Die voor-die-hand-liggende (maar beslis nie die enigste nie) voorbeelde van hierdie soort bepalings is onder die opskrif *Fundamentele Regte* in hoofstuk 3 van die Grondwet te vinde. Hierdie soort bepalings voorsien die howe en regerings van beginselgrondslae waarop hulle optrede afgestem moet word, maar op 'n wyse wat van geval tot geval en van tyd tot tyd kan varieer.

Dit beteken natuurlik nie dat die Grondwet juridiese relativisme en regsonsekerheid in die hand werk nie: inteendeel, groter sekerheid van rigting word bewerkstellig deur die voorsiening van 'n gesaghebbende beginselraamwerk as deur rigiede, dog maklik-wysigbare statutêre norme. Wat egter in verband met die universiteitswese onvoorspelbaar is, is die mate waarin die regering, universiteitsowerhede en vindingryke individue die perke van die tersake voorskrifte van die Grondwet sal beproef en wat die reaksie van die howe daarop sal wees, sou hulle by die proses betrek word.

In die proses van konkrete toepassing van die nuwe Grondwet sal dit noodsaaklik wees om gebruik te maak van regsvergelykende materiaal – dit word immers deur die Grondwet self voorgeskryf.[1] Derhalwe moet die betekenis van die nuwe Grondwet vir die universiteitswese ook regsvergelykend vasgestel word.

1 ENKELE ASPEKTE VAN DIE GRONDWET

1 1 Die Grondwet is die hoogste reg

Toekomstige statutêre bepalings rakende die hoër onderwys sal, soos alle ander reg, in alle opsigte versoenbaar moet wees met al die bepalings van die Grondwet. Die rede daarvoor is dat die Grondwet nou die "hoogste reg" in die land uitmaak waaraan alle owerheidsorgane – wetgewend, uitvoerend en regsprekend – gebonde is.[2]

Dit bring enersyds mee dat parlementêre en provinsiale wetgewing en uitvoerende handelinge nie inbreuk sal mag maak op aansprake wat ingevolge die Grondwet aan persone en instansies verleen word nie, en andersyds dat wetgewing en uitvoerende optrede op die terrein van die onderwys nie noodwendig aan méér beperkinge onderworpe sal wees as dié wat deur die Grondwet opgelê word nie.

1 2 Fundamentele regte

Verskeie bepalings van hoofstuk 3 van die Grondwet waarin fundamentele regte verskans is, het regstreeks of onregstreeks op die hoër onderwys betrekking.

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1 Kyk bv a 35(1) en 231(4): 35(1) "By die uitleg van die bepalings van hierdie Hoofstuk moet 'n geregshof die waardes wat 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid ten grondslag lê, bevorder en, waar van toepassing, die volkereg wat van toepassing is op die beskerming van die regte wat in hierdie Hoofstuk verskans is, in ag neem, en kan die hof vergelykbare buitelandse hofbeslissings in ag neem." 231(4) "Die reëls van die internasionale gewoontereg wat die Republiek bind, maak deel uit van die reg van die Republiek, tensy dit met hierdie Grondwet of 'n Parlementswet onbestaanbaar is."

2 A 4 van die Grondwet lui soos volg: "(1) Hierdie Grondwet is die hoogste reg van die Republiek en enige wet of handeling wat met die bepalings daarvan onbestaanbaar is, is, tensy uitdruklik of by noodwendige implikasie anders in hierdie Grondwet bepaal, nietig in die mate waarin dit aldus onbestaanbaar is. (2) Hierdie Grondwet bind alle wetgewende, uitvoerende en regsprekende staatsorgane op alle regeringsvlakke."

In die eerste plek verleen artikel 14 'n individuele reg op "akademiese vryheid aan instellings van hoër onderrig".[3] In die daaropvolgende artikel 15 word "die vryheid van wetenskaplike navorsing" gewaarborg.[4]

Watter presiese inhoud die regeringspraktyk en die howe aan akademiese vryheid en die vryheid van wetenskaplike navorsing sal gee, sal met verloop van tyd, veral uit die regspraak, moet blyk. Hieronder word verder daarop ingegaan.

Die hoër onderwyswese sal voorts moet voldoen aan die grondwetlike verbiedinge van diskriminasie. In hierdie verband is artikel 8(2) grondliggend deurdat "onbillike diskriminasie" deur die staat op enige denkbare grondslag uitdruklik verbied word.[5]

Ongeag die vraag of hoër onderwysinstellings vir doeleindes van die toepassing van die bepalings van die Grondwet as staatsorgane of as nie-staatlike instellings beskou moet word, vereis artikel 35(3) in verband met die uitleg van hoofstuk 3 dat die howe alle wette (dus ook wetgewing wat op die universiteitswese van toepassing is) in die gees van die fundamentele regte-bepalings van die Grondwet moet uitlê.

Ook die vraag wat *onbillike diskriminasie* in onderwysverband beteken, sal met verloop van tyd deur die regspraak beantwoord moet word. Hoër onderwyswetgewing en die toepassing daarvan sal ook die toets van die diskriminasieverbod moet slaag. Die formulering van sodanige wetgewing, waarby die universiteitswese hopelik 'n belangrike rol sal speel, behoort 'n wesenlike bydrae tot die proses van presisering van die betekenis van die toepaslike bepalings van die Grondwet te lewer.

Die diskriminasieverbod moet verder teen die agtergrond van ander grondwetlike regte en kwalifikasies verstaan word. So veroorloof artikel 8(3)(a) die tref van maatreëls ten gunste van benadeelde persone en groepe[6] en daar kan verwag word dat daar in die afsienbare toekoms ingevolge artikel 33(4) wetgewing aangeneem sal word wat daarop gemik is om "private" diskriminasie teen te werk.[7]

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3 14(1) "Elke persoon het die reg op vryheid van gewete, godsdiens, denke, oortuiging en opinie, waarby akademiese vryheid aan instellings van hoër onderrig inbegrepe is."

4 15(1) "Elke persoon het die reg op vryheid van spraak en uitdrukking, waarby inbegrepe is vryheid van die pers en ander media, en die vryheid van artistieke kreatiwiteit en wetenskaplike navorsing."

5 8(2) "Daar mag teen niemand onbillik gediskrimineer word nie, hetsy direk of indirek, en, sonder om afbreuk te doen aan die algemeenheid van hierdie bepaling, in die besonder op een of meer van die volgende gronde: ras, geslagtelikheid, geslag, etniese of sosiale herkoms, kleur, seksuele georiënteerdheid, ouderdom, gestremdheid, godsdiens, gewete, geloof, kultuur of taal."

6 8(3)(a) "Hierdie artikel belet nie maatreëls wat daarvoor ontwerp is om die genoegsame beskerming en vooruitgang van persone of groepe of kategorieë persone wat deur onbillike diskriminasie benadeel is, te bewerkstellig ten einde hul volle en gelyke genieting van alle regte en vryhede moontlik te maak nie."

7 Artikel 33(4) lui soos volg : "Hierdie Hoofstuk belet nie maatreëls wat daarvoor ontwerp is om onbillike diskriminasie deur ander liggame en persone as dié wat ingevolge artikel

vervolg op volgende bladsy

Artikel 32 skep bepaalde individuele regte op onderwys.[8] Vir die hoër onderwyswese is dit belangrik dat die staat in paragraaf (a) aan individuele studente gelyke toegang tot onderwysinstellings verseker. Verder lê paragraaf (b) 'n regstreekse verband met die beskerming van die individuele taal- en kultuurregte wat in artikel 31 verskans word;[9] die totstandbrenging van kultuur-, taal- en godsdiensgeoriënteerde onderwysinrigtings word voorts in paragraaf (c) gemagtig.

1 3 Die rol van provinsiale owerhede

Ingevolge artikel 126 en bylae 6 word daar nie aan die provinsiale regerings regstreekse verantwoordelikheid oor hoër onderwys opgedra nie, maar wel vir "opvoeding op alle vlakke, met *uitsluiting* van universiteits- en technikonopvoeding", asook vir "kulturele aangeleenthede". Daar kan desnieteenstaande vanselfsprekend verwag word dat provinsiale owerhede 'n besondere belangstelling in die hoër onderwys in hulle provinsies sal toon.

Provinsiale wetgewers word deur artikel 126(6) spesifiek gemagtig om die aanname van wetgewing oor aangeleenthede buite hulle jurisdiksie by die parlement aan te beveel[10] en sou dus onregstreeks sterk invloed op die hoër onderwyswese in hulle provinsies kon uitoefen.

1 4 Ontplooiing van die owerheidsbeleid

Vir die duur van die gelding van die Grondwet is artikel 247 van sleutelbelang vir die ontplooiing van owerheidsbeleid ten gunste van spesifieke onderwysinrigtings.[11]

7(1) gebonde is, te verbied nie." Die Amerikaanse ekwivalent hiervan is "civil rights legislation", soos die Civil Rights Act van 1964.

8 32 "Elke persoon het die reg –
(a) op basiese onderwys en op gelyke toegang tot onderwysinstellings;
(b) op onderrig in die taal van sy of haar keuse waar dit redelikerwys uitvoerbaar is; en
(c) om, waar dit uitvoerbaar is, onderwysinstellings gebaseer op 'n gemeenskaplike kultuur, taal of godsdiens tot stand te bring, met dien verstande dat daar geen diskriminasie op grond van ras mag wees nie."

9 31 "Elke persoon het die reg om die taal van sy of haar keuse te gebruik en om aan die kulturele lewe van sy of haar keuse deel te neem."

10 126(6) "'n Provinsiale wetgewer kan by die Parlement die aanname aanbeveel van enige wet wat betrekking het op enige aangeleentheid waaroor so 'n wetgewer nie bevoeg is om wette te maak nie of ten opsigte waarvan 'n Parlementswet ingevolge subartikel (3) voorrang bo 'n provinsiale wet geniet."

11 247 "(2) Die nasionale regering verander nie die regte, bevoegdhede en werksaamhede van die beheerliggame van universiteite en technikons kragtens wette wat onmiddellik voor die inwerkingtreding van hierdie Grondwet bestaan het nie, tensy 'n ooreenkoms wat voortvloei uit bona fide-onderhandeling, met daardie liggame bereik is en redelike kennis van enige voorgestelde verandering gegee is. (3) Indien 'n ooreenkoms nie ingevolge subartikel (1) of (2) bereik word nie, word die nasionale regering en die provinsiale regerings, behoudens die ander bepalings van hierdie Grondwet, nie belet om die regte, bevoegdhede en werksaamhede van die bestuursliggame, bestuursrade of soortgelyke owerhede van departementele, gemeenskap-beheerde of staatsondersteunde primêre of sekondêre skole, sowel as die beheerliggame van universiteite en technikons, te verander

vervolg op volgende bladsy

In hierdie bepaling word die regte, kompetensies en funksies van die beheerliggame van hoër onderwysinrigtings ingevolge die bestaande wetgewing onveranderd gelaat, behalwe as en totdat die nasionale regering ná *bona fide*-onderhandeling met sodanige beheerliggame en ná redelike kennisgewing die verandering daarvan teweegbring.

Sou ooreenkoms egter nie ná onderhandeling tussen die regering en die beheerliggaam bereik word nie, mag die regering wel wysigings aanbring. Die geldigheid van sulke veranderinge kan dan op die proef gestel word aan die hand van die vraag of die veranderinge met al die bepalings van die Grondwet bestaanbaar is.

1 5 Die grondbeginsels van die Grondwet

Die identifikasie van die hoekstene van die nuwe Grondwet is vir die uitleg daarvan van groot belang. Dit is so omdat moderne grondwette teleologies aan die hand van sodanige hoekstene (*Leitideen*) uitgelê word.[12]

Die Grondwet is egter die produk van 'n uitgerekte veelparty-onderhandelingsproses. Dit is ook nie 'n finale produk nie, want die grondslae en prosedure vir die verfyning en noodwendige vervanging daarvan word deur die Grondwet self[13] voorgeskryf. Dit is derhalwe te verstane dat die huidige teks 'n verskeidenheid van prinsipiële "seine" uitstuur wat by geleentheid kreatiewe interpretasie sal verg ten einde hulle met mekaar te versoen.

Die katalogus van fundamentele regte is gewoonlik die belangrikste bron van die grondwetlike grondslae. In hierdie Grondwet is daar egter verskeie ander dele waaruit die grondwaardes ook afgelei moet word, waaronder die aanhef, die laaste "narede"-bepaling[14] en veral ook bylae 4 onder die opskrif *Grondwetlike Beginsels*.

Dit is nie hier geleë om 'n volledige analise van die Grondwet te onderneem om die grondwaardes daarvan te probeer ontbloot nie, maar hieronder in paragraaf 2 word onvermydelik van sodanige grondwaardes kennis geneem ten einde die tersake bepalings sinvol te kan uitlê. Voorlopig word dus met slegs enkele punte volstaan.

Die *Aanhef* begin met die frase: "In nederige erkentlikheid teenoor die Almagtige God" en die substantiewe bepalings van die Grondwet word afgesluit met 'n versugting in ses tale op die tema van "God seën Suid-Afrika". Hierdie frases kan nóg as gesag daarvoor dien dat die Grondwet primêr uit 'n Christelike perspektief uitgelê moet word, nóg kan hulle as betekenisloos afgeskryf word.

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nie, maar is belanghebbende persone en liggame daarop geregtig om die geldigheid van so 'n verandering ingevolge hierdie Grondwet te toets."

12 Vgl bv Kruger en Currin *Interpreting a bill of rights* (1994), veral die hoofstuk deur Kruger getiteld "Towards a new interpretive theory" en die publikasies waarna op 103 verwys word, asook Du Plessis en De Ville se reeks van drie artikels "Bill of Rights interpretation in the South African context . . ." 1993 *Stell LR* 63 199 356.

13 Hfst 5 van die Grondwet is in geheel daaraan gewy.

14 Vgl Mureinik "A bridge to where? Introducing the interim bill of rights" 1994 *SAJHR* 31.

Allermins moet egter daarvan afgelei word dat die Grondwet erkenning verleen aan die oppergesag van God en dus geen mens, menslike instelling of norms erken wat voorgee om die soewereiniteit van God te misken nie.

Miskien is die sterkste aanduiding van die grondgedagtes wat die Grondwet weerspieël te vinde in die eerste drie paragrawe van die (ongenommerde) laaste bepaling. Enkele sleutelkonsepte word in die onderstaande aanhaling gekursiveer, maar origens spreek die bewoording vir sigself:

> "Hierdie Grondwet bou 'n geskiedkundige *brug* tussen die verlede van *'n diep verdeelde gemeenskap* wat gekenmerk is deur tweespalt, konflik, ongekende *lyding en ongeregtigheid*, en 'n toekoms wat gevestig is op *die erkenning van menseregte, demokrasie en vreedsame naasbestaan* en *ontwikkelingsgeleenthede* vir alle Suid-Afrikaners, ongeag kleur, ras, klas, geloof of geslag.
>
> Die strewe na *nasionale eenheid*, die *welsyn* van alle Suid-Afrikaanse burgers en vrede verg versoening tussen die mense van Suid-Afrika en *sosiale herstrukturering* van die gemeenskap.
>
> Die aanvaarding van hierdie Grondwet lê die vaste fondament vir die mense van Suid-Afrika om die *verdelings en tweespalt van die verlede*, wat gelei het tot growwe skendings van menseregte, die verbreking van menslikheidsbeginsels in gewelddadige konflik en 'n nalatenskap van haat, vrees, skuld en wraak, te *oorbrug*."

In een van die eerste gerapporteerde hofsake waarin die bepalings van die Grondwet toegepas is, het regter Froneman in ooreenstemming met wat hierbo gesê is, 'n voortreflike uiteensetting gegee en dit met die volgende stelling bekroon:[15]

> "The foundational concern of the Constitution is thus to form a bridge between an unjust, undemocratic and closed system of the past, and a future concerned with openness, democratic principles, human rights, reconciliation, reconstruction and peaceful co-existence between the people of the country."

2 'N VERTOLKING VAN ENKELE BEPALINGS VAN DIE GRONDWET

2 1 Die staat se verantwoordelikheid vir en gesag oor universiteite

Uit hoofde van die verdeling van gesag in die Grondwet tussen die nasionale en provinsiale owerhede, is dit duidelik dat die universiteitswese in die uitsluitlike gesagsdomein van die nasionale owerheid tuishoort. Dit blyk uit artikel 37[16] ingevolge waarvan die parlement met wetgewende kompetensie "vir die Republiek" (dit wil sê vir die hele land) beklee word, artikel 75[17] wat die nasionale

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15 *Qozeleni v Minister of Law and Order* 1994 3 SA 625 (OK) 632–634. Die aangehaalde stelling is op 634B.

16 37 "Die wetgewende gesag van die Republiek setel, behoudens hierdie Grondwet, in die Parlement, wat bevoeg is om wette vir die Republiek ooreenkomstig hierdie Grondwet te maak."

17 75 "Die uitvoerende gesag van die Republiek met betrekking tot alle aangeleenthede wat binne die wetgewende bevoegdheid van die Parlement val, berus by die President, wat sy of haar bevoegdhede en werksaamhede behoudens en ooreenkomstig hierdie Grondwet uitoefen en verrig."

uitvoerende gesag aan die wetgewende kompetensie van die parlement koppel, en bylae 6 wat "universiteitsopvoeding" uitdruklik van die wetgewende gesagsfeer van die provinsies uitsluit.

Die universiteitswese moet dus steeds deur parlementêre wetgewing gereël word en deur 'n nasionale departement wat aan 'n kabinetsminister toevertrou is, geadministreer word.

2 2 Is universiteite staatsorgane?

Artikel 4(2) van die Grondwet bepaal dat die Grondwet (as hoogste reg) "alle wetgewende, uitvoerende en regsprekende *staatsorgane op alle regeringsvlakke*" bind en artikel 7(1) (die eerste bepaling wat oor fundamentele regte handel) bepaal eweneens dat hoofstuk 3 "alle wetgewende en uitvoerende *staatsorgane op alle regeringsvlakke*" bind. In artikel 233(1) word bepaal dat "staatsorgaan", tensy uit die samehang anders blyk, *ook 'n statutêre liggaam* beteken. Ten einde dus vas te stel op watter wyse 'n universiteit deur die Grondwet gebind word, moet eers bepaal word of die universiteit deur die Grondwet as staatsorgaan geag word al dan nie.

Die universiteitswese in Suid-Afrika word uitvoerig deur parlementêre wetgewing gereël. Afgesien van algemene wetgewing wat op al die universiteite van toepassing is, is daar vir elke universiteit 'n spesiale (en in die meeste gevalle, 'n "private") wet deur die parlement aangeneem.

Ingevolge 'n bepaling wat in die meeste private universiteitswette voorkom, bestaan die betrokke universiteit "vir die doeleindes, en is saamgestel op die wyse en het die regte, bevoegdhede, voorregte en pligte" wat in die wet omskryf word. Die universiteit is dus vir sy bestaan, struktuur en kompetensies van parlementêre wetgewing afhanklik. As dít is wat in artikel 233(1) van die Grondwet met 'n "statutêre liggaam" bedoel word, dan word die universiteit deur regswerking vir doeleindes van die Grondwet geag 'n "staatsorgaan" te wees.

Verskeie vrae moet egter beantwoord word alvorens die gevolgtrekking gemaak kan word dat 'n universiteit op dieselfde wyse as byvoorbeeld die kabinet of die Onafhanklike Uitsaai-owerheid deur die bepalings van die Grondwet gebind word:

- Wat word in die Suid-Afrikaanse reg onder "statutêre liggaam" verstaan?
- Kan 'n universiteit as 'n instelling beskou word wat, in die woorde van artikels 4(2) en 7(1) van die Grondwet, op enige "regeringsvlak" funksioneer, en indien wel, watter een?
- Is daar 'n maatstaf wat aangewend kan word om verskillende kategorieë statutêre liggame te identifiseer, sommiges waarvan vir die Grondwet se doeleindes as "staatsorgane" beskou moet word en andere nie?

Die antwoorde op hierdie vrae kan beredeneer word, maar daar kan tans by gebrek aan gesaghebbende judisiële interpretasie van die tersake bepalings van die Grondwet geen finale of onomstootlike norm uitgespel word nie.

Dit wil voorkom of die reg tot dusver die betekenis van "statutêre liggaam" as so vanselfsprekend geag het dat daar in die regspraak[18] en in wetenskaplike geskrifte[19] nie noemenswaardige aandag daaraan geskenk is nie. Waar statutêre liggame nou egter deur die Grondwet as staatsorgane gedefinieer word, moet gevra word of *elke* instelling wat sy bestaan aan 'n statuut te danke het, voortaan vir doeleindes van die Grondwet as staatsorgaan beskou moet word: in hierdie kategorie ressorteer byvoorbeeld die Bybelgenootskap van Suid-Afrika (Wet 15 van 1970), die Metodistekerk van Suider-Afrika (Wet 111 van 1978), Die Nasionale Parkeraad (Wet 57 van 1976), die Bemarkingsraad (Wet 59 van 1968), die Landbank (Wet 13 van 1944), die Suid-Afrikaanse Geneeskundige en Tandheelkundige Raad (Wet 56 van 1974), en so meer.

Daar is 'n hele aantal wette wat die begrip "statutêre liggaam" *vir doeleindes van die betrokke wet* omskryf. Uit hierdie omskrywing kan moontlik afleidings gemaak word, maar dit sal met omsigtigheid gedoen moet word omdat sulke woordomskrywings dikwels vir 'n bepaalde wet "pasgemaak" word.[20]

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18 In *Gamiet v Heckroodt* 1960 1 SA 614 (A) het dit bv bloot gegaan oor die toepassing van die definisie van 'n statutêre liggaam in a 1 van die Wet op Groepsgebiede 41 van 1950 (nl "enige raad of liggaam deur of kragtens 'n wet ingestel") op die vraag of die Groepsgebiede-ontwikkelingsraad (as statutêre liggaam) ingestel ingevolge a 2 van die Wet op die Ontwikkeling van Groepsgebiede 69 van 1955, 'n ras het (!). Die hof bevind (624B) dat die raad, al is dit 'n statutêre skepping, nie 'n statutêre liggaam nie, maar (623H) "is really an organ or department of government which has been brought into existence to facilitate the working of group area legislation". Die beredenering in die regspraak oor die regterlike hersienbaarheid van besluite van die komitee van die effektebeurs op grond van die openbare belang wat gedien moet word, is in hierdie verband meer insiggewend: vgl bv *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 3 SA 344 (W) veral 364–365, wat in 'n reeks gewysdes gevolg is, waaronder *Davies v Chairman, Committee of the Johannesburg Stock Exchange* 1991 4 SA 43 (W) 46.

19 'n Kwessie wat egter nuttig is om hier in berekening te bring, dog nie presies dieselfde vraag aanspreek nie, is die identifikasie van 'n *administratiewe owerheidsorgaan* of 'n *public body* soos dit na vore kom in die administratiefregtelike literatuur en regspraak. Dit is ter sake omdat dit handel met maatstawwe vir die toepassing van publiekregsnorme op instellings wat van owerheidsweë ingestel is, maar dit handel nie met presies dieselfde vraag nie omdat a 233(1) van die Grondwet die ongenuanseerde begrip "statutêre liggaam", wat 'n spesie van die *genus* "owerheidsorgaan" kan wees, gebruik. Oor die betekenis van en toetse vir die klassifikasie van 'n administratiewe owerheidsorgaan, kan veral Wiechers *Administratiefreg* (1984) 73–77 en die gesag daarin aangehaal, geraadpleeg word. Sien ook Baxter *Administrative law* (1984) 99–101 (wat nie juis 'n duidelike rigting aandui nie), en Boulle, Harris en Hoexter *Constitutional and administrative law* (1989) 246–248.

20 'n Verteenwoordigende monster van sulke omskrywings van 'n *statutêre* liggaam is die volgende:
Wet 6 van 1962: "enige raad, fonds, instelling, maatskappy, korporasie of ander organisasie wat by of kragtens 'n wet gestig of saamgestel is";
Wet 94 van 1969: "'n raad of ander liggaam wat by of kragtens 'n Wet van die Parlement of 'n ordonnansie van 'n provinsiale raad of van die Wetgewende Vergadering van die gebied ingestel is om 'n werksaamheid te verrig wat by of kragtens wet voorgeskryf is, en (a) ten opsigte waarvan al die uitgawes aan die besoldiging van sy voltydse lede bestry word uit gelde wat deur die Parlement of deur 'n provinsiale raad of deur die Wetgewende Vergadering van die gebied, na gelang van die geval, vir die doel bewillig word;

vervolg op volgende bladsy

Dit is uit die aard van 'n grondwet asook die spesifieke bepalings van artikels 4 en 7 van die Grondwet duidelik dat dit daarin in die eerste plek gaan om die staat, sy struktuur, die verdeling van gesag tussen sy organe en sy verhouding met die ander deelnemers aan die regsverkeer, en dan primêr die publiekregsverkeer. Dit kom dus onwaarskynlik voor of die oogmerk met die insluiting van statutêre liggame by die omskrywing van staatsorgane daarop gemik kan wees om buite die normale terrein van die Grondwet te tree. Waar so 'n oogmerk in die Grondwet nagestreef word, word dit onomwonde gedoen.[21] Dit lyk dus geregverdig om, deur die toepassing van die frase "tensy uit die samehang anders blyk" in artikel 233(1), die aard van 'n statutêre liggaam in aanmerking te neem by die bepaling van die vraag of dit as staatsorgaan beskou moet word.

'n Staatsorgaan is 'n persoon of instelling wat owerheidshandelinge gesaghebbend namens die staat kan verrig. Owerheidshandelinge is handelinge wat die staat in die uitoefening van sy owerheidsgesag verrig. Hieruit spruit 'n sinvolle maatstaf voort aan die hand waarvan bepaal kan word of 'n statutêre liggaam as staatsorgaan benader word al dan nie, naamlik *die vraag of die statutêre liggaam owerheidsgesag namens die staat uitoefen.*[22]

Sou hierdie maatstaf aangelê word, blyk dit byvoorbeeld duidelik dat die Onafhanklike Uitsaai-owerheid, ingestel ingevolge Wet 153 van 1993, gemaklik as statutêre liggaam in die kategorie van 'n staatsorgaan val omdat die Uitsaai-owerheid tipiese owerheidshandelinge, soos die uitreiking van lisensies, beheer oor die uitsaaifrekwensiespektrum en die toepassing van gedragskodes, verrig vir doeleindes waarvan die wet aan hom gesag verleen. Daarenteen is dit ooglopend dat 'n kerklike of kulturele instelling wat ingevolge 'n private wet ingestel is nouliks beskou kan word as 'n orgaan wat met staatsgesag beklee is.

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of (b) wat, op sy aansoek, deur die Minister in oorleg met die Minister van Finansies as 'n statutêre liggaam vir die doeleindes van hierdie Wet aangewys is";
Wet 70 van 1970: "(a) 'n raad of liggaam wat by of kragtens 'n wet ingestel is en wie se fondse in die geheel of ten dele bestaan uit geld wat die Parlement ten bate van die raad of liggaam bewillig het; (b) 'n plaaslike bestuur; (c) 'n ander raad of liggaam, of 'n raad of liggaam wat behoort tot 'n klas rade of liggame, wat die Minister by kennisgewing in die Staatskoerant tot 'n statutêre raad of liggaam of statutêre rade of liggame vir die doeleindes van hierdie Wet verklaar";
Wet 77 van 1973: "'n komitee of liggaam van persone wat kragtens 'n Wet van die Parlement of 'n ordonansie van 'n provinsiale raad . . . ingestel is";
Wet 53 van 1985: "(a) 'n raad of liggaam by of kragtens 'n wet ingestel, wat geheel en al of gedeeltelik in stand gehou word uit geld vir die doel deur die Parlement bewillig, en waarvan die administratiewe personeel geheel en al of gedeeltelik bestaan uit persone wat aan die Staatsdienswet, 1984 (Wet 111 van 1984), onderworpe is; (b) 'n plaaslike bestuur; en (c) enige ander raad of liggaam wat die Minister by kennisgewing in die Staatskoerant tot 'n statutêre liggaam vir die doeleindes van hierdie Wet verklaar";
Wet 52 van 1989: "enige plaaslike owerheid, raad, fonds, instelling, maatskappy, korporasie of ander organisasie wat gestig of saamgestel is by of kragtens 'n wet en waarvan die rekenings en finansiële state ingevolge daardie wet deur die Ouditeur-generaal geouditeer moet word."

21 Vgl bv a 33(4) en 35(3) van die Grondwet.

22 Vgl Wiechers 75 *in fine* 76 *in fine*.

Die vraag of 'n universiteit 'n staatsorgaan is omdat dit 'n statutêre skepping is, het prominent in die Kanadese Supreme Court-uitspraak *McKinney v University of Guelph* [1990] 3 SCR 229 na vore gekom. Daar bestaan 'n groot mate van ooreenstemming tussen die juridiese ordeningswyse van Suid-Afrikaanse en Kanadese universiteite en derhalwe is die *McKinney*-uitspraak hier van besondere nut. Uit die verskeie toepaslike *dicta* in die uitspraak van regter La Forest kan die volgende uitgelig word:

> "But the mere fact that an entity is a creature of statute and has been given the legal attributes of a natural person is in no way sufficient to make its actions subject to the *Charter*. Such an entity may be established to facilitate the performance of tasks that those seeking incorporation wish to undertake and to control, not to facilitate the performance of tasks assigned to government."

Benewens bogemelde argumente teen insluiting van universiteite by die definisie van staatsorgane kan ook oorweeg word of die buite-staatlike ontstaan van die meeste Suid-Afrikaanse universiteite nie hier ter sake is nie. Dit sou vreemd opval indien 'n universiteit wat histories as private of nie-staatlike instelling ontstaan het, geag word 'n staatsorgaan te geword het bloot weens die feit dat dit sogenaamd statutêr geïnkorporeer is. Bowendien is dit nouliks denkbaar dat enige van die statutêre kompetensies van die universiteit vertolk kan word as owerheidshandelinge wat namens die staat verrig word.

Daar word gevolglik aan die hand gedoen dat daar, totdat 'n hof anders sou beslis of wetgewing anders bepaal, aanvaar moet word dat universiteite nie binne die definisie van artikel 233(1) van die Grondwet val nie en dus nie op dieselfde wyse as die staat en sy organe deur die Grondwet gebind word nie.

Dit beteken egter hoegenaamd nie dat die Grondwet se bepalings vir universiteite irrelevant is nie. Vanselfsprekend is 'n universiteit ingevolge die Grondwet 'n reghebbende.[23] Dit is egter ook nodig om die uitwerking van die "uitstralingsbepaling" in artikel 35(3)[24] van die Grondwet op die universiteit te verreken. Uit die bewoording van hierdie bepaling is dit duidelik dat enige

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23 Vgl bv a 7(3) en (4) van die Grondwet wat bepaal:
"(3) Regspersone is geregtig op die regte in hierdie Hoofstuk vervat waar, en in die mate waarin, die aard van die regte dit vatbaar daarvoor maak.
(4) (a) Wanneer 'n inbreuk op of bedreiging van enige reg in hierdie Hoofstuk verskans, beweer word, is enige persoon bedoel in paragraaf (b) daarop geregtig om by 'n bevoegde geregshof gepaste regshulp aan te vra, wat 'n verklaring van regte kan insluit.
(b) Die regshulp bedoel in paragraaf (a) kan aangevra word deur–
(i) 'n persoon wat in sy of haar eie belang optree;
(ii) 'n vereniging wat in die belang van die lede daarvan optree;
(iii) 'n persoon wat namens iemand anders optree wat nie in 'n posisie is om sodanige regshulp in sy of haar eie naam aan te vra nie;
(iv) 'n persoon wat as 'n lid van of in die belang van 'n groep of klas persone optree; of
(v) 'n persoon wat in die openbare belang optree."

24 35(3) "By die uitleg van enige wet en die toepassing en ontwikkeling van die gemene reg en gewoontereg, neem 'n hof die gees, strekking en oogmerke van hierdie Hoofstuk behoorlik in ag."

regsreël, hetsy statutêr, gemeenregtelik, geskrewe of ongeskrewe daardeur getref word. Elke handeling van 'n universiteit wat regtens gereguleer word (en daar is weinig wat buite dié kategorie val), moet dus ooreenkomstig die "gees, strekking en oogmerke" van hoofstuk 3 van die Grondwet beoordeel word. Die vraag is egter watter betekenis aan "gees, strekking en oogmerke" gegee moet word. Dit is ook 'n aangeleentheid wat gesaghebbend deur die howe vertolk sal moet word en intussen kan dit slegs beredeneer word.

Daar word aan die hand gedoen dat artikel 35(3) nie fundamentele regte summier op die terrein van die privaatreg ("horisontaal") laat geld nie. Die vraag sal egter in elke konkrete geval gevra moet word of daar 'n riglyn in hoofstuk 3 gevind kan word wat sinvol op 'n regshandeling van die universiteit toegepas kan word. Die volgende tipe voorbeelde kan ter illustrasie dien:

- Artikel 8(2) bevat 'n diskriminasieverbod: sonder om dit oor die boeg van 'n fundamentele reg te gooi maar wel in ooreenstemming met die "gees, strekking en oogmerke" wat uit sodanige verbod blyk, kan aanvaar word dat geen regsvoorskrif die universiteit veroorloof om "onbillik" te diskrimineer nie.
- Artikel 13, wat aan elke persoon "die reg op sy of haar privaatheid" verleen, dra vir die universiteit moontlik implikasies vir die manier waarop daar met die persoonlike gegewens van personeel en studente omgegaan word en vir die toegang wat die universiteitsowerheid homself tot studente en personeel se rekenaardata veroorloof.
- Enige universitêre aktiwiteite wat nadelig vir die omgewing of mense se gesondheid is, sal waarskynlik as onregmatig aangemerk kan word uit hoofde van die "gees, strekking en oogmerke" van artikel 29.[25]

Hieruit kan die gevolgtrekking gemaak word dat, al sou die universiteit nie geag kan word 'n staatsorgaan te wees nie, en al sou niemand 'n fundamentele reg as sodanig teen 'n universiteit as statutêre liggaam kon afdwing nie, die regsmilieu waarin die universiteitswese funksioneer, deurdrenk is met die gedagtegoed waarop die fundamentele regte van die Grondwet berus en dat universiteite hulle optrede dienooreenkomstig sal moet skik.

2 3 Akademiese vryheid en institusionele outonomie

Terwyl die Grondwet, soos aangedui, (in a 14(1)) uitdruklik melding maak van "akademiese vryheid" en (in a 15(1)) van "vryheid van wetenskaplike navorsing", word geen regstreekse verwysing na die outonomie van universiteite gemaak nie.

2 3 1 Akademiese vryheid en vryheid van wetenskaplike navorsing

Wat "akademiese vryheid" en "vryheid van wetenskaplike navorsing" regtens behels, is nie 'n uitgemaakte saak nie. Die Suid-Afrikaanse reg self bied weinig leidrade aangesien daar nie 'n fundamentele regte-tradisie is waarop staatgemaak

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25 29 "Elke persoon het die reg op 'n omgewing wat nie vir sy of haar gesondheid of welsyn nadelig is nie."

kan word nie. Derhalwe moet verwag word dat daar in die regsprekende en wetgewende prosesse sterk op regsvergelyking gesteun sal word.[26]

'n Probleem is egter dat daar maar enkele ander grondwette is wat akademiese vryheid en vryheid van wetenskaplike navorsing by name vermeld en verskans. Benewens die Duitse bepaling wat hieronder behandel word, is daar byvoorbeeld artikels 20.1(c)[27] en 27.10[28] van die Spaanse Grondwet van 1978, artikel 17 van die Oostenrykse *Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger*[29] en artikel 9(1)[30] van die Europese Menseregtekonvensie. In die meeste ander jurisdiksies word akademiese vryheid afgelei van ander grondwetlike regte soos gewetensvryheid, spraakvryheid of vryheid van inligting. Daar word aan die hand gedoen dat die naaste vergelykbare stelsel[31] waarby kers opgesteek kan word, die Duitse stelsel is ten opsigte waarvan daar in elk geval ook die wydste gesaghebbende vertolkings te vinde is.[32]

Artikel 5(3) van die Duitse *Grundgesetz* (hierna "*GG*") bepaal in die eerste sin dat die kuns en wetenskap, navorsing en onderrig *vry* is.[33] By die toepassing van hierdie bepaling het die Duitse konstitusionele hof klinkklare bevindings gemaak, waaronder die volgende:

- Artikel 5(3) *GG* verleen aan die individu wat hom met die wetenskap besig hou of besig wil hou, 'n konkrete afweerreg teen inmenging deur die staat;[34]
- tegelyk bevat hierdie bepaling 'n fundamentele voorskrif aan die staat wat sy optrede aangaande kuns, wetenskap, navorsing en onderrig betref, naamlik dat dit die staat se taak is om die vryheid van die wetenskap (wat navorsing en onderrig insluit) te beskerm, wetenskapsbeoefening moontlik te maak en te bevorder deur menslike, finansiële en organisatoriese hulpbronne daarvoor

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26 Sien in hierdie verband die besonder nuttige werk van Malherbe "Die regsbeskerming van akademiese vryheid en universiteitsoutonomie in 'n nuwe Suid-Afrika" 1993 *TSAR* 359, veral 360–367.

27 Die amptelike vertaling van a 201.1 (c) lui soos volg:
"1. The following rights are recognized and protected: . . .
c) the right to academic freedom; . . ."

28 Die vertaling van a 27.10 lui soos volg:
"10. The autonomy of the Universities is recognized, under the terms to be laid down by a law."

29 Die wetenskap en die onderrig daarvan is vry – vgl Adamovich en Funk *Österreichisches Verfassungsrecht* (1984) 346.

30 9(1) "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, *teaching*, practice and observance" (kursivering bygevoeg).

31 A 5 *GG* handel oor die vryheid van opinie, persvryheid, kuns-, akademiese, navorsings- en onderrigvryheid, terwyl a 14 en 15 van die Suid-Afrikaanse Grondwet die betrokke regte in dieselfde soortgelyke konteks plaas deur te handel met die vryheid van gewete, godsdiens, denke, oortuiging en opinie, akademiese vryheid, vryheid van spraak en uitdrukking, persvryheid, vryheid van artistieke kreatiwiteit en wetenskaplike navorsing.

32 Malherbe 368–371 bevat hieroor ook 'n bondige en goedbegronde oorsig.

33 *Kunst und Wissenschaft, Forschung und Lehre sind frei.*

34 *BVerfGE* 35, 79 (112–113) (*Hochschulurteil*).

beskikbaar te stel asook om toe te sien dat gemelde fundamentele reg van die individu binne die raamwerk van wetenskaplike instellings (soos universiteite) teregkom;[35] en

- anders as die meeste ander fundamentele regte is akademiese vryheid nie ondergeskik aan statutêre inperking of die perke van ander se regte nie.[36]

In die Duitse regsliteratuur oor akademiese vryheid word daar ook, hoofsaaklik aan die hand van die aangehaalde sleutelbeslissing van die konstitusionele hof, geen doekies omgedraai oor die hoë premie wat op hierdie grondwetlike grondwaarde en fundamentele reg geplaas word nie.[37]

'n Interessante dimensie van akademiese vryheid in die Duitse konteks is die probleem van die dissiplinêre gesag van die universiteit oor sy akademiese personeel. As 'n verteenwoordigende voorbeeld van die probleem kan verwys word na die onlangse geval waar 'n mediese hoogleraar navorsingsbevindings gepubliseer het oor diagnostiese metodes wat geblyk het op "gekookte" gegewens te berus. Die vraag het ontstaan of die universiteitsowerhede, in die lig van die professor se grondwetlike reg op akademiese vryheid, hoegenaamd bevoeg was om ondersoek in te stel na die geldigheid van die navorsing. In 'n artikel[38] na aanleiding van die uitspraak van die Hessiese konstitusionele hof oor die aangeleentheid betoog Ralf Kleindick dat, ongeag die feit dat universiteitspersoneel se diensverhouding deur die reg wat betrekking het op staatsamptenare gereël word, artikel 5(3) van die Grondwet sodanige amptenarereg kwalifiseer en tot gevolg het dat die staat (of universiteitsowerheid) steeds nie die terrein van die wetenskaplike se akademiese vryheid kan betree en daarop inbreuk mag maak nie.

Die Duitse voorbeeld vir die hantering van akademiese vryheid is egter nie ongekwalifiseerd toepasbaar op die Suid-Afrikaanse reg nie. Die Suid-Afrikaanse grondwetlike bepalings resoneer met die ooreenstemmende Duitse bepalings in die sin dat daar in albei gevalle sprake is van 'n grondwetlikverskanste fundamentele reg wat strenger as van die ander fundamentele regte teen beperking beskerm word,[39] maar die Duitse beperking op inbreukmaking is aansienlik sterker. Nietemin kan daar weens die aangeduide ooreenkomste 'n sterk saak daarvoor uitgemaak word dat die manier waarop inhoud aan

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35 *BVerfGE* 35, 79 (113–116) (*Hochschulurteil*).

36 *BVerfGE* 35, 79 (114) (*Hochschulurteil*), asook *BVerfGE* 30, 173 (*Mephisto*), *BVerfGE* 67, 213 (*Anachronistischer Zug*) en *BVerfGE* 83, 130 (*Josefine Mutzenbacher*), welke lg uitsprake oor kunsvryheid gehandel het, maar waarna goedkeurend in die *Hochschulurteil* tap verwys is.

37 Kyk bv Faller "Bestand und Bedeutung der Grundrechte im Bildungsbereich in der Bundesrepublik Deutschland" 1982 *Europäische Grundrechte Zeitschrift* 618–619, asook Häberle "Die Freiheit der Wissenschaften im Verfassungstaat" 23 *Archiv des öffentlichen Rechts* 329 veral 358–359.

38 Kleindick "Wissenschaftsfreiheit in der Hochschule zwischen kritischer Öffentlichkeit und Disziplinarordnung" 1993 *Juristenzeitung* 998.

39 A 33(1)(b) van die (Suid-Afrikaanse) Grondwet vereis benewens die redelikheid en regverdigbaarheid van 'n beperking op die reg op akademiese vryheid ook nog dat dit noodsaaklik moet wees.

akademiese vryheid in die Duitse grondwetlike reg gegee word, rigtinggewend moet wees vir die vertolking van die Suid-Afrikaanse Grondwet.

2 3 2 Institusionele outonomie

'n Aanduiding van die erkenning van 'n partikuliere status van onderwysinrigtings in die Grondwet is te vinde in die aangehaalde oorgangsbepalings in artikel 247[40] en in die bepalings oor onderwysregte in artikel 32. Die graad van institusionele outonomie van universiteite is egter nie net van die Grondwet afhanklik nie. Dit word mede-bepaal deur "gewone" (bestaande en toekomstige) wetgewing van die parlement, wat deurgaans die toets van versoenbaarheid met die Grondwet sal moet slaag.

Die bestaande universiteitswetgewing het op 27 April 1994 ingevolge artikel 229[41] van die Grondwet bly voortbestaan en uit hoofde van artikel 247 kan die mate van outonomie wat deur sodanige wetgewing bewerkstellig is, nie sonder meer vernietig word nie. Oor die betekenis wat aan die outonomie van universiteite in grondwetlike verband gegee moet word, is dit weer noodsaaklik om vergelykend te werk te gaan.

In die Duitse stelsel, waar daar ook nie uitdruklik van institusionele outonomie in die Grondwet melding gemaak word nie, word die bestaan daarvan regstreeks van die grondwetlike beskerming van akademiese vryheid afgelei.[42] Ingevolge die reeds aangehaalde *Hochschulurteil* van die Duitse konstitusionele hof, laat die Grondwet aan die wetgewers groot ruimte om die universiteitswese ooreenkomstig hulle eie beleidsoogmerke te struktureer, maar hulle word daarin deur die grondwetlike beskerming van akademiese vryheid beperk. Universiteitswetgewing moet derhalwe beoordeel word aan die hand van die vraag of en in watter mate die universiteit se bekwaamheid om sy funksies te verrig, die individuele wetenskaplike se reg op akademiese vryheid en vrye wetenskapsbeoefening bevorder of beperk.[43]

Die beskerming van akademiese vryheid bepaal voorts twee soorte grense vir owerheidsoptrede in verband met die strukturering van universiteite: enersyds moet gepaste vryheidsbevorderende universiteitstrukture (*geeignete freiheitliche Strukturen der Universität*) geskep word sodat soveel moontlik (akademiese) vryheid vir die betrokke individuele reghebbendes toegelaat word, en andersyds word die wetgewer verbied om die universiteitswese so te struktureer dat die ruimte wat vir die universiteitspersoneel bestaan om hulle akademiese vryheid uit te oefen, beperk word.[44]

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40 Par 1 4 hierbo en Cachalia ea *fundamental rights in the new Constitution* (1994) se opmerkings op 53.

41 229 "Behoudens hierdie Grondwet bly alle wette wat onmiddellik voor die inwerkingtreding van hierdie Grondwet van krag was in enige gebied wat deel van die nasionale grondgebied uitmaak, van krag in daardie gebied, behoudens enige herroeping of wysiging van sodanige wette deur 'n bevoegde gesag."

42 *Contra* egter a 17 van die gemelde Oostenrykse *StGG* van 1974, wat 'n soortgelyke formulering as die Duitse *GG* het, en nie vertolk word as sou dit institusionele outonomie waarborg nie: vgl bv Adamovich en Funk 346–347.

43 *BVerfGE* 35, 79 (120).

44 *BVerfGE* 35, 79 (123–124).

In die Duitse staatsregliteratuur bestaan daar klaarblyklik ook geen twyfel nie oor die vertolking van die Grondwet as sou daar op grond van artikel 5(3) institusionele outonomie vir die universiteite gewaarborg word.[45]

Die Duitse voorbeeld is beslis van waarde vir die interpretasie van die Suid-Afrikaanse Grondwet aangaande institusionele outonomie. Weens die voorskrif van artikel 35(3) van die Grondwet ingevolge waarvan alle reg in "die gees, strekking en oogmerke" van die fundamentele regte-bepalings uitgelê moet word, moet die bepalings van artikel 14(1) en 15(1) (soos in Duitsland) verstaan word as rigtinggewende beginselbepalings. Die Duitse logika wat daartoe lei dat die outonomie van universiteite aldus grondwetlik verskans is (ongeag die feit dat die universiteitswese statutêr gereguleer word en universiteitspersoneel formeel as 'n kategorie staatsamptenare benader word), is regstreeks op die Suid-Afrikaanse situasie toepasbaar: universiteitswetgewing wat meebring dat 'n universiteitsowerheid nie aan sy personeel die ruimte bied om hulle regte op akademiese vryheid en op vryheid van wetenskaplike navorsing te kan uitoefen nie, sal ongrondwetlik wees. Daardie regte behoort (as uitgangspunt) in hulle klassieke vorm, naamlik dié van die intellektuele ongebondenheid van die "private" geleerde wat sonder perke kan navors en onderrig, gekonstrueer te word, waarna beoordeel kan word of beperkings daarop ingevolge artikel 33(1) regmatig is.

Ook die Kanadese voorbeeld is regstreeks toepasbaar. In die reeds aangehaalde *McKinney*-beslissing laat regter La Forest hom oor universiteitsoutonomie duidelik soos volg uit:

> "The legal autonomy of the universities is fully buttressed by their traditional position in society. Any attempt by government to influence university decisions, especially decisions regarding appointment, tenure and dismissal of academic staff, would be strenuously resisted by the universities on the basis that this could lead to breaches of academic freedom. In a word, these are not government decisions."

2 4 Regstellende optrede

Regstellende optrede het oor die algemeen te doen met 'n uitsondering op of kwalifikasie van die diskriminasieverbod. In hoofstuk 3 van die Grondwet word

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45 So verklaar Peter Badura byvoorbeeld in Isensee en Kirchhof *Handbuch des Staatsrechts* Band VII (1992) 50: "Das Selbstverwaltungsrecht öffentlichrechtlicher Körperschaften bleibt ein Gegenstand der Grundrechte, wenn die Gewährleistung der Freiheit der einzelnen gerade durch die autonome Gestaltung in öffentlich-rechtlicher Organisationsform spezifisch gesichert erscheint, wie im Falle der Universitäten (Art.5 Abs.3 GG) und der Rundfunkanstalten (Art.5 Abs.1 S.2 GG). 'Autonomie' begegnet somit in unterschiedlicher Weise als Schutzgegenstand von Verfassungsrechtssätzen, im Bereich der Grundrechte sowohl als geschützte Freiheit privatrechtlicher oder öffentlich-rechtlicher Gestalt als auch im Sinne der grundsätzlichen Staatsfreiheit schutzbedürftiger Einrichtungen oder Körperschaften im Dienste gesellschaftswichtiger Selbsverwaltungsbereiche." Vgl ook Häberle tap en Faller, wat op 625 van die aangehaalde bydrae oa sê: "[D]ie Selbstverwaltung im 'akademischen', d.h. dem auf Forschung und Lehre unmittelbar bezogenen Bereich besteht faktisch unangefochten. Sie ist in den Hochschulgesetzen der Länder anerkannt und auch in den meisten Länderverfassungen ausdrücklich garantiert."

ten minste twee vorme van regstellingshandelinge veroorloof (sonder egter dat dit by die naam genoem word), naamlik

- "maatreëls" wat ingevolge artikel 8(3)(a) deur die staatsowerheid getref word "wat daarvoor ontwerp is om die genoegsame beskerming en vooruitgang van persone of groepe of kategorieë persone wat deur onbillike diskriminasie benadeel is, te bewerkstellig ten einde hulle volle en gelyke genieting van alle regte en vryhede moontlik te maak"; en
- "maatreëls" wat ingevolge artikel 33(4) eweneens deur die staatsowerheid getref word "wat daarvoor ontwerp is om onbillike diskriminasie deur ander liggame en persone as" wetgewende en uitvoerende staatsorgane op enige regeringsvlak "te verbied".

Dit is interessant om daarop te let dat artikel 8(3)(a) handel oor maatreëls wat ontwerp is om volle en gelyke *genieting* van alle regte en vryhede *moontlik te maak*, terwyl artikel 33(4) maatreëls beoog waardeur nie-staatlike *diskriminasie verbied* word.

Die bewoording van artikel 8(3)(a) herinner sterk aan die taal wat in verband met die "affirmative action"-kwessie in die VSA na vore gekom het en derhalwe kan verwag word dat die howe geneig sal wees om by die Amerikaanse reg te gaan kers opsteek.[46] Kortom kom dit daarop neer dat artikel 8(3)(a) so vertolk kan word dat die grondwetlike struikelblokke in die weg van programme waardeur histories benadeelde groepe in die VSA bevoordeel moes word, in Suid-Afrika vermy kan word.

Die sleutelbeslissing van die Amerikaanse Supreme Court is *Regents of the University of California v Bakke* 438 US 265 (1978). In daardie saak het die hof (in 'n 5 teen 4-beslissing) bevind dat 'n spesiale toelatingsprogram tot 'n mediese skool, ingevolge waarvan 'n aantal plekke vir lede van benadeelde minderhede gereserveer is en waarvoor laer toelatingsvereistes gestel is, in stryd met die gelykheidseis van die Veertiende Wysiging van die Konstitusie is. Hoewel hierdie uitspraak hoegenaamd nie veroorsaak het dat "affirmative action" belet is nie, kan geargumenteer word dat, indien die Supreme Court die saak moes beslis op grond van 'n bepaling soos die Suid-Afrikaanse artikel 8(3)(a), meer regters geneig sou wees om die regmatigheid van die spesiale toelatingsprogram te aanvaar.[47]

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46 Malherbe 371–376 verskaf 'n goeie oorsig van die stand van die Amerikaanse reg in hierdie verband.

47 In die meerderheidsuitspraak het Powell R oa gesê: "The fatal flaw in the petitioner's [die universiteit se] preferential program is disregard of individual rights as guaranteed by the Fourteenth Amendment . . . Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest." Daarteenoor het Marshall HR hom in sy minderheidsuitspraak soos volg uitgelaat: "I do not agree that petitioner's admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy

vervolg op volgende bladsy

Artikel 33(4) van Suid-Afrika se Grondwet kan verstaan word as 'n meganisme om opsetlike private, onbillike diskriminasie van staatsweë teen te werk. Daar sou geargumenteer kon word dat, waar opset om te diskrimineer ontbreek, die "maatreëls" wat daarteen getref mag word, nie ter sake is nie.[48] Wat egter in hierdie verband gesaghebbend deur die howe vasgestel sal moet word, is wanneer diskriminasie as *onbillik* aangemerk moet word. Om dit te kan vasstel, sal die verskillende bepalings van die Grondwet en veral van hoofstuk 3 teen mekaar opgeweeg moet word. Byvoorbeeld, is 'n vereiste dat slegs graduandi van 'n universiteit lede van 'n bepaalde sosiale klub kan word (vryheid van assosiasie ingevolge artikel 17) onbillike diskriminasie op grond van die verbod in artikel 8(2) op onbillike diskriminasie weens sosiale herkoms? Omdat daar verwag kan word dat artikel 33(4) binne die afsienbare toekoms aanleiding sal gee tot spesifieke wetgewing wat skerper op hierdie soort problematiek sal fokus, word dit nie hier verder behandel nie.

2 5 Ten slotte

Die nuwe grondwetlike bedeling en die politieke verandering wat deur die inwerkingtreding van die Grondwet teweeggebring is, bring ongetwyfeld mee dat die universiteitswese aanpassings sal ondergaan. Uit bostaande blyk dat die tersiêre onderwys, anders as in die verlede, ook nou 'n prominente grondwetlike dimensie verkry het. Fundamentele regte vir individue en instellings en grondwetlike gesagsafbakening tussen die staat, universiteite en die akademiese gemeenskap het integrerende aspekte van die reg met betrekking tot die universiteitswese geword.

Hoe die bepalings van die Grondwet rakende die openbare status van universiteite, akademiese vryheid, institusionele outonomie en regstellende programme ook al mettertyd vertolk sal word, kan verwag word dat die uiterste perke van die bepalings beproef sal word om diskriminasie in enige vorm aan te val. Waar sulke maatreëls 'n uitwerking kan hê op die akademiese vryheid en die karakter van 'n universiteit, sal die gewig van die onderskeie belange teen die agtergrond van wat geag word die Grondwet se basiese waardes te wees, asook tersake beleidsoorwegings, opgeweeg moet word.

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the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier."

48 Hierteenoor moet 'n *dictum* soos die volgende uit die VSA se Supreme Court-beslissing in die *Bakke*-saak in gedagte gehou word: "[O]ur cases under Title VI of the Civil Rights Act [wat soos volg bepaal: "No person in the United States shall, on grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."] have held that, in order to achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Such legislation has been sustained even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment, or a case-by-case determination that those to be benefited suffered from racial discrimination."

Marginal notes on powerful(l) legends: Critical perspectives on property theory*

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OPSOMMING

Kantaantekeninge by kragtige (mags-)legendes: kritiese perspektiewe op eiendomsteorie

In hierdie artikel word verskillende perspektiewe op eiendomsteorie krities ondersoek. Daar word van die standpunt uitgegaan dat eiendomsteorie fundamenteel polities van aard is omdat dit handel oor die wyse waarop eiendom en mag in die gemeenskap verdeel is en bestuur word. 'n Aantal eiendomsteorieë of -verhale word in drie afdelings uiteengesit en ondersoek. In die eerste afdeling, wat handel oor eiendomsteorieë waarin privaateiendom en mag deur 'n bepaalde wêreldbeskouing gelegitimeer word, word die eiendomsverhale van die Fransiskaanse armoedestryd en van die Kanadese eiendomsfilosoof Alan Brudner ondersoek. Die tweede groep verhale handel oor eiendomsteorieë waarin privaateiendom en mag op grond van 'n bepaalde siening van die regswetenskap en van regswetenskaplike metode gelegitimeer word, en sluit in die eiendomsteorieë van Hugo de Groot, Windscheid en Hohfeld. Die derde groep verhale sluit in eiendomsteorieë waarin privaateiendom en mag gelegitimeer word op die basis van sosiale konsensus oor eiendom en die verdeling en manipulasie daarvan in die gemeenskap. Al hierdie teorieë word aan die kritiese analise van Schnably onderwerp om te wys hoedat dit die *status quo* legitimeer deur die rol van mag in die gemeenskap te onder- en oorskat. In die slotgedeelte van die artikel word die voor- en nadele en die teoretiese meriete van 'n kritiese teorie, gegrond op die uitgangspunte van *Critical Legal Studies*, post-strukturalisme en dekonstruksie, oorweeg. Die gevolgtrekking is dat so 'n kritiese teorie nie suiwer negatief of waardeloos is nie, en dat dit bevrydende en nuttige perspektiewe op die eiendomsteorie moontlik maak.

LEGENDS OF POWER

Property theory is essentially a form of political debate, in the sense that it boils down to a discussion of the ways in which property structures in society are distributed, managed and manipulated. Property relations have always been linked closely to power relations and power struggles, and in this sense property

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law is fundamentally tied up with socio-economic and political structures. However, the way in which power structures are embodied in property relations is not always recognised or explicated in property theories – in fact, the purpose of property theory often is to hide and camouflage power structures behind legends which present the law as a politically neutral system of abstract rules and institutions.

The aim of this article is not to present an overview or a systematic classification of property theories, but rather to enter into an introductory critical discussion of property theory from the fundamentally political perspective that the power structures underlying property relations should be revealed. In order to do so, it is necessary to leave the comfort of accepted learning and explore the fringes of the law. Contrary to accepted academic tradition, the idea is neither to penetrate to the depths where the essence of property law is buried, nor to rise to the heights of abstraction where the basic and universal tenets that form the backbone of property discourse are formulated. This article is directed at what is not central, not essential, not fundamental and not universal in property law – it is focused on histories in which abstract and universal legal and judicial concepts, institutions, rules and practices break down and fail. The focus will, therefore, not be on the design of the property tapestry, but on the flaws and the frayed edges that bear testimony to the origin of property theory as a human artifact. Far from being discouraged by legends which hide or camouflage these flaws, this analysis will attempt to discover them where they are least obvious.

In order to get a grip on the frayed fringes of property theory the analysis is structured loosely around the *Diepsloot* history.[1] This case concerns an application by the residents of the Diepsloot area for an interdict to prevent the Administrator of Transvaal from going ahead with the planned settlement of the so-called Zevenfontein squatter community in a less formal township in the Diepsloot area.[2] According to the applicants, the establishment of a less formal township on state land in their vicinity would create a public nuisance in the form of an expected rise in criminality and pollution and a concomitant fall in property values. The application for an interdict was lodged when initial negotiations between the landowners, the squatter community, local authorities and the police failed to produce consensus. Initially De Villiers J granted the

1 Ie to the story of its development. The cases are reported as *Diepsloot Residents' and Landowners' Association v Administrator, Transvaal* 1993 1 SA 577 (T), 1993 3 SA 49 (T) and 1994 3 SA 336 (A) per De Villiers J, McCreath J and Smalberger JA (Botha JA, FH Groskopf JA, Nicholas AJA and Olivier AJA concurring) respectively. See in this regard generally Van der Walt "The impact of a bill of rights on property law" 1993 *SA Public Law* 306–312; Van der Walt "Notes on the interpretation of the property clause in the new Constitution" 1994 *THRHR* 185–191; Roux "Balancing competing property interests" (case note) 1993 *SAJHR* 539.

2 In accordance with the administrator's powers in terms of the Less Formal Township Establishment Act 113 of 1991, which was one of the much vaunted reform measures introduced by the then State President De Klerk's initiative in introducing land reforms and the abolition of apartheid land laws in the White Paper on Land Reform of 1991. See the reference to these measures by Smalberger JA 1993 4 SA 336 (A) 347C–E.

temporary interdict as applied for, but on the return day McCreath J overturned this decision and denied the application for a final interdict. On appeal the application for an interdict was once again denied. This history offers the very kind of borderline actuality that is required for a critical analysis of the fringes of property law, because a number of its characteristics make it unsuitable for analysis in terms of traditional property theory.[3]

PROPERTY, THE WORLD AND EVERYTHING

Many traditional property legends are characterised by the metaphysical pretensions of grand theory, which presents property law and property relations as part of one coherent cosmic design. Although this kind of theory is not very popular or common any more, it is part of the Roman-Germanic legal heritage. Traditionally this kind of property theory was supposed to justify the existence of private property. In Thomas Aquinas's (1225–1274) account of property, God, as creator of the universe, is the original and only owner of creation. The external things in creation are there for the common use and sustenance of all humans. However, as a rational being the individual person was created in the image of God, which means that she is capable of subjecting the rest of creation to her rational will and thereby acquiring a secondary property of things that are necessary for her sustenance. This is described by Aquinas as the *potestas procurandi et dispensandi*, the power of control and disposal of external things.[4]

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3 Some of the most interesting characteristics are the following: (a) The case affects a mixture of private and government interests. It was instituted by private landowners against a government organ for exercising statutory government powers, and it involves both private and state land. (b) It involves a typically political (as opposed to legal) conflict between the haves and the have-nots in the housing issue. The establishment of the less formal settlement is specifically aimed at finding a solution for the plight of the homeless Zevenfontein squatter community, who were unlawfully residing on unsuitable and environmentally sensitive state land. (c) One of the parties cannot be said to have any rights in the traditional legal sense, but nevertheless insists on its interests being attended to. Being unlawful squatters on state land, the members of the squatter community have no rights to the land in question. (d) Various other parties were obliged by existing legislation physically to evict the squatting community from the land they occupy, but failed to do so. In terms of s 3B of the Prevention of Illegal Squatting Act 52 of 1951 the police, the landowner and the local authority are all not only allowed but actually obliged to evict the squatters and remove the building material from the land. (e) Initial efforts to solve the conflict through negotiation failed, resulting in the court applications under discussion. In a certain sense the very fact that a case reaches the courts is an indication of a breakdown in the legal system. It is deeply ironic that so many legal rules and principles derive from court decisions, which in themselves are the loci of such breakdowns, thereby indicating what is abnormal, exceptional, and contested in the legal order, and not of an order of consensus. (f) Two consecutive judgments in the case are in direct conflict with each other, thereby indicating a breakdown in the judicial order. (g) The issue was eventually indirectly affected by the promulgation of the new Constitution. S 28 and 121–123 of the Constitution of the Republic of South Africa Act 200 of 1993 deal with land matters; see the sources referred to in fn 1 above.

4 Aquinas *Summa theologica* IIa IIae quaest 66 art 1–2. See in this regard Feenstra "Historische aspecten van de private eigendom als rechtsinstituut" 1976 *Rechtsgeleerd*

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In this way private individual property is justified as part of the natural scheme of God's creation, thereby simultaneously providing justification for the power (*potestas*) derived from and exercised through property.

A different but equally interesting theologically-inspired property story is set against the backdrop of the poverty debate in the Franciscan order during the 13th century. (This debate also features under the surface of Umberto Eco's medieval whodunnit *The name of the rose*.) In his testament Francis of Assisi (1182–1226), the founder of the order, prescribed that members should not acquire ownership of anything, and that they should live a life of poverty according to scripture.[5] This caused a heated debate between the Franciscans and the Dominicans concerning the morality and theological acceptability of the huge riches accumulated by the church in a time of general poverty and destitution among the laity. In an effort to solve the crisis precipitated by this debate, Pope Gregory IX introduced the papal bull *Quo elongati* in 1230, in which it was stated that the church was allowed to use property, but not to own it. However, it was soon pointed out by Bonaventura (Giovanni Fidanza, 1221–1274) that this did not solve the problem, since in terms of Roman law[6] the use of consumables such as food and clothing automatically resulted in the acquisition of ownership through consumption. Pope Nicholas III had to step in and proclaim a further papal bull, the *Exiit qui seminat* of 1279,[7] to distinguish between *usus iuris* and *usus facti*, and to confirm that *usus facti*, even of consumables, was allowed and that it did not result in the acquisition of ownership by the user. To justify this conclusion, it was said that the distinction between mere use and ownership of property was determined by the will to be owner. Ownership can be acquired only in the presence of the *animus domini*, and if the user did not intend to acquire ownership the original owner retained it. This empty form of nominal ownership still had value for the owner, even though it was no more than *nuda proprietas*, in view of the moral and religious merit of placing the property at the disposal of the church. In subsequent discussions it was also emphasised that the owner can dispose of the property in a wide range of ways, while the user has a very limited right of disposal.[8] Thus the twin characteristics of ownership,

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Magazijn Themis 268–269; Feenstra "Der Eigentumsbegriff bei Hugo Grotius im Licht einiger mittelalterlicher und spätscholastischer Quellen" in Behrends *et al* (eds) *Festschrift für Franz Wieacker zum 70. Geburtstag* (1978) 214; Van der Walt "Der Eigentumsbegriff" in Feenstra and Zimmermann (eds) *Das römisch-holländische Recht: Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 485 496–499.

5 The testament of Francis of Assisi actually laid down a stricter rule of poverty than the so-called *Regula Bullata*; see Schrage *Actio en subjectief recht: over Romeinse en middeleeuwse wortels van een modern begrip* (1977) 38; and see further Kölmel "Apologia pauperum – die Armutslehre Bonaventuras da Bagnoregio als soziale Theorie" 1974 *Hist Jarhbuch des Görres-Gesellschaft* 46.

6 The church lived according to Roman law – *ecclesia secundum legem Romanam vivit*.

7 This bull was incorporated into the *Corpus iuris canonici*, and more particularly the *Liber Sextus*: VI 5 12 3 (Friedberg ed 1879–1881 vol 2 col 1109 ff).

8 The main authors in this regard were Bonagratia of Bergamo (?-1340) *Tractatus de Christi et apostolorum paupertate*; William Occam (1290–1349) *Opus nonaginta dierum*; see Schrage (fn 5 above) 68.

namely its close connection to the will of the owner and the wide range of powers of disposition associated with ownership, were brought together in a context which was much more concerned with the powers and attitudes of certain groups within the church than with the law of ownership as such.

The point of this marginal history is that an important aspect of the Roman-Germanic concept of ownership, namely the way in which ownership is defined with reference to the will of the owner and the wide scope of the owner's right of disposal, derives at least partially from the distinctions invented by the parties to this ecclesiastical debate.[9]

The origin of the debate was a matter of internal church politics, namely the riches and power acquired by certain groupings within the church and the extent in which it involved these groupings in secular politics and power-play. In the final analysis the debate between the Franciscans and the Dominicans was about power within the church, and the distinction between ownership and use was no more than a handy weapon with which to fight for this power. And yet, contingent and marginal as the substantive rule-related part of this discourse may seem today, it was influential in shaping the way in which lawyers think about ownership. The crucial link between questions of faith, morality, power, ownership and the consumption of food was made possible by the unitary world-view of the time, in terms of which the law and church politics were not so sharply separated as they are today.

The all-embracing cosmological or metaphysical property story is no longer fashionable today, although it is still favoured by a small number of philosophically-minded theoreticians such as Alan Brudner.[10] Brudner supports

> "the idea of law as a norm to which appeal may be made for a rational (and hence impartial) settlement of claims of right. Such an idea requires that law form an unbroken totality, a system unified by a single theme, for otherwise there is nothing to constrain a judge's choice among competing principles of right and nothing to differentiate legal argument from political rhetoric".[11]

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9 There is some controversy about the question whether (and exactly how) this debate influenced later developments. Schrage (fn 5 above) 68–69 concludes that, although it gave rise to a certain method of reasoning based on rights, the poverty debate does not provide a theory of subjective rights. According to Villey "Les origines de la notion du droit subjectif" in *Archives de philosophie du droit* (1953–1954) 103 the treatment of this debate by William Occam must be regarded as the origin of the modern theory of subjective rights. Tuck *Natural rights theories: their origin and development* (1979) 20–24 45–50 identifies the line of development from the Franciscan poverty debate via Occam, Summenhart and Gerson to Grotius; and cf Feenstra "Der Eigentumsbegriff bei Hugo Grotius im Licht einiger mittelalterlicher und spätscholastischer Quellen" in *Festschrift für Franz Wieacker zum 70. Geburtstag* 209. See further in this regard Van der Walt (fn 4 above).

10 See Brudner's largely Hegelian property theory as set out in "The unity of property law" 1991 *Can J Law & Jur* 3. Certain exponents of Christian legal theory follow a similar approach; cf Van Zyl and Van der Vyver *Inleiding tot die regswetenskap* (1982) ch 2–4 11–12; Venter "Die publieke subjektiewe reg – 'n voorraadopname" 1991 *THRHR* 349 in respect of the role of order in creation and in the law.

11 See Brudner 1991 *Can J Law & Jur* (fn 10 above) 3 5.

Although a unified and coherent system of property law can, in Brudner's view, accommodate a diversity of doctrinal systems and formations, it needs a unifying theme which saves, connects and orders them as parts of a unified whole.[12] This unifying theme is found in personality, which is "conceived initially in [a] quite insular, decontextualised, and disembodied manner".[13] In Brudner's account, property is a medium for the self-realisation of the human personality.[14] Because property is understood as the objectively realised notion of the human person being the end of all things, property is necessarily private and exclusive in nature.[15] Furthermore, this principle makes it possible to distinguish between perfect and imperfect, superior and inferior, and absolute and relative property according to the extent in which each promotes the full realisation of the person.[16] In this way, the individual person becomes the beginning and the end of the law: on the one hand subjectivity or personality as the capacity for rights and freedom is the starting point from which all rights are developed, and on the other the full realisation of personality is the end towards which all property rules are aimed.

Brudner, Aquinas and the poverty story all present property relations and property law as part of an all-embracing scheme of things which include property, the world and everything else. Brudner's account, however, is secularised – whereas Aquinas and the poverty debate approach property from the perspective of God's creation and providence, Brudner is concerned with the nature, needs and fulfilment of the human subject. And, similarly, while Aquinas and the poverty debate also recognise the function of property laws and institutions in ensuring the self-preservation of humans, in their account this function of property is restricted and qualified by the divine scheme of which it forms part, together with other aspects such as God's providence, church structures and individual charity. In Brudner's story the power of property is not restricted by external or higher norms, since the whole scheme itself is explained in terms of the power of the individual person who benefits from property. This shift in emphasis is important, since it is representative of a shift in the power structures that underlie property relations. Ever since the Enlightenment, property legends have been primarily determined by the power which the individual person, the legal subject, derives from property. In the teleological perspective of Brudner's property theory all property rules are aimed at and geared towards the fullest possible realisation of the individual person, which requires an order consisting of property rules and institutions that restrict and impinge upon private, exclusive property spheres as little as possible. In this way a generally accepted system of neutral rules is justified by a cosmic or theoretical design which ensures order, peace and equilibrium between optimally exclusive individual spheres of non-interference.

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12 6. The Toronto Law Faculty seems to favour this kind of approach; see Ernest J Weinrib *The idea of private law* (1995) in respect of the law of contract and delict.

13 14.

14 Explained at 16–35.

15 21.

16 *Ibid.*

The *Diepsloot* story, by way of contrast, creates the impression that property relations are normally characterised by chaos, imbalance and strife rather than by order, equilibrium and consensus. This poses the question whether the cosmic design which underlies and justifies metaphysical property legend accommodates the interests of the have-nots and the homeless. What happened to God's providence when certain groups are excluded from using land to house and feed themselves? Must they accept that all land has been parcelled out to individual owners, and that they are therefore now excluded from the common use of property allowed for the sustenance of all humans? The non-enforcement of property rules created in terms of this legend may be interpreted as a sign of the individual mercy and charity which formed part of property legend according to Aquinas or the poverty debate, but at the same time it casts doubt on the legitimacy and enforcement of the whole system. In view of the ensuing legitimacy crisis the legend of property was and still is increasingly subjected to renewed criticism and investigation.

However, even if one accepts the basically metaphysical idea that property relations are usually orderly and peaceful, and that chaos and dissent are abnormal, the metaphysical justification of property has become too rich for most lawyers' blood, especially since the age of positivism. Since the fifteenth century the enormous growth and successes of the then emerging natural sciences have inspired lawyers to strive for a new legal science, which would be just as scientific, just as dependable and just as certain as the natural sciences of Newton and Copernicus. Many theorists wanted to ensure that choices among competing rights are constrained by clear and unambiguous principles, so that judicial judgment could be separated form the uncertainties of political rhetoric and metaphysical theory. The lawyers of the Enlightenment were, in a word, looking for a legal science in which certainty was guaranteed through method. Ever since the Enlightenment this implied that the legal story, and particularly the story of property, would have to be transformed from a religious fable into a scientific dissertation.

PROPERTY AS A SUBJECTIVE RIGHT

Hugo Grotius and his intellectual heirs amongst the German theorists of the nineteenth century are the original authors of the kind of scientific, non-metaphysical property legend we are used to and comfortable with today. In this legend the legitimacy of the law is built not upon metaphysical and cosmological but upon scientific pretensions: the legend of property is presented in the form of a well-argued scientific doctrine. The authority of property law is, therefore, guaranteed by the logic of the scientific doctrine of which it forms part, and not by any metaphysical or religious world view.

In view of this change in emphasis, it is interesting that religious and church politics nevertheless played a marginal role in establishing the modern science of the law. Petrus Ramus (1515–1572), a teacher of logic at the University of Paris, exercised an enormous (if indirect) influence upon the "set of mental habits" which formed the foundation of the scientific, rationalistic approach to law in the

post-Renaissance Roman-Dutch tradition.[17] In the "set of mental habits"[18] that characterise Ramist scientific logic, the techniques of definition, division[19] and logical reasoning[20] play a major role. The idea is that infallible solutions to any problem can be produced by sound application of these techniques. In order to realise this goal it is necessary to formulate a number of simple and basic propositions about legal relations that could serve as self-evident and incontrovertible axioms, to define and organise legal relations and their constitutive parts logically, and then to manipulate these elements of the law according to the infallible laws of logic.[21] The truth and objective trustworthiness of legal reasoning can be ensured by following a fairly simple set of abstract logical rules. In true humanistic tradition, rhetoric and logic were expected to provide dependable solutions of practical utility,[22] and therefore the Ramist "set of mental habits" was eagerly adopted by Roman-Dutch scholars of the seventeenth and eighteenth centuries, albeit indirectly. The interesting aspect of this history is that Ramus himself was and still is considered an incompetent charlatan, a dishonest amateur with an inflated ego,[23] whose influence upon Roman-Dutch law is not at all attributed to his personal or scientific merit. In fact, Ramus's influence seems to have been inspired by martyrdom. Upon his conversion to Protestantism in the early 1560s Ramus was forced to leave France, and his lectures at universities in Germany and Switzerland brought his work to the attention of like-minded jurists at protestant universities such as Leyden, where expatriate French protestants such as Hugo Donellus (1527–1591),[24] as well as Dutch humanists such as Hugo Grotius (1583–1645),[25] were trying to establish a legal science along rationalist lines. Eventually Ramus's fame was ensured when he was murdered in the St Bartholomew's Night massacres in August 1572.[26]

Grotius's account of private law and of property law reflects the scientific system of Ramist thinking. At the back of his *Inleidinge tot de Hollandsche*

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17 See in this regard Van der Merwe "Ramus, mental habits and legal science" in Visser (ed) *Essays in the history of law* (1989) 32 esp 33.

18 The term is used by Van der Merwe (*ibid*) and derived from an eminent scholar of Ramism, Ong *Ramus, method, and the decay of dialogue* (1958) 7 8 171 303.

19 Esp in the form of simple dichotomisation; see Van der Merwe (fn 17 above) 42–43.

20 Which includes axioms, syllogism and deduction; see *idem* 43–44.

21 See the summary of scientific techniques adopted by legal scholars as set out by Van der Merwe *idem* 45.

22 See *idem* 37.

23 See *idem* 32.

24 Professor at Leyden between 1577–1587. He studied at Toulouse and Bourges and became professor at Bourges before fleeing the religious persecution of the St Bartholomew's Night in 1572. Before he went to Leyden he was professor at Heidelberg. See Van Zyl (fn 25 below) 148–149; Ahsmann and Feenstra *Bibiografie van hoogleraren in de rechten aan die Leidse universiteit tot 1811* (1984) 105.

25 A student at Leyden between 1594–1597. His father was narrowly involved in the university, and was a curator between 1594–1617. See Van Zyl *Geskiedenis van die Romeins-Hollandse reg* (1979) 346.

26 See Van der Merwe (fn 17 above) 39–40.

rechtsgeleerdheid[27] Grotius includes a number of tree diagrams which represent the whole of Dutch law as he sees it in terms of definitions and dichotomous divisions. In the *De jure praedae*[28] and *De jure belli ac pacis*[29] Grotius still concerns himself with the origin and metaphysical justification of private property, but in the *Inleidinge* that concern makes way for a purely scientific explanation and description of property relations. The most important and influential aspect of Grotius's writings on property is the way in which he fits it into a specific system of definitions and logical relations.[30] Grotius divides patrimonial rights into real and personal rights,[31] and real rights into ownership and possession.[32] Real rights are defined as rights in terms of which something belongs to a person without reference to any other person, whereas personal rights involve reference to others.[33] Ownership is defined in terms of the owner's right to vindicate,[34] and possession as actual physical control over things.[35]

The really interesting definitions and subdivisions in Grotius's scientific story of the law involve the distinction between what is currently known as ownership and the limited real rights. Grotius explains that in principle two persons can have ownership over the same thing when the actual use of the property is separated from the title and transferred to another person. Normally a person enjoys full ownership, that is, both title and use,[36] but when use is separated from title both persons enjoy imperfect ownership.[37] Full ownership entitles the owner to make full use of the object for her own benefit and according to her own will, inasmuch as such use is not prohibited by law.[38] Imperfect ownership, on the other hand, is characterised by a shortcoming in this full power of disposal, in that the power of disposal is limited or restricted in some way. In order to distinguish rationally between the two forms of imperfect ownership, Grotius proposes to refer to only the first one as ownership, namely that which is retained when use is transferred. The other form of imperfect ownership, namely mere use that has been separated from full ownership and transferred, is now described as a

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27 Edition Dovring, Fischer, Meijers (1952).
28 Edition Hamaker (1868).
29 Edition Kanter-van Hettinga Tromp (1939).
30 See Van der Walt (fn 4 above) 490.
31 Grotius uses the terms "recht van toe-behoren", "beheering" and "inschuld": see *Inleidinge* (fn 27 above 48) II 1 57–59.
32 *Idem* II 1 60: "eigendom" en "bezit-recht".
33 *Idem* II 1 58–59.
34 *Idem* (50) II 3 1.
35 *Idem* (48) II 2 2.
36 *Idem* (151) II 33 1.
37 *Ibid*; "gebreckelicke eigendom" v "volle eigendom".
38 This is Grotius's version of the definition of *dominium*, traditionally used since Bartolus de Saxoferrato (1313–1357) provided the first formal definition; see Bartolus *ad D* 41 2 17 1 fn 4: "dominium est ius de re corporali perfecte disponendi nisi lege prohibeatur"; and cf Van der Walt (fn 4 above) 500; Van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" 1986 *THRHR* 305.

gerechtigheid, which is (no more than) a (limited real) right.[39] Simultaneously Grotius reserves the traditional definition of ownership for complete ownership. In this way the limited real rights are distinguished from ownership in the way we know it, and demoted from a form of ownership to something different and less than ownership.[40] In the process, Grotius drafted his own personal property story, based upon the power of disposal ascribed to an owner of property, and simultaneously drew a firm line through another story of property, which used to be the standard medieval story.

In medieval accounts of property[41] the feudal system finds expression in the widespread recognition of divided ownership, in terms of which both a feudal landlord and a vassal could have different forms of ownership with regard to the same land: the landlord had direct ownership[42] and the vassal indirect ownership.[43] Both forms of ownership were explicitly included in the standard definitions of ownership. This division reflected and accommodated the feudal division of land and power: the vassal's actual use of the land was recognised and protected politically in return for political and military allegiance to the landlord, who had nominal ownership of the land. It is, therefore, not at all surprising that the abolition of feudal land law and of the divided forms of ownership was one of the most important reforms of the French revolution of 1789, when a unified form of ownership free of feudal restrictions and limitations replaced the feudal divided ownership. In line with post-revolutionary natural law thinking and the concomitant aversion to the divided feudal ownership, Grotius brought about a similar reform of Roman-Dutch law, but in his case by means of a much less obvious intellectual revolution. As in the case of the French revolution the abolition of feudal relations was a political issue with serious social consequences, but Grotius camouflaged his contribution to this power-struggle behind a cloak of scientific reasoning. In the *Inleidinge*[44] Grotius redefines the old feudal use-ownership of the vassal, *dominium utile*, as imperfect ownership and then relegates it to non-ownership as one of the *gerechtigheden*. Secondly, the traditional definition of ownership in terms of the owner's wide powers of disposition is reserved for the landlord's complete or full ownership. In this process social power-relations are revolutionised by what seems to be abstract, neutral logical reasoning about concepts, definitions and logical relations. Grotius could, in fact, only lay the foundation for a new, scientific property legend by effectively destroying the existing feudal legend. The reason for destroying the existing legend was that the kind of power structures reflected and accommodated by it was no longer acceptable. The method for destroying

39 *Inleidinge* (fn 27 above 151–152) II 33 1; the term "gerechtigheid" is used for the separated rights.

40 See Van der Walt (fn 4 above) 493.

41 See in this regard *idem* 500–505; Van der Walt and Kleyn "Duplex dominium: the history and significance of the concept of divided ownership" in *Essays on the history of law* (fn 17 above) 235–243.

42 *Dominium directum*; see Van der Walt (fn 4 above) 503.

43 *Dominium utile*; see fn 42 above.

44 And esp *Inleidinge* (fn 27 above 151–152) II 33 1.

the existing legend was to create a shroud of seemingly abstract, logical reasoning behind which the demolition of old and the construction of new power structures could take place.

Grotius provided the dynamite for imploding and demolishing the existing property legend and the smokescreen behind which the demolition could be done, but the scientific construction of a new, modern property legend which cemented the powerful social and political position of property in modern society was completed by Bernhard Windscheid (1817–1892), who perfected the scientific system introduced by Grotius into what is still regarded as the ultimate statement of modern legal reasoning.[45] Windscheid defines ownership as a subjective right, which is contrasted with objective law.[46] His explanation of the relationship between objective law, subjective rights and the individual will is particularly enlightening: objective law issues a norm[47] which allows a specific person to determine whether or not to act in a certain manner. The norm granted to this person does not force her to act, but allows her to decide whether to act, and more particularly whether to make use of the supplied judicial remedies to force others to comply with and respect that freedom. Thus Windscheid states that the will of the person with a right is decisive for the enforcement of the principle against others.[48] In this context a subjective right is the power, granted by law and backed up by judicial remedies, to enforce one's will against others.[49] A real right, therefore, is a right which allows the beneficiary to enforce her will by determining the actions of everybody else with regard to a thing which is the object of the right.[50] Real rights are essentially exclusive and negative: they allow the beneficiary to prevent others from performing actions that would interfere with the object or with the beneficiary's own actions with regard to the object.[51] Ownership is distinguished from the limited real rights in terms of the scope of this power to exclude others: only the owner has the power to exclude others and to determine their actions with regard to the object in the totality of its relations, while the beneficiary of a limited real right has this power only with regard to certain relations of the object.[52]

In Windscheid's story, which is presented as a logically coherent scientific system of definitions and relations, ownership and property rights are deeply involved with power. Rights, and especially ownership as the fundamentally

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45 See Van der Walt "Ownership and personal freedom: subjectivism in Bernhard Windscheid's theory of ownership" 1993 *THRHR* 569.

46 See Windscheid *Lehrbuch des Pandektenrechts* 8th ed Kipp 199 vol 1 book 2 par 37 (130).

47 Windscheid uses the word "Befehl", and in the fn "Norm, Imperativ"; see *idem* 131.

48 *Idem* par 37 131.

49 See Van der Walt (fn 45 above) 572.

50 Windscheid (fn 46 above) par 41 (149); see Van der Walt (fn 45 above) 573.

51 Windscheid (fn 46 above) par 38 (140–141); see Van der Walt (fn 45 above) 573. The philosophical background to this approach is provided by Kant and Von Savigny; see Van der Walt (fn 45 above) 586.

52 Windscheid (fn 46 above) vol 1 book 3 par 38 (629); see Van der Walt (fn 45 above) 573.

negative right to exclude others from acting within or interfering with one's power sphere, are the external medium through which humans exercise power over things and against each other. When ownership is described as an abstract and elastic right which is absolute in principle, although it can accommodate temporary restrictions,[53] it is clear that the exclusivity of ownership should be as absolute as possible in order to allow the individual will maximum scope of power. This scientific story, as told by Windscheid, has had enormous influence in shaping the way in which modern lawyers think about rights and, more particularly, property rights. It shaped the way in which the law is perceived as a system of subjective or personal rights more than anything else, and it shaped the way in which these rights are perceived as individual spheres of exclusive power and autonomy, within which each person can reign supreme as queen of her own castle, and from where she can dictate the actions and inactions of anybody else who dares to come within striking distance. The function of the law, according to this legend, is to provide the necessary backup for enforcing this power with legal remedies and, if required, with the might of the sword. Far from being a scientific treatise of logical definitions and terminological and categorical relations, Windscheid presents a legend of absolute individual autonomy, of interpersonal power dressed up as rights, and of the law as a handmaiden of the powerful. Windscheid's textbook of private law actually hides a sociology of legally legitimised and spatialised individual power behind the facade of the theory of subjective rights. In the process of transforming property theory from metaphysical legend into scientific treatise, Grotius and Windscheid actually use the pretence of abstract scientific reasoning to hide a different sort of metaphysics, in which the individual subject assumes the central position. The religious metaphysical property legend is replaced by a scientific egocentric property legend.

Scientific property theory based upon the definitions of and logical relations between terms and concepts is also known to Anglo-American law. The important contribution in this respect was made by Hohfeld. In two classic articles[54] Hohfeld explains all rights, including property rights, in terms of an analytical vocabulary[55] describing the law in terms of a logical system of legal relations.[56] First, four fundamental legal conceptions are defined in relation to their correlatives. Each conception entails and is entailed by its correlative, so that a claim-right

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53 Windscheid (fn 46 above) vol 1 book 3 par 167 (756–757); see Van der Walt (fn 45 above) 575.

54 Hohfeld "Some fundamental legal conceptions as applied in judicial reasoning" 1913 *Yale LJ* 16; Hohfeld "Fundamental legal conceptions as applied in legal reasoning" 1917 *Yale LJ* 710. See further in this regard Singer "The legal rights debate in analytical jurisprudence from Bentham to Hohfeld" 1982 *Wisconsin LR* 975–1059.

55 A term used by Munzer *A theory of property* (1990) 18.

56 The fundamental conceptions are explained in three columns:

Conceptions	*Correlatives*	*Opposites*
Claim-right	Duty	No-right
Privilege	No-right	Duty
Power	Liability	Disability
Immunity	Disability	Liability

(to property) entails and is entailed by a duty (to respect property), just like a power (to expropriate property) entails and is entailed by a liability (to be expropriated). Secondly, a set of opposites is created by the external negation of each of the fundamental conceptions, so that the opposite of a claim-right is a no-right, and the opposite of a power is a disability. The interesting thing about this theory is that it banished the need for and discussion of things from property law.[57] Property, like all legal institutions in Hohfeld's story, consists of relations between legal subjects, and not of things. This view contributed to the dephysicalisation[58] and, ultimately, the disintegration of property.[59] According to Grey, the specialist who uses this approach, as opposed to the lay person, tends to "dissolve the notion of ownership and to eliminate any necessary connection between property rights and things", and to "fragment the robust unitary conception of ownership into a mere shadowy 'bundle of rights'", so that the term "property" becomes so diffuse and fragmented that it ceases to be an important legal and political category – "the specialists who design and manipulate the legal structures of the advanced capitalist economies could easily do without using the term 'property' at all".[60] In the process of dephysicalisation, the idea of property revolves around relations between legal subjects, and not around things. Honoré's incidents-analysis of ownership[61] is based upon the standard incidents of ownership, which are defined as "those legal rights, duties and other incidents which apply, in the ordinary sense, to the person who has the greatest interests in a thing admitted by a mature legal system".[62] This analysis strengthens the idea of property as a diffuse bundle of powers (or incidents).

The *Diepsloot* history shows that both kinds of scientific thinking about property fail to provide acceptable answers. In terms of the scientific legend of subjective rights the members of the squatting community fail even to enter into the scientific equation, since they have no right that fits into the system of subjective rights. De Villiers J illustrates this kind of logic in his fairly simplistic privatist argument: the applicants had certain rights, the state's actions will interfere with the applicants' rights, and if such interference had been foreseen by the legislature when writing the act, proper provision would have been made for suitable compensation. In this kind of logic the squatting community's interests are simply not catered for, because their interests do not fit into the system of rights, which means that they have no rights or interests with legal effect. Their position of unlawful occupation can never be translated into a right that can be acceptable within this system, and the relentless logic of the judicial syllogism rejects them from the judicial process with the unfailing and predictable

57 According to Vandevelde "The new property of the nineteenth century: the development of the modern concept of property" 1980 *Buf LR* 360.

58 *Ibid.*

59 According to Grey "The disintegration of property" in Pennock and Chapman (eds) *NOMOS XXII: Property* (1980) 69 74.

60 73.

61 Honoré "Ownership" in Guest (ed) *Oxford essays in jurisprudence* (first series) (1961) 107.

62 *Ibid.*

regularity of a computer that refuses to boot from a non-system disk. The same applies in terms of the Hohfeldian scientific approach: the only fundamental conception which can be regarded as a description of the squatting community's position is "no-right", which is the opposite of a claim-right and correlates with a privilege.

The only way in which to accommodate any consideration of the squatting community's position in either system of scientific reasoning is in terms of a policy which allows room for amendments to the system. This can be done by following the internal logic of public rather than private law. In terms of this logic it is possible to take cognisance, not of the squatting community's own interests, but of the state's powers to look after the interests of the squatting community, on the basis of statutory authority. According to public law reasoning, the powers created by the statute in question include three separate steps: acquisition of land (in this case by expropriation), designation of the land to be used for a less formal settlement, and the actual settlement. In a strictly legalistic argument the expropriation itself does not in any way constitute an infringement of the applicants' rights. The second step, the designation of the land, could affect the applicants' rights, but as long as it is carried out in the prescribed manner it would be open to review on the basis of gross unreasonableness only, in the absence of which such interference is not unlawful and not actionable. Once again, once the designation is in order, the actual settlement cannot be unlawful either, as it has already been sanctioned by the designation. Interestingly enough, in the final decision of the Appellate Division, Smalberger JA rejected this kind of argument as too legalistic.[63] He preferred to enter into a material consideration of the whole acquisition, designation and settlement process, against the background of the history of the act and the socio-political reforms of which it forms part. In the end, however, his decision was based largely upon the question whether the kind of interference with private rights involved here could logically have been foreseen and therefore sanctioned by the legislature, based upon the approach in *Johannesburg Municipality v African Realty Trust Ltd.*[64] In the final analysis this argument does not escape the legalist logic of scientific property legend. It does not really succeed in reaching a decision based upon a material consideration of the various interests involved, against the context of the conflict about property. It still assumes that individual property rights are fundamentally inviolate, and that state interference with them can be sanctioned when it is possible to argue that the interference in question must have been foreseen by the legislature when drafting the empowering statute.

The apparent contradictions in and fundamental similarities between the three judgments indicate the existence of a jurisprudential fault line. A similar indication is contained in the history of the *Diepsloot* case: by entering into negotiations, the applicants in this case pointed out a failure in the system of property

63 1993 4 SA 336 (A) 348J.
64 1927 AD 163.

rights. Similarly, the fact that state organs such as local authorities and the police fail to enforce existing anti-squatting legislation against the squatting community, must be seen as a symptom of the legitimacy crisis which makes it difficult to apply and enforce the current property legend in the existing socio-political context. In short, the *Diepsloot* case shows that the scientific legend of subjective rights has lost its general credibility and has to be amended, corrected or replaced by a new legend with more legitimacy. In the aftermath of the two world wars, a growing awareness of this situation and of the concomitant need for a socially more responsible perception of the law, resulted in a new legend in which the required corrections are based upon the good sense, the rational morality, the social consensus of the community. When the results of rationalistic and legalistic reasoning fail to satisfy or convince, and the lawyers turn to the legal morality of society for corrective principles, property theory enters into the sphere of a new legend, the legend of social consensus.

PROPERTY BASED UPON SOCIAL CONSENSUS

Since World War II, continental legal theory has been characterised by an increasing awareness of the shortcomings and fundamental untenability of the traditional property legend, especially as far as the absolute autonomy of the individual property holder to dispose of property is concerned. Lawyers and politicians realised that the property rights of individuals have to be limited or circumscribed by the context and by the interests of society. This awareness gave rise to a number of different but related versions of a new property legend. Dutch theorists[65] developed a so-called functionalist story, in terms of which the nature, content and limits of property rights are functionally determined by the nature of the subject,[66] the nature of the object[67] and the context.[68] Similar debates in German theory resulted in the creation of the concepts of *Funktionseigentum*[69] and *kleineres Eigentum*. The idea of *kleineres Eigentum* is interesting

65 See Valkhoff *Een eeuw rechtsontwikkeling* (1949); *Vermaatschappelijkt vermogensrecht in het Nieuwe BW* (1967); Slagter *Juridische en economische eigendom* (1968); "Eigendom en privaatrecht" 1976 *RM Themis* 276; "Eigendom en pseudo-eigendom" in Hondius *et al* (eds) *Quod licet. Kleijn-bundel* (1992) 357; and more recently Van Goch "Naar een gedifferentieerd eigendomsbegrip" 1982 *Recht en Kritiek* 82; Schut "Naar een meer pluriforme regeling van het eigendomsrecht?" 1981 *RM Themis* 329; Van Neste "Eigendom morgen" 1983 *T Privaatrecht* 479.

66 So that the property rights of individuals are different from the property rights of companies and multinationals.

67 So that property of a bicycle would entail different rights from property of a factory or a nuclear power plant.

68 So that property rights are determined by the social, political and economic realities surrounding them. Cf Singer and Beerman "The social origins of property" 1993 *Can J Law & Jur* 217.

69 Which means that the substance of property is distinguished from its function, and that only the actual content of property is affected by statutory restrictions and limitations, while the essence is left intact as an absolute right. According to the *Immanenztheorie* of a minority of authors, statutory restrictions affect the essence of ownership. See Sontis "Strukturelle Betrachtungen zum Eigentumsbegriff" in Pauls *et al* (eds) *Festschrift für*

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in this respect. It is based on the assumption that the traditional concept of absolute property rights cannot apply to all sorts of property in the contemporary world, and that it should be restricted to a smaller sphere of personal property that is closely related to the person of the individual, while other sorts of property can be subjected to much more fundamental limitations and restrictions.[70]

Margaret Jane Radin's theory of property and personhood[71] follows a similar line of reasoning. Radin sets out to investigate what property is justifiably crucial to personhood, and what legal action is most appropriate in providing suitable protection for it. She argues that at least some kind of external embodiment of personhood in property is necessary for humans to flourish, and that certain categories of goods and attributes should be commodified for this purpose, with the result that at least some conventional property interests should be recognised and protected.[72] For this purpose personal property is distinguished from, and sometimes enjoys legal preference over, "fungible" property.[73] Traditionally important property interests such as the family home are, accordingly, identified as worthy of special care and protection. In so far as the traditional legend of an absolute right of property survives, it is restricted to this smaller sphere of property that serves the promotion of personhood.

The restriction of the traditional property legend to the smaller personal sphere of *kleineres Eigentum* or personal property, results from a greater awareness of the social context and importance of property relations. The traditional legend of an autonomous individual who has an absolute right of disposal with regard to property is simply not tenable in view of contemporary social, political and economic realities. A properly contextualised property story should, therefore, explain property against the background of its social responsibilities, and not simply in terms of individual autonomy. This can be done, according to Radin, by making use of normative judgments regarding the social justifiability of particular property interests, such normative judgments deriving from society's historical perspective.[74] Social experience shows that the property system as such can be held intact only if certain allowances and sacrifices, in the form of accepting restrictions and state interferences with "fungible" private property, are made.

Karl Larenz zum 70. Geburtstag (1973) 981; Weber "Eigentum als Rechtsinstitut: Beurteilungsstand und Entwicklungstendenzen" 1978 *Z Schweizerisches Recht* 161; Rey "Dynamisiertes Eigentum" 1977 *Z Schweizerisches Recht* 65; Pawlowski "Substanz- oder Funktionseigentum? Zum Eigentumsbegriff des geltenden Rechts" 1965 *AcP* 395.

70 See esp Weber and Rey (both fn 69 above).

71 See "Property and personhood" 1982 *Stanford LR* 957; "Market-inalienability" 1987 *Harv LR* 1849. A similar approach is followed by Radin's colleague Simon "Social-republican property" 1991 *UCLA LR* 1335, in which Simon works out at least some of the implications (and shortcomings) of a combination of market-socialism and the republican ideal. For an interesting application of this idea see Jeffres "Resolving rival claims on East German property upon German unification" 1991 *Yale LJ* 527–549.

72 1982 *Stanford LR* (fn 71 above) 1014.

73 Which is not so closely related to personhood.

74 Radin 1982 *Stanford LR* (fn 71 above) 961–962.

With reference to the *Diepsloot* case, this greater awareness of the social context of property implies that the *Diepsloot* conflict cannot be disposed of, having regard for the individual rights of the existing landholders only – the proper social context and the personhood-related value of the property involved must be taken into account. Interestingly enough, the property in issue in the *Diepsloot* case is obviously closely related to personhood in Radin's perspective, because it concerns the housing situation of both the applicants and the squatting community. According to Radin's analysis, even such a conflict, which involves personhood-related property of both parties, can be resolved with reference to normative judgments deriving from society's historical perspective. In this particular case Radin's concept of non-ideal evaluation would be employed to make a choice between two different personhood-related interests.

Stephen Schnably[75] refuses to accept this new, socialised property legend on face value. He refers to what Roberto Unger has called the modernist insight, namely that "society is made and imagined . . . a human artifact rather than the expression of an underlying natural order",[76] and argues that Radin's reliance upon an underlying essential relation between personhood and property reflects a fundamental inability to come to terms with this modernist condition. Moreover, Schnably argues, this property legend of Radin serves to camouflage and strengthen existing power – it is bound to fall prey to an implicit conservative bias, to protect the *status quo*.[77] Rather than rely upon widely shared social norms, Schnably argues, we should be deeply mistrustful of them, because they camouflage and hide from view the underlying power relations that actually characterise society. By analysing the "widely shared" and seemingly uncontroversial, even idyllic picture of the family home as the central locus of property for personhood, Schnably uncovers and illustrates the ways in which this seemingly uncontroversial picture of suburban security camouflages and upholds all sorts of undisclosed barriers to freedom: the relative precedence of private over public life; the allocation and institutionalisation of gender roles; the cultural homogeneity of local communities; the suburban style of town planning and urban life; and so on. Rather than rely upon widely shared and uncontroversial social views and values to create and guarantee a socially legitimate system of property rules, we should treat the most uncontroversial and the most commonly shared social values about property with the deepest mistrust and scepticism,[78] because they curtail freedom by simultaneously underestimating[79] and overestimating[80] existing power structures in society. Instead of looking for social consensus upon which property rules can be based, Schnably wants to treat social consensus about property with mistrust and scepticism in order to uncover underlying power relations and possibilities for resisting them.[81]

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75 "Property and pragmatism: a critique of Radin's theory of property and personhood" 1993 *Stanford LR* 347.

76 *Idem* 353, with reference to Unger *Social theory: its situation and its task* (1987) 1.

77 *Idem* 352.

78 1993 *Stanford LR* (fn 75 above) 363.

79 By not uncovering it.

80 By not leaving room for extra-judicial struggles and resistance against power.

81 See Schnably 1993 *Stanford LR* (fn 75 above) 375–379 397–404 resp.

Contemporary property stories built on social consensus and widely accepted values assume a variety of forms. In current Anglo-American literature an important example concerns the discourse on what should or should not be regarded as property. This trend received an important impetus in the property story told by Charles Reich.[82] According to Reich, the traditional protection of property rights with regard to things became obsolete as a result of the changing face of property – property holders in the modern world are much more concerned with their interests in jobs, pensions, medical benefits and shares than in physical objects. To cater for this transformation in the view most people hold with regard to property, the law of property should extend the scope of what is regarded and protected as property.[83] In other words, the definition and conception of property is adapted according to changing social values about property. A similar approach is followed by Kevin Gray[84] with regard to the so-called "propertiness" and the "propertisation" of property. The essence of property, that which makes it property, is the way in which it is "propertised" for exclusive individual use and exploitation.[85] The key to "propertisation", according to Gray, is excludability, which means that the resource "is 'excludable' only if it is feasible for a legal person to exercise regulatory control over the access of strangers to the various benefits inherent in the resource".[86]

The excludability of a particular resource is determined by three sets of factors, namely physical, legal and moral determinants.[87] Social consensus about what should be propertised plays a role in the second and third of these factors. In the "comprehensive approach" of Laura Underkuffler,[88] property is seen as having a mediating function between individual rights and government power.[89] In order to serve this purpose, the justification of property is seen as rooted in some concept of human well-being and in collective recognition by others.[90]

In contemporary South African private law theory the idea of social consensus plays an interesting role in the form of the so-called legal convictions of the community or *boni mores*.[91] This concept is especially important in the law of delict, where it enjoys most attention. According to Neethling, Potgieter and Visser, the legal convictions of the community or *boni mores* constitute the

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82 "The new property" 1964 *Yale LJ* 733.

83 See further Van Alstyne "Cracks in 'the new property': adjudicative due process in the administrative state" 1977 *Cornell LR* 445; Anderson "Takings and expectations; toward a 'broader vision' of property rights" 1989 *Univ Kansas LR* 529; Large "This land is whose land? Changing concepts of land as property" 1973 *Wisconsin LR* 1039.

84 "Property in thin air" 1991 *Cam LJ* 252.

85 268.

86 *Ibid.*

87 266–295.

88 "On property: an essay" 1990 *Yale LJ* 127.

89 139.

90 *Ibid.*

91 See in this regard esp Neethling, Potgieter and Visser *Law of delict* (1994) 29–66 and sources referred to there, esp in the footnotes.

general criterion to be employed in determining whether a particular infringement of interests is unlawful.[92] This is said to be an objective test based on reasonableness:

> "The basic question is whether, according to the legal convictions of the community and in the light of all the circumstances of the case, the defendant infringed the interests of the plaintiff in a reasonable or unreasonable manner."[93]

In this regard the general criterion of reasonableness, according to the *boni mores*, is described as

> "a juridical yardstick which gives expression to the prevailing convictions of the community regarding right and wrong. It is a criterion which enables the court continuously to adapt the law to reflect the changing values and needs of the community".[94]

This yardstick is, furthermore, described as a legal (delictual, as opposed to a social, moral, ethical or religious) criterion of right and wrong[95] and as an objective (as opposed to subjective) criterion.[96] It is said that the general and comparatively vague *boni mores* test for wrongfulness is used only in exceptional cases, since the fact of an actual infringement is usually already an indication of wrongfulness.[97] Furthermore, the general test is said seldom to be applied directly, since "more precise methods have been developed to determine the legal convictions of the community".[98] Examples of these "more precise methods to determine the legal convictions of the community" are that wrongfulness amounts to (a) the infringement of a subjective right, or (b) non-compliance with a legal duty to act.[99] These more precise tests are described as "merely practical applications of the general criterion of reasonableness", and as "juridical methods or procedures whereby one determines whether an infringement of interests is in conflict with the legal convictions of the community and therefore wrongful".[100] Usually the more general (and more basic) *boni mores* test is used on a supplementary level, namely as a test for wrongfulness where there is no clear legal norm involved, and for purposes of refinement in borderline cases.[101]

It is arguable whether the historical picture which is implied by this explanation, namely that the doctrine of subjective rights is a further (and thus later) refinement of the general (and thus earlier) *boni mores* doctrine,[102] is acceptable.

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92 31.
93 32.
94 35.
95 *Ibid.*
96 36.
97 39.
98 40.
99 *Ibid.*
100 *Ibid.*
101 41.
102 In the sense that the doctrine of subjective rights is interpreted in this way, namely as a refinement of the more general *boni mores*, it has to be stated clearly that this doctrine has lost its original philosophical and scientific background and intent, and has become a purely technical instrument for establishing whether a right has been infringed. Despite

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In the light of historical evidence it seems much more likely that the test for wrongfulness, which is based upon the legal convictions of the community, is the later development which was supposed to provide a corrective and a greater deal of suppleness for what proved to be a not generally suitable test based upon the (earlier) doctrine of subjective rights. Be that as it may, the interesting point is that, in fact, these two stories are not entirely mutually compatible. Historically speaking, the theory of subjective rights was supposed to provide a strictly logical science of legal concepts and relations in order to bracket all political, social and contingent judgments from legal discourse. The idea of legal norms based upon the legal convictions of the community, however, is a product of the (later) desire to supplement the supposedly neutral and objective, but ultimately sterile and misleading pretensions of scientific *Begriffsjurisprudenz*. The former is built upon aspiration towards a neutral, logical and abstract legal science of concepts and definitions, whereas the latter is built upon the wish to reflect the changing views and needs of the community – hence the concern about objectivity when dealing with the *boni mores*.

The *Diepsloot* case illustrates an important aspect of the role of social convictions and beliefs in the legal process. In the judgments of De Villiers J, McCreath J and Smalberger JA it is clear that the court found it difficult to determine the proper social context, the legal convictions of the community, against which the judgment should be given. The reason for this is obvious: the legal convictions of the community against which this judgment should be given is still unclear, unformed, in flux – it is continuously changing. In fact, Smalberger JA indicated that he was aware of the fact that his judgment itself was playing a role in establishing the social context for the adjudication of cases like this:

> "Significant developments took place in the Republic in 1991 with regard to the dismantling of the system of apartheid. Parliament passed laws repealing a wide range of racially discriminatory legislation dealing, *inter alia*, with the ownership and occupation of land. That year also saw a rapid increase in urbanisation with resultant squatting in urban areas . . . It is permissible to view and interpret the relevant provisions of the Act against the background of these developments which are sufficiently well-known for judicial cognisance to be taken of them."[103]

There is, in other words, a complicated process of influences and counter-influences at work between law reform, social and political change, and the legal convictions of the community, and it may be extremely difficult at any given stage to determine with any measure of certainty which of these is shaped by which.

In this regard the private law function of the fundamental rights which are guaranteed in chapter 3 of the Constitution of the Republic of South Africa Act 200 of 1993 is extremely interesting. This part of the Constitution may be seen as an effort to create social equilibrium and certainty via constitutionally institutionalised consensus. Uncertainty and fear of anarchy (or of change in general)

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the general statement of Neethling, Visser and Potgieter (fn 91 above) 43 ff, this approach casts the doctrine of subjective rights in a totally different light.

103 1994 3 SA 336 (A) 347D–E.

are supposed to be allayed by way of consensus about the instances and the ways in which unavoidable restrictions and infringements of existing rights may be rendered acceptable. Even the most superficial knowledge of the public constitutional discourse prior to and during the transition of April 1994 confirms that the expected reassuring and calming effect of the Constitution was important for its acceptability and legitimacy.

However, only three months after the elections it was already clear that the focus of the constitutional debate had shifted from creating and formulating consensus to the interpretation of the minutes of consensus, the Constitution. During the preliminary negotiations everybody's hope for the future was pinned on the successful outcome of social and political negotiations, but now everybody is placing their trust in a sensible interpretation of the Constitution. Far from being a product of social consensus, the Constitution begins to function as a major influence upon the social, legal and moral views of the community. The people elected to the constitutional court are suddenly much more important for our future survival than the possibility of political settlement. As in the case of property legends which rely upon a vague form of social consensus (such as the *boni mores*), it soon becomes clear that social consensus is never clear-cut, never comprehensive and, above all, never static. In fact, the very idea of legal norms based upon the legal convictions of the community is the product of a wish to make legal rules and institutions less static, more flexible and more dynamic, in reflecting changes in society. It always requires interpretation, and therefore always ends up knee-deep in the discourse of hermeneutics, which constitutes a property legend of its own.

PROPERTY BALANCED ON THE EDGE OF THE LEGAL ORDER

The focus and content of property theory is always closely linked to the form of property legend. In a largely metaphysical property legend, it is necessary for property theory to account for certain philosophical and cosmological debates; in a largely logical-scientific property legend, the theory of property is situated squarely within a seemingly abstract doctrinal and institutional logic; and in a property legend based largely upon the changing legal convictions of society, property theory is submerged in sociology and hermeneutics. As a result of the turns which the property legend has taken during this century, especially in countries where private property is protected constitutionally, property theory has more recently become inextricably involved in discourse and constitutional interpretation theory. In this regard it has become inevitable for the student of property theory to listen to stories from fields and topics that are traditionally foreign to private property law, such as critical legal studies, critical race theory, critical gender theory, deconstruction, post-structuralism, constitutionalism, new federalism and neo-pragmatism, to name a few of the most obvious examples.

One of the most interesting stories of our age is told by Stephen Schnably,[104] who warns against the dangers of under- and overestimating power. Power is

104 See 1993 *Stanford LR* (fn 75 above) 347–407.

underestimated when existing social and legal values and consensus about the continuation or interpretation of these values are taken on face value, thereby stabilising and cementing the deeply-embedded power relations that underpin them. By simply accepting existing social values or consensus about them we underestimate the basically conservatist and repressive effect of hidden power relations.[105] Power is overestimated if, once aware of them, we accept the existence and effects of deeply ingrained power structures and relations in society and in the law, without leaving or creating room for different, alternative or new ways of resisting the conservatism and stasis created by them.[106] In effect, Schnably's story is about the repressive and debilitating effects of hidden and camouflaged power structures in society and in the law, and about possibilities for resisting and undermining these powers. In a time of dramatic political reform and social transformation, nothing could be more unfortunate than the processes described and the dangers warned against by Schnably. In order to offer resistance to these dangers, the legal theorist who wishes to contribute to the transformation of South African society and law would, therefore, have to open her ears and her heart to this and similar stories about the powerful legends we live with. She would have to expand her theoretical horizons, and start looking for the critical points where these legends break down.

Contemporary critical property stories indicate that the repressive and negative effects of existing power structures can be resisted by subverting their false securities, uncovering their hidden weaknesses. This idea is often expressed in the statement that critical theory must concentrate upon the breaking points or fault lines of existing legends.[107] By focusing on the unusual, the marginal and the problematical, the critical theorist affords herself the opportunity to obtain a different, unusual, lateral perspective of the law, in which the fault lines, shortcomings and breakdowns of existing theory, existing learning and existing power structures become apparent. By working on these fault lines, the theorist can unravel existing

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105 375.

106 397.

107 Schlag "'Le hors de texte, c'est moi': the politics of form and the domestication of deconstruction" 1990 *Cardozo LR* 1669: "In American law, deconstruction must thus displace and subvert this relatively autonomous self and its rhetorical supports"; 1647: "Given that the rhetorical field in law is always already structured in a sedimented understanding of self and world, theory and practice, substance and form, serious and non-serious, the politics of deconstruction are to expose and exploit the fault lines in a manner that will subvert and displace our image of the political"; Schnably 1993 *Stanford LR* (fn 75 above) 375: "This heuristic prompts us to examine the tensions underlying a supposedly consensual value and to consider the power relations that were instrumental in creating it"; 397: "The second heuristic indicates that the tensions in apparent consensus that the first heuristic uncovers as a matter of theory are brought into the open as a matter of fact by actual struggle and conflict"; Radin and Michelman "Pragmatist and post-structuralist critical legal practice" 1993 *Univ Penn LR* 1037: "In the pragmatic moment of critical practice, one may understand the structural weakness of a target discourse not as its already fatal flaw, but as its working interface with surrounding cultural dispositions." Cf Michelman "Justification (and justifiability) of law in a contradictory world" in Pennock and Chapman (eds) *Justification: NOMOS XXVIII* (1986) 71.

legends, disclose their hidden assumptions and power structures, and undermine their false securities, thereby creating the possibility of freedom of choice in the form of dissenting, non-conforming decisions and views. Schlag warns that this critical approach to theory should not be reduced to just another instrument of rhetoric or just another scientific technique,[108] for that would mean the end of critical thinking. The point is, according to Schlag, to keep burrowing through the sediment of existing theory, to subject each facet of it to constant critical probing, to place all its weak spots and fault lines under constant pressure.[109]

It is often objected that this kind of critical approach is purely negative, destructive and pointless; that it destroys and rejects all constructive legal thought without replacing it with anything else; that it removes the structures, concepts and certainties which are necessary for productive theoretical activity. But it is possible to subject this criticism of criticism to its own dose of deconstruction. Beneath the surface of the accusation that criticism is purely negative lurks an unspoken but nevertheless very popular and widely accredited little legend, which presents theoretical activity as a productive and positive undertaking not unlike the construction business – it has to build things, even if they amount to nothing but sandcastles and houses of cards. Theoretical activity is viewed with disdain if it does not produce a positive product. However, in a different kind of story theoretical activity might be presented as an activity that resembles mining rather than construction, so that it can be destructive and constructive all at once. In such a story theory could scratch, drill, burrow, break and undermine all it wants and yet be considered exploitation in the positive sense.[110] This is the kind of story of theoretical activity that is told by Radin and Michelman[111] or Sarat and Kearns,[112] who suggest that the theoretical fault lines exploited by critical theory must be seen as the working face of the academic coalmine, where meaning is carved and scratched out. This story does not present the law as a more or less mechanical process by which hidden (but nevertheless existing) legal meaning is found or discovered, but rather as a process by which it is wrested (and thus created) from the very loci of conflict, strife and power-struggle which make it necessary.

In order to exploit the rich possibilities promised by this picture the legal theorist will have to tear herself loose from the comfortable and well-worn old

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108 Schlag 1990 *Cardozo LR* (fn 107 above) 1653.

109 1650 ff 1657 ff.

110 Afrikaans "ontginning".

111 1993 *Univ Penn LR* (fn 107) 1037.

112 "A journey through forgetting: toward a jurisprudence of violence" in Sarat and Kearns (eds) *The fate of law* (1991) 217. Cf the metaphor used by Hutchinson "Working the seam: truth, justice and the Foucault way" in *Dwelling on the threshold: critical essays on modern legal thought* (1988) ch 9 261. Unfortunately, Hutchinson, preferring to develop the Foucault aspect of the metaphor (where "working the seam" refers to needlework rather than coal mining) does not develop the coalmine-aspect of the metaphor very far. See further Tushnet "Following the rules laid down: a critique of interpretivism and neutral principles" 1983 *Harv LR* 781. See also Singer "The player and the cards: nihilism and legal theory" 1984 *Yale LJ* 1–70.

legends of her intellectual childhood, and come to terms with new stories with different morals and unknown endings. The old legends will not go away; we should never burn the books of our childhood, and perhaps a quick reread every now and again will serve its purpose, but we also have to read the stories of our time at least some of the time. To corrupt and exploit a wonderfully suggestive phrase of a Dutch colleague and friend of this Department, Gerrit van Maanen,[113] theoretical activity cannot always take place in the safety of established and generally accepted learning – at some stage it has to venture outside that and balance upon the very edge of the legal order, where existing and accepted theory and practice are subjected to maximum pressure and strain. On the edge is where the strain and the pressure will test the seams and the fissure lines and expose the weaknesses of theory. We cannot wallow in the comfortable certainties of existing theory, but at the same time we need not do a Gadarene dive over the edge – we must keep our balance there. We as academic lawyers still have to teach our students, and the judges still have to hand down judgments. Both require a certain amount of theoretical simplicity and clarity, but they also require a certain minimum of theoretical honesty. We cannot simply ignore or sweep aside existing theory or existing legal practice; we have to deal with it, but critical theory requires that we deal with it critically, creatively, on the edge of the legal order.

In order to get ourselves to the edge of the legal order and do our balancing trick there we need a different perspective of what legal theory is. We need to break the hypnotic spell of accepted formulae, generalisations, universalities and logical sequences, and look for cracks in accepted theory where we can start worrying at the surface of the coalface. We have to turn to different stories of the law, stories of the marginal and the trivial or unusual. Stories such as the *Diepsloot* case. A marginal case, by all accounts – a case which highlights quite an astonishing wealth of fissure lines, faults and breakdown points in South African property theory and practice. Tap on the applicants' version of this story, and a hairline crack appears when it becomes apparent that their resistance to the establishment of a less formal settlement is much more than a superficial effort to protect private property from nuisance – deeper down it is resistance to social and political change. Under the surface of what looks like a fairly normal neighbour law dispute there is evidence of the wish to maintain the *status quo*, to time-freeze property relations and distributions as they are. Prod at the three courts' versions of this story, and a light shower of crumbling flakes and dust is released in the judges' scramble for meaning and justification in what appears to be more or less contradictory judgments. There is no room for an appeal to a shared religious or metaphysical frame of reference, and therefore the various judgments seek comfort in a remarkably unappetising and unconvincing show of

113 Who is a professor in the Department of Private Law, Rijksuniversiteit Limburg, Maastricht, Netherlands. See Van Maanen "Balanceren op de grens van de rechtsorde" 1982 *Recht en Kritiek* 467.

confidence in the legend of abstract scientific private law reasoning,[114] or in a superficial display of liberal open-mindedness regarding a supposedly equally scientific public law reasoning which takes note of the changing *boni mores*,[115] while leaving the well-established legend of subjectivist private law thinking intact. And, more or less finally, peer at the ghost story that is never quite presented by the invisible yet dust-coated members of the squatter community continually hovering in the wings of this story, and then feel the hair at the back of your neck rise at the fleeting but uncomfortable thought of further, unseen cracks and fault lines somewhere above, ready to give under the immense weight of all those millions of tons of black pressure. Actually, this is a common and well-known story, one that was often told and more often pointedly not told in those gloomy days before the election, and even now, in the heady aftermath of the initial transition. But it is not a story which is often told as part of legal culture. We do not deal in ghost stories – after all, we are scientists.

We deal in legends, though, and in fables and in fairytales. We uphold the legend of the law as a neutral and abstract system of logical and coherent concepts and institutions which, when deftly manipulated by a professional, produces just and equitable results. We embroider upon the fable of a legal community which, when suitably prompted, can be delivered of flexible yet objectively trustworthy consensual legal convictions to fill in the gaps where legal science is still straining to keep up with social dynamics. And we proclaim the fairytale of a lone judge who dispenses justice objectively with the broadsword of neutral principles and mechanical interpretivism, periodically and unquestioningly sharpened on the grindstone of a handily positioned interpretive community.[116] And the ghost stories and the horror stories about all those invisible cracks and the constant pressure upon them? We try not to think about those. Not too often, anyway.

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114 Per De Villiers J in the first decision, see 1993 1 SA 577 (T). This judgment is an example of a supposedly abstract and neutral or mechanical application of the syllogism of subjective rights: Individual property rights are inviolate and may be infringed only if so provided by law; a law providing for such infringement would make provision for suitable compensation; the law in question makes no provision for compensation; therefore, infringement upon individual rights could not have been foreseen and is not justified by that law.

115 Per McCreath J in the second judgment, see 1993 3 SA 49 (T), and per Smalberger JA in the decision of the Appellate Division, see 1994 3 SA 336 (A). In the former judgment the court makes heavy weather of the question whether the decision should be based upon the private law doctrine of nuisance or the public law doctrine of statutory authority. In the final judgment the court sets out a strictly legalistic argument based upon statutory authority, then rejects this argument for being too legalistic, and finally settles for a judgment based upon a no less legalistic analysis of the powers of the administrator in terms of what is argued to have been the intention of the legislator by necessary implication.

116 See in this regard the poignant remarks of Schlag "Fish v Zapp: the case of the relatively autonomous self" 1987 *Georgetown LJ* 37.

Deliktuele aanspreeklikheid weens nadeel deur onbekende lede van 'n groep toegebring I: Probleemstelling, die regsvergelykende metode, sekere gebruikte begrippe en die menings van Suid-Afrikaanse skrywers*

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SUMMARY

Delictual liability for harm brought about by unknown members of a group

The topic will be explored in four parts. In this article the question to be studied is set out, the applicability of the comparative method and the way in which it should be employed explored, certain terms explained and the views of South African authors on the matter researched. In the second article the probable nature of and requirements for the delictual liability of a group member where harm was occasioned by someone else in the group, are examined. This entails a discussion of concepts such as tortfeasorship and causality in the Anglo-American and German legal systems. The third article covers the position in Switzerland, and explains the new approach recently adopted in the Netherlands. In the fourth article the question whether the proposed delictual liability of a group member will not unduly inhibit people in exercising their fundamental right to express themselves and to demonstrate, is addressed. In this context the influence of violence occurring in the course of a demonstration, and the role that the imposition of delictual liability could play relative to other available remedies, is commented upon in the light of experience gained elsewhere. Some conclusions and proposals are also made there.

"Group" is used here to indicate everybody involved in the activity, regardless of the party with which persons may have aligned themselves.

The matter in hand concerns but one example of the vexed question of multiple causation. Matters are further complicated by the proven potential of mass demonstrations to lead to violence and harm. Approaching the comparative research from an angle which takes cognisance of the teachings of the functional school, but which also takes into account relevant extra-juridical perspectives, opens up many more possibilities for discovering the similarities and differences between legal systems with a view to reaching a useful synthesis in the end.

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* Die finansiële en ander ondersteuning wat verleen is deur die Sentrum vir Wetenskapsontwikkeling, Getrouheidsfonds vir Prokureurs en PU vir CHO het meegehelp dat hierdie ondersoek onderneem kon word. Elke bydrae word met dank erken. Standpunte hierin ingeneem moet uiteraard slegs aan die navorser toegeskryf word.

South African authors agree that the *conditio sine qua non* doctrine fails in cases of multiple causation. How this should be remedied, however, is problematic. Viewpoints vary from stout defence of the traditional doctrine, to cosmetic tinkering with it, or the creation of a "joint deed/action" doctrine, to the outright rejection of the traditional doctrine, replacing it with an approach based on common sense. There is a clear need for a strong proposal to give new direction to the debate and to facilitate the solution of some of the practical problems arising from group situations causing harm.

1 INLEIDING

1 1 'n Ondersoek in vier dele

Baie min koerante, tydskrifte, nuusbulletins of gesprekke in Suid-Afrika handel nie tans onder andere oor die gewelddadige aard en skadestigtende gevolge van die een of ander vorm van massa-optrede nie. Die wye voorkoms daarvan mag nie ongemerk aan die skadevergoedingsreg verbygaan nie.[1] Hierdie bydrae behels die eerste deel van die verslag oor 'n ondersoek na die betrokke terrein. Dit handel oor 'n verskynsel wat byna oral al meer van belang is. Oorhoofs word dit toenemend as die probleem van "multi-kousale nadeel"[2] aangedui. As sodanig kom dit op verskillende terreine voor,[3] waarvan hierin net een aangepak word.[4] Voorlopig kan gesê word dat dit hier uiteindelik gaan oor gevalle waar

1 As 'n eerste hipotese vir die ondersoek kan gesê word dat daar in beginsel deur die skadevergoedingsreg gevolge geheg behoort te word aan gevalle soos dié wat die onderwerp van hierdie ondersoek uitmaak.

2 Hierin word nie onderskei tussen vermoënskade en nie-vermoënskade nie (Switserse *BGE* (*Bundesgerichtsentscheidungen*) 57 II 417, 420), en word albei as vorme van nadeel beskou waaraan verskillende regsgevolge geknoop mag word. Vir die Suid-Afrikaanse reg word volstaan met die vanselfsprekende stelling dat in elke geval aan die normale vereistes vir die vestiging van aanspreeklikheid voldoen moet word alvorens 'n verbintenis tot die betaling van skadevergoeding, genoegdoening of kompensasie tot stand sal kom. Sover moontlik word dus hierin na *nadeel* ("harm") verwys.

3 Benewens die kwessie van die vergoeding van nadeel veroorsaak tydens demonstrasies en boikotte, gebouebesettings en deur toeskouerwangedrag, bv ook in verband met privaatregtelike aanspreeklikheid ingevolge die milieureg (Pellon *Privatrechtliche Haftung für Umweltschäden und Versicherung* (1993)); produkte-aanspreeklikheid (Schweighauser *Hersteller, Mehrzahl von Ersatzpflichtigen und Regress im Produktehaftungsrecht* (doktorale proefskrif StGallen 1993)) in die algemeen, en besonderlik ook aanspreeklikheid weens nadeel veroorsaak deur die inname van voorgeskrewe farmaseutiese stowwe met nadelige nawerkinge (Bodewig "Probleme alternativer Kausalität bei Massenschäden" 1985 *AcP* 505–508; Pfister *Die Haftung des Herstellers für Nebenwirkungen von Arzneimitteln nach amerikanischem Recht* (1989); Fernhout, Bregonj en Otto "Alternatieve causaliteit en DES-dochters" 1989 *NJB* 1376–1378; Vogel *Die Produkthaftung des Arzneimittelherstellers nach schweizerischem und deutschem Recht, mit zusätzlicher Berücksichtigung der EG-Produkthaftungs-Richtlinie und weiterer Rechtsordnungen* (1991); *Sindell v Abbott Laboratories; Rogers v Rexall Drug Company* 26 Cal 3d 588, 163 Cal Rprtr 132, 607 P 2d 924, 2 ALR 4th 1061, 449 US 912 (1980), die beroemde DES (diethylstilbestrol)-saak – verskuiwing van bewyslas ten opsigte van kousaliteit na die verweerders/aanspreeklikheid volgens markaandeel). Ook gevalle van bydraende nalatigheid word as 'n verskyningsvorm van multi-kousale nadeel aangemerk (bv deur Boberg *The law of delict: vol 1 Aquillian liability* (1984) 386 404(e) ev).

4 Na die vergoeding van nadeel aangerig deur gebouebesetting, optrede van stakende werkers en toeskouerwangedrag word hierin net verwys. Dieselfde grondprobleem doen hom in elk geval daar voor as in die gevalle wat hierin ondersoek word (Oftinger 1968 64

vervolg op volgende bladsy

nadeel aangerig word deur mense wat deel uitmaak van 'n demonstrasie sonder dat vasgestel kan word wie uit die groep die nadeel daadwerklik toegebring het.

Aspekte van die problematiek van aanspreeklikheid vir nadeel in groepsverband toegebring, geniet toegespitsde aandag van werkgewers en die howe in sommige lande – en byna oral van skrywers. Ten spyte daarvan heers groot onsekerheid oor die grondslag van en vereistes vir sodanige aanspreeklikheid, veral as dit toegepas word op verskynsels soos demonstrasies. Die tradisionele benaderingswyses, begrippe en tegnieke van die skadevergoedingsreg blyk veelal ontoereikend te wees vir die taak,[5] en die vraag is hoe dit dan sinvol gehanteer kan word. Enige poging om hierop 'n antwoord te vind, moet, benewens die vaktegniese aspekte, ook die beklemtoning van die belang van die fundamentele reg op vrye meningsuiting en demonstrasie terdeë verdiskonteer.[6]

Die eerste deel van die ondersoek gaan daaroor om die probleem te omlyn, uit te maak of en hoe die regsvergelykende metode aangewend kan word om die ondersoek te bevorder,[7] om sekere begrippe te omskryf en die menings van Suid-Afrikaanse skrywers daaroor aan te teken. Vir sover dit met die oog op die latere bespreking van die vereistes vir sodanige aanspreeklikheid nodig is, moet enkele aspekte van die sosiologiese verskynsel van groepsvorming aangestip word.[8]

Die tweede been van die ondersoek fokus op die vraag waarmee 'n mens ingevolge die reg aangaande die onregmatige daad eintlik te make het waar een of meer ongeïdentifiseerde persone, wat deel is van 'n groep, nadeel onregmatig aan 'n ander toebring; die benadeelde(s) kan uiteraard self deel van die groep, of 'n buitestander(s) wees. Die vraag is op watter grondslag iemand anders, wat wel deel van die groep was maar nie die nadeel berokken het nie, vir daardie nadeel aanspreeklik gehou kan word.[9] Verder word gepoog om die vereistes vir sodanige aanspreeklikstelling te gee. Reëls in verband met die onderlinge verhaal tussen groepslede wat aanspreeklik gehou word vir nadeel wat in groepsverband onregmatig veroorsaak is, word slegs genoem waar die betoog dit nodig maak. Hier word regsvergelykend kennis geneem van wat ten opsigte van die handelings- en kousaliteitsvereistes in die Anglo-Amerikaanse en Duitse reg ontwikkel het.

In die derde aflewering word oorweeg of ons iets uit die posisie in die Switserse reg kan leer, en word die onlangse nuwe rigting wat deur die Nederlandse wetgewer hieroor ingeslaan is, uiteengesit.

SJZ 228: gebouebesetting; *BGE* 57 II 417 419–420: stakende werkers rand nie-stakendes aan; sporttoeskouers), hoewel veral deur statutêre ingrype besondere reëls op die meeste van daardie gebiede kan bestaan. Sodanige reëls word nie hierin bespreek nie.

5 Hierdie kan as 'n tweede hipotese vir die ondersoek aangemerk word.

6 Hierdie kan as 'n derde hipotese vir die ondersoek aangemerk word.

7 As 'n vierde hipotese vir die ondersoek kan aangemerk word dat die aanwending van die regsvergelykende metode hier tot verrykende resultate vir die Suid-Afrikaanse reg kan lei.

8 Voorlopig word hier net daarop gewys dat aan "groep" in hierdie verband 'n wyer as gewoonlike betekenis toegeken word. Dit word in par 3 5 verduidelik.

9 As 'n vyfde hipotese vir die ondersoek kan gesê word dat iemand wat deel was of deel gebly het van 'n groep waaruit iemand anders onregmatig nadeel teweeggebring het, in gepaste gevalle vir sodanige nadeel deliktueel aanspreeklik gehou behoort te kan word.

In die vierde gedeelte van die verslag word ingegaan op die vraag na die toepassing op en betekenis van die onderhawige aanspreeklikheidsvorm vir demonstrasies.[10] In daardie gedeelte kom die vraag na die verband tussen aanspreeklikstelling weens onregmatige dade in groepsverband gepleeg en beskerming van die fundamentele reg op meningsuiting deur demonstrasie aan die orde. Voorts word oorweeg watter rol sodanige aanspreeklikstelling moontlik relatief tot ander regsmiddele in verband met die hantering van die uitwerking van gewelddadige optrede tydens demonstrasies kan speel. Sekere gevolgtrekkings en aanbevelings word ook gemaak.

Hoewel die hele ondersoek regsvergelykend aangepak word, geskied dit steeds in die lig van wat in die Suid-Afrikaanse omstandighede moontlik en wenslik mag wees.

1 2 Breë probleemstelling

Die vrae waaroor dit hier handel, is tipies van die samelewing in die laaste dekades van die twintigste eeu, en moet in daardie lig benader en opgelos word.[11] Dat die vraag na sodanige verfyning en afgrensing van die aanspreeklikheidsreëls altyd ,só, amper by nabaat, aandag trek, kan miskien toegeskryf word aan die aard van die problematiek teen die agtergrond van die tradisionele *casum sentit dominus*-benadering – in elk geval kan dit nie sonder meer as 'n teken van werklikheidsvreemdheid of taakversuim aan die kant van privaatregslui aangemerk word nie. Dit is waarskynlik eerder die geval dat die onhoudbaarheid van oordrewe beklemtoning van die alles-of-niks-uitwerking van daardie benadering tot die afwenteling van nadeel, wat swaar op die mens- en wêreldbeskouings van die 19de eeu steun, meer algemeen erken word. Ernstiger pogings word dus aangewend om oplossings te soek vir situasies wat dalk in die verlede uit 'n dogmatiese hoek as anomalieë afgemaak is. Intussen het die erkenning van aanspreeklikheid in gevalle wat nie noodwendig logies verklaarbaar of histories of sistematies konsekwent is nie, omdat dit óf nie sonder meer onder die tradisionele subjektiewe regte-leer tuisgebring kan word nie, óf 'n vraagteken agter die gewaande noodwendige rasionaliteit van die geykte vereistes vir aanspreeklikheid geplaas het, groot veld gewen. Die Verligting, met sy beklemtoning van rasionele denkmodelle het immers grootliks teleurgestel en verbygegaan; daar moet nou opnuut erken word dat ook die skadevergoedingsreg met die pluraliteit van die betrokke stuk werklikheid rekening moet hou.

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10 Gepubliseer te word as 'n afsonderlike bydrae.

11 Die 19de eeu het sy eie uitdagings vir die skadevergoedingsreg gebied, veral tov aanspreeklikheid vir nadeel veroorsaak deur die spoor- en motorverkeer, steengroewe, myne, plofstowwe, fabrieke en elektrisiteit. Daarop is geantwoord deur met die skuldvereiste weg te doen of dit af te water en strikte aanspreeklikheid in te voer. Hiermee het 'n verfyning van die destyds geldende skadevergoedingsreg ingetree wat meteen ook tot verskerpte aanspreeklikheid op die betrokke terreine gelei het (só skryf Hedemann in 1910 in Hedemann *Die Fortschritte des Zivilrechts im XIX Jahrhundert, Erster Teil: Die Neuordnung des Verkehrslebens* (1910) 82–98).

Die negentiende eeu is ook op 'n ander manier vir die onderwerp van belang. Destyds, soos nou, het dit ook gehandel oor menslike aktiwiteite wat, hoewel dit 'n erkende potensiaal het om nadeel te veroorsaak, desondanks as gewens of toelaatbaar aangemerk is, met dien verstande dat dit tot aanspreeklikheid kon lei in gevalle wat nie aan die andersins geldende vereistes daarvoor sou voldoen het nie. Destyds was vrae rakende aanspreeklikheid vir nadeel wat deur die bedryf van treine, motorvoertuie en vliegtuie teweeggebring is met verwysing na die fundamentele regte op ondernemings- en bewegingsvryheid aan die orde.[12] Nou moet besin word oor die noodsaaklike verfyning van die reëls rakende 'n geval van aanspreeklikheid vir nadeel waarvan die oorsaak nie bewys kan word nie, en moet die betrokke fundamentele reg(-te) terdeë in ag geneem word. In 'n sekere sin het die vraagstelling dus dieselfde gebly, naamlik: hoe ver, gesien teen die agtergrond van die betrokke fundamentele regte, behoort aanspreeklikheid te strek waar nadeel uit sekere wenslike dog gevaarskeppende aktiwiteite ontstaan?

2 DIE AANWENDBAARHEID VAN DIE REGSVERGELYKENDE METODE OP DIE ONDERWERP

2 1 Inleiding

Die taak wat hier aangepak word, stel hoë eise aan enige ondersoekmetode, soos reeds blyk uit die volgende onheilspellende woorde van Prosser:

> "The terms 'joint tort' and 'joint tortfeasors' have been surrounded by no little uncertainty and confusion[13] . . . An examination of the multitude of cases in which they are to be found leads to the conclusion that they have meant very different things to different courts, and often to the same court, and that much of the existing confusion is due to a failure to distinguish the different senses in which the terms are used, which often has had an unfortunate effect on the substance of the law."[14]

Gesien die verreikende verskille wat op hierdie gebied tussen regsfamilies en regstelsels binne dieselfde regsfamilie en selfs binne een regstelsel voorkom, is die uitdaging dus groot. Die aanwendbaarheid van die regsvergelykende metode word egter nie verhinder deur die feit dat die verskille wat op die betrokke terrein bestaan groot is of ooreenkomste slegs met moeite vasgestel kan word nie.[15] Dit gaan immers by die regsvergelykende metode oor 'n wetenskaplike metode wat daarop gerig is om in die lig van die ooreenkomste en verskille tussen regstelsels oor 'n onderwerp tot 'n sintese te kom, ten einde sinvolle teorievorming, aanwendbare gevolgtrekkings en kreatiewe probleemoplossing te

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12 Só neem Hedemann 83 uitdruklik standpunt in ivm die afstanddoening van die skuldbeginsel in Oostenryk.

13 Hierin sal blyk dat dit nie noodwendig tot groter helderheid lei as die onderhawige probleem in terme van gesamentlike of mededaderskap uitgedruk word nie.

14 *Prosser and Keeton on the law of torts* (5 uitg Keeton) (1984) 322; Harper, Fleming en Gray *The law of torts* vol 3 (1986), met 1991 *Cumulative supplement No 2* III 1; Van Oosten "Oorsaaklikheid in die Suid-Afrikaanse strafreg – 'n prinsipiële ondersoek" 1982 *De Jure* 4–33 25 vn 7 kla ook oor die begripsverwarring wat voorkom tussen dinge soos "gesamentlike", "alternatiewe" en "kumulatiewe kousaliteit".

15 Venter *et al Regsnavorsing: metode en publikasie* (1990) 221–222.

bereik.[16] By die keuse van die betrokke regstelsels en die wyse waarop daaroor verslag gedoen word, moet die diepgaande verskille nietemin terdeë in gedagte gehou word.

2 2 Vergelykbaarheid en motivering van die keuse van regstelsels vir die vergelyking

2 2 1 Die keuse van die element(-e) wat vergelyk gaan word

'n Moontlike vertrekpunt vir die beantwoording van die vergelykbaarheidsvraag is om die juridiese boustene of elemente te identifiseer wat die praktiese situasies en terme uitmaak wat gebruik kan word om die moontlik toepaslike regsbeginsels en regsbeleid in die te vergeleke regstelsels mee te vind en te beskryf. Regsfeite,[17] regsreëls, regstegnieke en regsfigure kan almal as sodanige moontlike elemente beskou word.[18] Indien verder sorg gedra word dat die element waarmee gewerk word as 'n samehangende bundel probleme van 'n buitejuridiese (byvoorbeeld maatskaplike, politieke, ekonomiese of kriminologiese) of 'n vakfilosofiese aard gesien word, kan voortgegaan word om die element te omlyn aan die hand waarvan die vergelykbaarheidsvraag beantwoord moet word en die moontlik betrokke regstelsels gekies kan word.

Die probleem van die grondslag en grense van aanspreeklikheid vir nadeel wat ontstaan uit groepsgedrag sonder dat die veroorsaker daarvan bepaal kan word, is, as dit as element uitgedruk en geanaliseer word, soos pas gesê is, een wat baie suksesvol regsvergelykend bestudeer kan word. Die element wat sodoende omlyn is, moet sover moontlik geanaliseer word deur soveel vrae moontlik in verband daarmee te formuleer. Hierdie vrae stel die navorser dan in staat om die verskillende regskulture as 't ware in hulle "natuurlike staat" te bestudeer ten einde die ooreenkomste en verskille tussen hulle vas te stel.

Dit behoef geen verdere betoog nie dat die element, soos dit hierbo omskryf is, in die meeste regskulture,[19] indien nie in almal nie, aangetref sal word. Dit is myns insiens belangrik om by die toepassing van die regsvergelykende metode nie die stap wat pas uitgevoer is te beperk tot 'n soektog na regsreëls met dieselfde funksie in die verskillende regstelsels nie. Dit moet dus wyer as die blote funksie van regsreëls gaan; dit sluit ook die hele regskultuur in, met die houdings en ander (ook buitejuridiese) oorwegings wat daaraan 'n bepaalde styl gee. Daar kan dus wel na regsreëls met dieselfde funksie gevra word maar dit moet nie die enigste aspek wees wat as bousteen vir die regsvergelykende ondersoek dien nie. Die voorkoms en rol van strafregtelike verwysings in die hantering van gevalle van multikousale nadeel kan illustreer waar die voorgestelde benadering beter moontlikhede bied as die funksionele benadering.

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16 *Idem* 213.
17 Dws handelinge, toestande of gebeurtenisse.
18 Venter *et al* 225.
19 *Idem* 220.

2 2 2 Die strafreg as relevante ondersoekveld op grond van die funksionele benadering

'n Opvallende gemeenskaplike funksionele faktor tussen die verskillende regsfamilies is in die onderhawige verband daarin geleë dat in elkeen van hulle, in die soeke na aanknopingspunte vir die hantering van die probleemgebied, oorspronklik by die strafreg aangeklop is of steeds word. Só word in die Romeins-Germaanse én Anglo-Amerikaanse regsfamilies na aspekte van die misdaad roof verwys,[20] en word in die Anglo-Amerikaanse regsfamilie na "conspiracy"[21] en na die hantering van "principals in the first and second degree"[22] terugverwys. Hierdie benadering kan seker daaruit voortspruit dat groepsgedrag waaruit nadeel ontstaan meestal in die eerste plek tot strafregtelike ingrepe lei, en dat by die hantering van die privaatregtelike vrae daarom by strafregtelike denkbeelde aanknoping gesoek word. Daar kom egter ook ander publiekregtelike kwessies aan die orde (byvoorbeeld van staats- en administratiefregtelike aard) wat teen só 'n simplistiese verklaring spreek en die indruk laat dat die raakpunte dieper gesoek moet word.

Die moontlike gronde vir die oënskynlike relevansie van aspekte van die strafreg vir die huidige hantering van die vergoeding van multikousale nadeel word nie hierin spesifiek ondersoek nie. Van Oosten[23] lê klem op die onderskeid tussen die straf- en deliktereg. Enkele aspekte daarvan kan soos volg saamgevat en uit die oogpunt van ons ondersoek van kommentaar voorsien word:

- Vir die deliktereg is daderskap (afsonderlike, gesamentlike of mededaderskap) deurslaggewend; in die strafreg bied medepligtigheid en begunstiging ruimer moontlikhede.
- Vir die deliktereg gaan dit oor die voltooide daad; in die strafreg bied poging, uitlokking en sameswering ruimer moontlikhede.
- In die deliktereg gaan dit altyd oor gevolgsaanspreeklikheid; in die strafreg kom sowel handelings- as gevolgsaanspreeklikheid voor – eweneens bied dit ruimer moontlikhede.
- Vir die deliktereg is skuld nie altyd 'n vereiste nie; vir die strafreg word skuld in die reël altyd vereis. Hier is die strafreg meer beperkend as die deliktereg.

Strafregtelike stappe is in elk geval een van die voor-die-hand-liggende maniere waarop die reg kan reageer wanneer die situasie wat ons ondersoek, hom voorgedoen het of dreig om hom voor te doen. Dit mag ons egter nie in ons ondersoek van die vreemde stelsels tot die strafreg beperk nét omdat die funksionele benadering ons in daardie rigting sou lei nie. Waar die funksionele benadering van meet af aan die ondersoek op die strafregtelike raakpunte sou toespits, maak die voorgestelde benadering dit moontlik om – bo en behalwe die betrokke strafregreëls – na alle ander relevante aspekte ook te kyk. Hierin word

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20 Bv *BGE* 47 II 417, 420; *Sir John Heydon's* Case (1613) 77 ER 1150.
21 Bv Prosser en Keeton 324.
22 Bv Fleming *The law of torts* (1992) 256.
23 Van Oosten 1982 *De Jure* 4–33.

nie verder iets oor die moontlik toepaslike strafregsreëls en die moontlike effektiwiteit daarvan gesê nie.

Dit kom dienlik voor om die praktiese situasie wat hom in die onderhawige gevalle voordoen as die te ondersoeke element met die oog op 'n sinvolle vergelyking van die verskillende regstelsels aan te merk. *Die element is dan die feit dat iemand vermoënskade of persoonlikheidsnadeel gely het en 'n regsmiddel wil hê, maar nie kan aantoon wie uit 'n groep mense die nadeel veroorsaak het nie.* Aan die hand van hierdie element kan dan 'n aantal vrae gestel word waarvolgens die ondersoek gestruktureer kan word. Voorbeelde daarvan is: Word regsgevolge geheg aan so 'n voorval? Watter soort gevolge? Wat is die grondslag of verklaring vir die heg van skadevergoedingsregtelike gevolge aan so 'n geval? Wie kan daarby betrek word? Wat moet bewys word? Aan die hand van sodanige vrae kan die verskillende regstelsels dan onderskei word.

2 3 Die verdere keuse van 'n metodologiese benaderingswyse tot die ondersoekmateriaal

In die algemeen is dit by hierdie ondersoek nie maklik om uit te maak of 'n induktiewe dan wel 'n deduktiewe benaderingswyse beter kan wees nie. Enersyds kan geredeneer word dat die onderwerp makliker toeganklik gemaak kan word as 'n dogmaties-sistematiese en induktiewe (veralgemenend kan ons sê na aanleiding van die Vastelandse tradisie van regsnavorsing), eerder as 'n kasuïstiese en deduktiewe (veralgemenend kan ons sê na aanleiding van die Anglo-Amerikaanse tradisie van regsnavorsing) benaderingswyse gevolg sou word. Andersyds bring die aanvanklike konfrontasie met feitestelle nuanses na vore wat nie so regstreeks uit die meer dogmatiese styl blyk nie. Aangesien daar myns insiens nie so iets soos 'n alleen-korrekte metode bestaan nie en die regsvergelykende metode ons tot 'n sintese teen die agtergrond van die vasgestelde ooreenkomste en verskille tussen regstelsels moet voer,[24] gaan gepoog word om voordeel uit elke metode te put. Om die betoog te vergemaklik, en ook omdat oor die aard van die onderhawige aanspreeklikheidsvorm klaarblyklik nog nie in die Anglo-Amerikaanse regsfamilie veel gesê is nie, begin die regsvergelykende uiteensetting deur die Duitse,[25] Nederlandse[26] en Switserse[27] posisies daaroor weer te gee. Tussendeur kom die Anglo-Amerikaanse en Suid-Afrikaanse posisies aan die orde.

2 4 Die invloed van die styl van 'n regstelsel ten opsigte van aanspreeklikheid weens nadeel op die behoefte aan aanspreeklikstelling weens onregmatige dade in groepsverband gepleeg

Vooraf moet daarop gewys word dat die nodigheid vir 'n reël ten opsigte van die onderhawige gevalle hoofsaaklik daardeur bepaal word of 'n algemene aanspreeklikheidsbeginsel ten opsigte van onregmatig veroorsaakte nadeel in die

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24 Venter *et al* 235–236.
25 Nav §830 *BGB*.
26 Nav a 166 *Nieuw BW*.
27 Nav a 50 *OR*.

betrokke regstelsel bestaan of nie. Waar dit wél bestaan, kan die onderhawige grondvraag soos volg gestel word: Kan iemand wat deel van 'n groep was sélf, bloot deur sy deelwees of deelbly van die groep, in bepaalde omstandighede aanspreeklikheid weens onregmatige daad oploop? Waar geen algemene aanspreeklikheidsbeginsel geld nie sal die vraag eerder wees of daar 'n spesiale reël bestaan om sodanige verweerders aanspreeklik te stel vir nadeel wat onregmatig deur 'n ander lid van die groep toegebring is.[28] Die voor-die-hand-liggende verskil tussen hierdie benaderingswyses lyk onoorbrugbaar: In die eerste geval gaan dit oor die vraag of die aangesprokene self 'n onregmatige daad gepleeg het[29] en in die tweede oor die omstandighede waarin iemand weens 'n onregmatige daad gepleeg deur 'n ander aanspreeklik gestel kan word.[30] Miskien juis vanweë die minder dogmatiese styl wat laasgenoemde benaderingswyse kenmerk, is dit my kontensie dat hierdie benaderingsverskil weinig praktiese implikasies het vir dit wat ons ondersoek. Die verskil in benadering moet egter terdeë in gedagte gehou word anders word probleme ondervind om die vergelykingsproses tot by 'n sintese gevoer te kry.

Hoe dit ook al mag wees, waar skrywers oor die Suid-Afrikaanse reg insake die onregmatige daad tereg klem daarop plaas dat ons reg wél van 'n algemene aanspreeklikheidsbeginsel uitgaan,[31] en hulle siening met verwysings uit die regspraak gestaaf kan word,[32] kan dus eintlik verwag word dat min teenstand ondervind sal word om aanspreeklikheid in die onderhawige gevalle binne die Suid-Afrikaanse deliktereg tuis te bring. Hierdie ondersoek het dan onder andere ten doel om vas te stel wat die huidige situasie met betrekking tot sodanige aanspreeklikstelling in ons reg is, en, indien gewens, hoe dit moontlik verbeter kan word.

Dit gaan hierin, uit een oogpunt beskou, oor die verligting van die posisie van 'n eiser in sekere gevalle waar dit dan nie vir hom nodig is om te bewys wie sy nadeel veroorsaak het nie. Daar bestaan in elke regstelsel talle voorbeelde van gevalle waar die dader en die aanspreeklikgestelde verskillende persone is, en die eiser se bewyslas wesenlik verlig word. Hier kan aan middellike aanspreeklikheidsgevalle gedink word waar dit voldoende is om te bewys dat 'n werknemer van die aangesprokene, ongeag watter spesifieke een, die nadeel aangerig het;[33] of in ander gevalle, dat 'n dier van die aangesprokene die nadeel aangerig

28 Nav *Toelichting: Ontwerp voor een Nieuw Burgerlijk Wetboek 3de Gedeelte Boek 6* 660.

29 Wat meer met die Romeins-Germaanse regstelsels se benadering ooreenstem.

30 Wat meer met die benadering in die Anglo-Amerikaanse regstelsels ooreenstem.

31 Sien bv Corbett "Aspects of the role of policy in the evolution of our common law" 1987 *SALJ* 52–69; Van Aswegen "Policy considerations in the law of delict" 1993 *THRHR* 171–195.

32 Soos *Blower v Van Noorden* 1909 TS 890 905; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T); *Minister van Polisie v Ewels* 1975 3 SA 590 (A); *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A).

33 Nav die feit dat die kousale verband een tussen die riskante diensaktiwiteit en die nadelige gevolge is, soos Scott *Middellike aanspreeklikheid in die Suid-Afrikaanse reg* (1983) 48 aantoon.

het, ongeag watter een; ensovoorts.[34] Daar kan ook statutêre gevalle bestaan.[35] Verder val hieronder die spesifieke statutêre bepalings wat die onderwerp van ons regsvergelykende ondersoek raak.[36]

Die feit dat hierdie kwessie gesien kan word uit die oogpunt van 'n verligting van die eiser se posisie omdat hy dan nie die identiteit van die skadeveroorsaker hoef te bewys nie, het waarskynlik daartoe bygedra dat hierdie gevalle in die Anglo-Amerikaanse reg geklassifiseer word as gevalle waar iemand vir die onregmatige dade van 'n ander aanspreeklik gehou word. Dit is myns insiens egter 'n té beperkte kriterium, en dit moet vir doeleindes van hierdie ondersoek uiteindelik liewer vervang word deur die wyer siening ingevolge waarvan dit hier handel oor *die vraag van die afwenteling van multikousale nadeel in 'n fundamentele regte-bedeling op 'n demonstrant wat nie self nadeel aangerig het nie weens deelname aan so 'n groepsaktiwiteit.*

3 BEGRIPSBEPALINGS

Ten einde 'n standpunt oor die moontlike grondslag en vereistes vir aanspreeklikheid in die onderhawige gevalle te kan aanbied, is dit belangrik om eers oor 'n aantal begrippe stelling in te neem gesien die grootskaalse verwarring wat onderdele van hierdie terrein kenmerk. Die volgende begrippe is van belang:

3 1 Dader

"Dader" word gebruik vir die anonieme, nie-aangesproke pleger van 'n onregmatige daad in groepsverband, wat (of wie se bydrae tot die benadeling) weens die anonimiteit wat die groepsbetrokkenheid gebied het, onbekend gebly het. Dit kan op 'n natuurlike of 'n regspersoon, handelende deur sy organe, dui.

3 2 Aangesprokene

Daarmee word iemand bedoel wat aangespreek word vir skadevergoeding weens nadeel wat onregmatig aangerig is deur iemand anders uit 'n groep (die dader, soos hierbo beskryf), omdat die aangesprokene in die omstandighede deel was of gebly het van die groep, sonder dat hy self die nadeel aangerig het of die dader daartoe aangestig of daarmee gehelp het, of dit namens hom deur 'n verteenwoordiger gedoen is of hy daarvoor middellik aanspreeklik is. Dit kan op 'n natuurlike of 'n regspersoon, handelende deur sy organe, dui.

3 3 Aanspreeklikheid weens onregmatige dade in groepsverband gepleeg

Hoewel in hierdie verband dikwels na "groepsaanspreeklikheid" en "groepsdelikte" verwys word, is dit eintlik verkeerd. Dit gaan eerder daaroor dat die

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34 Nav Quendoz *Modell einer Haftung bei alternativer Kausalität in Zürcher Studien zum Privatrecht* Nr 85 (1991) 16.

35 Soos ingevolge die Switserse Strassenverkehrsgesetz (1958) 76 I (tref-en-trap slagoffers word uit motorvoertuigversekeringsfonds vergoed), of Kernenergiehaftpflichtgesetz (1983) 16 I(a), ingevolge waarvan vergoeding moet geskied al kan die aanspreeklike nie bepaal word nie (Quendoz 17).

36 Nl §830 *BGB*, a 50 *OR* en a 166 *Nieuw BW*.

aangesprokene 'n onregmatige daad gepleeg het wat daarin bestaan dat hy deel was van 'n groepsaktiwiteit in omstandighede toe dit redelikerwys voorsienbaar was dat sy deelwees of deelbly van die groep die kans op die intrede van nadeel deur die pleeg van 'n onregmatige daad deur iemand anders uit die groep in die omstandighede sodanig verhoog het dat hy hom van deelname of verdere deelname aan die groepsaktiwiteit moes onttrek het, en hy dit nie gedoen het nie. Dit gaan dus oor die vraag of die aangesprokene weens sy eie onregmatige daad aanspreeklik gehou kan word.

Veral as gedink word aan groepe sonder regspersoonlikheid is dit verder duidelik dat iets soos 'n "groepsdelik" nie bestaanbaar is nie.[37] Hieruit moet myns insiens nie afgelei word dat die verskynsel waaroor hierdie ondersoek handel hom nie kan voordoen waar 'n groep of 'n deel of dele daarvan wel oor regspersoonlikheid (hetsy gemeenregtelik of statutêr) beskik nie. Al belang wat die vraag van regspersoonlikheid dan sou hê, is om 'n voor-die-hand-liggende verdere, potensieel kapitaalkragtiger verweerder te identifiseer, byvoorbeeld indien 'n lid van die regspersoon 'n onregmatige daad sou pleeg in omstandighede wat vir die regspersoon regstreekse of middellike aanspreeklikheid kan meebring. Vir die vraag wanneer iemand wat deel uitgemaak het van 'n groepsaktiwiteit terwyl 'n ongeïdentifiseerde persoon/persone uit die groep onregmatig nadeel aangerig het, persoonlik vir sodanige nadeel aanspreeklik gehou kan word, kan die kwessie van regspersoonlikheid van die groep of enige deel daarvan in elk geval nie deurslaggewend wees nie.

Daarmee word nie ontken dat die feit van regspersoonlikheid van groot belang kan wees as dit oor die moontlike persoonlike aanspreeklikheid gaan van mense wat namens beweerde regspersone opgetree het of voorgegee het om dit te doen nie. 'n Aangesprokene sou hom immers daarmee kon verweer dat hy as gevolmagtigde namens 'n natuurlike of 'n regspersoon, of as werknemer in die loop van sy diens van so 'n natuurlike of regspersoon deel van die groep was, en sodoende poog om persoonlike aanspreeklikheid te ontkom. Die kwessie sou dan oor volmag of middellike aanspreeklikheid handel – en oor daardie voorbeelde van *ex lege*-aanspreeklikheid weens 'n onregmatige daad deur 'n ander gepleeg handel hierdie ondersoek nie.

Die onderhawige probleemgebied moet dus ook onderskei word van gevalle wat voorkom waar dit gaan oor die moontlike persoonlike aanspreeklikheid van iemand wat 'n onregmatige daad pleeg terwyl hy die skyn verwek het dat hy as gevolmagtigde[38] of andersins[39] namens 'n natuurlike persoon of 'n regspersoon optree, terwyl hy of byvoorbeeld sy prinispaal of sy werkgewer nie die bevoegdheid daartoe gehad het nie. Só iemand berokken uiteraard self die onregmatig veroorsaakte nadeel terwyl hy die aanspreeklikheid daarvoor deur

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37 Nav Boonekamp *Onrechtmatige daad in groepsverband volgens het NBW* (1990) 6. Dieselfde geld vir informele of toevallige versamelings van mense.

38 Wat bv sy volmag oorskry het of wat namens 'n versweë prinsipaal opgetree het en lg bly versweë.

39 Bv as werknemer wat in die loop van sy diens handel.

regswerking byvoorbeeld op sy prinsipaal of werkgewer wil laat neerkom, en dit is nie die verskynsel waaroor hierdie ondersoek handel nie. *Hierin gaan dit uitsluitlik oor die gevalle waar nie bepaal kan word wie uit 'n groep die nadeel onregmatig aangerig het of wat elkeen se bydrae daartoe was nie.* Indien die *identiteit* van die dader (waaronder ook die *aandeel* van meerdere persone aan die nadeel verstaan moet word) vasgestel kan word, het die geval dus moontlik raakvlakke met onderskeibare (dog verbandhoudende) ander situasies, byvoorbeeld aanstigting, hulpverlening, verteenwoordiging, middellike aanspreeklikheid, ensovoorts waaroor hierdie ondersoek nie handel nie.

3 4 "Mass torts"/"massa-deliktuele aanspreeklikheid"

Of die uitdrukking "mass torts" of "massa-deliktuele aanspreeklikheid" in die onderhawige verband[40] enigsins 'n verbetering op "group torts" of "groepsaanspreeklikheid" is, is te betwyfel. Met die eerste oogopslag lyk dit wel aantreklik omdat dit nie soveel klem op die groep as 'n entiteit plaas nie, en dit dus minder gevaar inhou dat iemand kan aflei dat dit oor onregmatige dade gaan wat deur of namens 'n groep as *groep* gepleeg word. Daarenteen hou juis hierdie "voordeel" egter die gevaar in dat té wye aanspreeklikheid daaruit kan volg: dit is tog ondenkbaar dat enigiemand wat hom in 'n massa mense bevind (byvoorbeeld die winskopiejagters wat hulle op 'n geadverteerde halfprysdag rondom en binne 'n winkel bevind) wanneer iemand uit die massa onregmatig nadeel veroorsaak (deur byvoorbeeld die ruite te breek en die uitstalrakke of kasregister om te stamp en te beskadig), vir daardie nadeel aanspreeklik gehou kan word. Vanselfsprekend kan 'n massa nie vir die betaling van skadevergoeding gedagvaar en daartoe gevonnis word nie.

3 5 'n Wye betekenis van "groep" en "groepsaktiwiteit"

Die vereistes wat vir aanspreeklikheid en die afdwing daarvan gestel word, maak dit onontbeerlik dat hier in terme van *'n min of meer omlynde versameling mense* gedink word waarvan die aangesprokene *op 'n spesifieke manier* deel gevorm het toe nadeel onregmatig aan 'n ander toegebring is. Ons noem sodanige versameling hierin "'n groep", ongeag of dit 'n groep is wat oor regspersoonlikheid beskik (soos 'n politieke party, vakbond of verbruikersorganisasie moet of kan hê) of nie (soos baie belangekringe, openbare optogte of spontane demonstrasies).

'n Verdere belangrike punt in verband met die terme "groep" en "groepsaktiwiteit" in hierdie verband is dat dit verstaan moet word in die sin van *alle deelnemers aan die gebeure in die loop waarvan die onregmatig berokkende nadeel aangerig is.* Van Leeuwen[41] stel dat onder "groep" alle deelnemers aan so 'n aktiwiteit (dit wil sê van die verskillende kante) verstaan moet word. Dit omvat byvoorbeeld in die geval van 'n gebouebesetting, demonstrasie of boikotaksie

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40 Ander moontlike betekenisse van hierdie uitdrukking, bv ivm "ongelukke", farmaseutiese of ekologiese "rampe", daargelaat.

41 BHA "Aansprakelijkheid voor demonstratieschade en betogingsvrijheid" 1985 *NCJM-Bulletin Nederlands Tijdschrift voor de Mensenrechten* 99.

waartydens gevegte tussen besetters, demonstrante of boikotters en teenstanders van die aksie uitbreek, ten minste[42] sowel die besetters, demonstrante of boikotters én die teenstanders van die besetting, demonstrasie of boikot. Dit gaan dus gewoonlik in hierdie verband nie in beginsel oor die vraag of die (in ons voorbeeld) besetting, demonstrasie of boikot deur die een of ander "groep" gereël is nie, maar daaroor dat daar 'n aktiwiteit plaasgevind het waarby 'n aantal mense betrokke was, ongeag van die kant(e) (indien enige) waaraan hulle was.

In die lig van die wye betekenis wat hierin aan "groep" en "groepsaktiwiteit" geheg word, moet verder in gedagte gehou word dat die groepe waaroor dit hier gaan in omstandighede mense uit twee of meer kampe kan insluit. Binne bykans enige groep[43] kan daar uiteraard ander groepe aanwesig wees; trouens, dit sal meestal die geval wees. Só kan binne 'n groep wat by 'n boikotaksie betrokke is voor- en teenstanders van die boikot, leiers en volgelinge, ordebepalers en openbare veiligheidsmense, die publiek, werknemers en klante, ouer en jonger mense, besadigde en militante mense, ongewapende en gewapende mense, georganiseerde en ongeorganiseerde mense, simpatiseerders en nuuskierige toeskouers, ensovoorts aanwesig wees. Die feit dat so 'n groep uit individue en ander groepe saamgestel kan wees, doen nie af aan die uitgangspunt dat almal wat, hóé dan ook, by die gebeure betrokke is vir doeleindes van ons onderwerp deel van die groep vorm nie. Noukeurige analise van die betrokke groep om te bepaal watter individue en subgroepe daarin aanwesig was, is belangrik omdat dit feite en oorwegings na vore kan bring wat in ag geneem sal moet word by die beantwoording van die vraag of die aangesprokene aan die gedragsnorm voldoen het wat in die omstandighede vir hom gegeld het. Hiermee kom ons ook uit by die kwessie van aanspreeklikheid in die geval van misbruik van 'n andersins nieriskante geleentheid, byvoorbeeld deur 'n bende fanatici, om ter bevordering van hulle oogmerke onregmatige dade te pleeg sonder dat dit teen hulle bewys sal kan word. Hulle gebruik dan die anonimiteit wat vanself (of wat weens intimidasie of omkopery verdiep is) binne die groep bestaan en die geleentheid wat dit bied om ongemerk so 'n daad te pleeg, om aan aanspreeklikheid te ontkom, terwyl hulle desgewens steeds byvoorbeeld daaruit propagandamateriaal kan put of in 'n oogmerk om te intimideer kan slaag.

Uit die voorgaande is dit duidelik dat aan "groep" hier nie die vaktegniese betekenis wat byvoorbeeld in die sosiologie daaraan geheg word, toekom nie. Desondanks moet terdeë rekening gehou word met die invloed van groepsvorming[44] en die normatiwiteit vir individuele gedrag wat as konformiteitsdruk en sosiale kontrole in groepe[45] aanwesig is.[46] Dit kan 'n deurslaggewende invloed op individuele

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42 Meelopers, toeskouers, toesighouers, polisiebeamptes, ens, kan bv ook deel wees daarvan.

43 Dws: bestaande uit almal wat by die gebeure betrokke is, ongeag van die manier, rede, oogmerk en verloop van sodanige betrokkenheid of die kwessie van regspersoonlikheid.

44 Bv die anonimiteit wat individuele lede binne 'n groep gewoonlik geniet; intimidasie, omkopery of sameswering kan hierdie anonimiteit uiteraard verdiep (nav Herder *Lexikon soziologie* (1978) 30).

45 Hoe kleiner die groep, hoe beter is die lede gewoonlik onderling aan mekaar bekend of minstens vir mekaar identifiseerbaar.

46 Die groepsdinamika leer dat 'n groep 'n selfbewussyn, 'n "groep"- of "ons"-gevoel ontwikkel. Dieselfde sal in subgroepe voorkom. Dit moedig konformiteit van individuele

vervolg op volgende bladsy

gedrag uitoefen weens die sterk druk ten gunste van konformiteit wat daarvan uitgaan.[47] Hierdie faktore kan 'n rol speel wanneer die *verwytbaarheid* van 'n lid van so 'n groep se gedrag beoordeel moet word. Indien dit dus sou blyk dat *skuld* vir aanspreeklikheid vereis word in hierdie gevalle sal weer na groepsteorieë in die sosiologie gekyk moet word.

3 6 Groepslid

In hierdie ondersoek moet onder "groepslid" nie verstaan word dat dit noodwendig gaan oor lidmaatskap waarvoor 'n minder of meer formele lidmaatskapsaansoek, -uitnodiging, -aanbeveling of -aanmelding vereis word nie. Netso word ook nie vereis dat daar 'n formele bedanking, skorsing of ander vorm van beëindiging van lidmaatskap moet wees voordat iemand sal ophou om deel van so 'n groep te wees nie.

Verder moet onthou word dat elke individu lid van meerdere groepe kan wees.[48] Elke groepslid, vir doeleindes van ons ondersoek, is dus meteen ook lid van etlike ander groepe wat ook invloed op hom en die situasie kan uitoefen. Ook dít moet verreken word by die beoordeling van die situasie om te bepaal watter gedragsnorm daarvoor gegeld het.

4 HOE GEVALLE SOOS DIE ONDERHAWIGE VOLGENS SUID-AFRIKAANSE SKRYWERS BENADER MOET WORD

4 1 Van der Merwe en Olivier

Volgens hierdie skrywers lýk dit net of die *conditio sine qua non*-benadering in die onderhawige gevalle faal; word dit korrek aangewend, lewer dit ook in hierdie gevalle bevredigende resultate.

Dit gaan volgens hulle hier oor 'n gesamentlike handeling van die groep – en nie oor die afsonderlike handeling van elke groepslid nie – waarvan die optrede van elke lid van die groep wel 'n bestanddeel was. Elke lid van die groep word dus as 'n *mededader* aangemerk:[49]

> "Is die gesamentlike handeling oorsaak van die gevolg en is A ('n lid van die groep) se optrede nie skeibaar van die kumulatiewe veroorsakende gedraging nie, is A se handeling as bestanddeel van die groter geheel oorsaak van die gevolg."[50]

Hulle werk dus met 'n "kumulatiewe daderskap-begrip"[51] en is van mening dat dit die enigste manier is waarop hierdie gevalle gehanteer kan word – ten minste

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groepslede se gedrag met die groepsgedrag aan; dit is gewoonlik swakker by 'n massa (bv 'n oploop van mense, stadionbesoekers of massa-demonstrasie) of versameling (bv busryers, toustaners of fliekgangers) aanwesig as in kleiner groepe (nav Herder *Lexikon sv* "Masse").

47 Schwonke *Die Gruppe als Paradigma der Vergesellschaftung* in Schäfers *Einführung in die Gruppensoziologie, Geschichte, Theorien, Analysen* (1980) 36.

48 Elke individu behoort glo aan minstens vyf tot agt groepe (Gukenbiehl en Schäfers *Grundbegriffe der Soziologie* (1986) *sv* "Gruppe").

49 Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* 4de uitg (1980) 199.

50 *Idem* 200.

51 *Idem* 200 vn 25.

as nie weggedoen moet word met die feitelike basis van die kousaliteitsmaatstaf nie. Sonder daardie feitelike grondslag sal volgens hulle van die "aangeleentheid van veroorsaking 'n juridiese klugspel" gemaak word.[52]

'n Handeling kan dan volgens hulle as 'n "juridies relevante mede-oorsaak" aangemerk word in twee gevalle: (i) waar die handeling self wel weggedink kan word sonder dat die gevolg verdwyn, maar dit saam met 'n ander handeling of handelinge, wat ook weggedink kan word sonder dat die gevolg verdwyn, nie weggedink kan word sonder dat die gevolge uitbly nie (wat hulle 'n "kumulatiewe handeling/veroorsakende feit" noem); en (ii) waar meerdere juridies relevante handelinge as selfstandige oorsake van die gevolg aan te merk is.[53]

Uit die voorbeelde wat die skrywers aanbied, is dit duidelik dat hulle nie 'n antwoord gee vir die gevalle waar nie bewys kan word dat die aangesprokene in die gewone sin van die woord 'n dader was wat dus die gevolg feitelik (mede-) veroorsaak het nie.[54] Enersyds sê hulle dat as bewys kan word dat die aangesprokene nie die gevolg veroorsaak het nie, hy nie aangespreek kan word nie. Dit kan as vanselfsprekend aangemerk word en neem die kwessie geensins verder nie. Andersyds sê hulle dat, as nie bewys kan word dat die aangesprokene se optrede wel deel was van die kumulatiewe handeling nie, hy nie aangespreek kan word nie.[55] Dit lyk ook vanselfsprekend. Die probleem ontstaan egter juis as bewys word dat die aangesprokene in die besondere omstandighede deel was of deel gebly het van 'n groep,[56] maar nie bewys kan word wie uit die groep die nadeel veroorsaak het, of in welke mate elke lid (of, minstens, die aangesprokene) tot die intrede van die nadeel bygedra het nie. Die vraag is immers of en wanneer die blote deelword of deelbly van 'n groep tot aanspreeklikheid kan lei vir nadeel wat uit die groepsoptrede ontstaan het, sonder dat bewys is dat, of in watter mate, die aangesprokene tot die intrede daarvan feitelik meegewerk het.

In die mate waarin die skrywers se benadering van 'n pro-verweerder ingesteldheid getuig, moet dit as 'n *petitio principii* beskou word: die vraag is juis of dit in orde is dat die eiser in sodanige gevalle bedroë daarvan moet afkom. Om sonder meer in die trant van *casum sentit dominus* ten gunste van die verweerder te besluit, is nie noodwendig in pas met moderne opvattings nie. Die antwoord op hierdie probleem hoef immers nie daarin geleë te wees dat "die werklikheid deur 'n norm verdring . . . en die kousaliteitsvereiste 'n inhoudlose

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52 Weinrib "A step forward in factual causation" 1975 *Mod LR* 518–534 beklemtoon eweneens die belangrikheid van die vereiste van feitelike kousaliteit, sodat skadevergoedingsaksies beperk kan word tot die gevolge wat werklik "relevant" is (518). Uitlatings soos hierdie en dié in die teks spruit klaarblyklik uit 'n vooraf ingenome standpunt wat nie net aan die gedagtegoed van *casum sentit dominus* herinner nie maar van 'n primêr dader-georiënteerdheid getuig.

53 Van der Merwe en Olivier 200 vn 25.

54 Neethling, Potgieter en Visser *Law of delict* (1994) 164 vn 22 wys met instemming op Boberg 383 se kritiek teen Van der Merwe en Olivier se benadering in die gevalle van onafhanklike daders wat dieselfde nadeel teweegbring.

55 Van der Merwe en Olivier 200 vn 25.

56 In die wye sin waarin "groep" hierin gebruik word.

slagspreuk [word]" nie.[57] Alvorens aanvaar sal kan word dat aan die kwessie ontkom kan word deur die skrywers se voorstel van 'n alternatiewe handelingsbegrip te aanvaar, sal die vereistes daarvan eweneens uitgewerk moet word. Hoedanig sou die verband tussen die aangesprokene se optrede en die groep se optrede moet wees om as "nie skeibaar nie" of "bestanddeel van" aangemerk te word? Die mannekoor- en vuurpeloton-voorbeelde wat die skrywers gebruik, is gevalle waar waarskynlik van "common design" gepraat kan word.[58] Origens val dit op dat die twee gevalle wat hulle as verskyningsvorme van juridies relevante mede-oorsake aantoon, albei gevalle is waar die feitelike kousale verbande reeds vasstaan. Só beskou, is dit blote oëverblindery wanneer die skrywers voorgee om die probleem te hanteer deur hulle toevlug tot 'n kumulatiewe handelingsbegrip te neem. Hierin sal uitgemaak moet word of ons dermate verknog moet wees aan die tradisionele *conditio sine qua non*-teorie en die *casum sentit dominus*-benadering dat ons hoegenaamd nie 'n verfyning van die oorgelewerde sienings wil oorweeg nie.

4 2 Neethling, Visser en Potgieter

Hierdie skrywers skaar hulle by diegene[59] wat die standpunt inneem dat die *conditio sine qua non*-teorie, afgesien van ander besware wat daarteen kan bestaan, in elk geval geen oplossing bied vir gevalle van multikousale benadeling nie. Volgens hulle is die oplossing daarvoor relatief eenvoudig. Waar bewys word dat die optrede van byvoorbeeld twee onafhanklike daders saam genoegsaam was om die nadeel teweeg te bring,[60] spreek dit volgens hulle vanself[61] dat beide daders se betrokke handelinge die nadeel veroorsaak het.[62] Hiermee toon die skrywers aan dat die *conditio sine qua non*-teorie vir kritiek vatbaar is, maar word verder niks gesê wat ons kan help om bevredigende antwoorde te vind waar juis nie van 'n kousale verband in die gewone betekenis sprake kan wees nie.

Visser en Potgieter[63] voer die saak ook nie verder nie. Hulle val eenvoudig terug op "gesonde verstand" as dit oor die bevind van 'n kousale verband in

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57 Van der Merwe en Olivier 200 vn 25.

58 Soos hierdie gevalle gewoonlik gehanteer word, bring dit nie die eintlike probleem na vore nie: dit is een ding om te sê dat daar 'n gesamentlike handeling was waar elke lid van 'n koor gesing of elke lid van 'n vuurpeloton gevuur het. Dit is egter 'n ander vraag of iemand wat net by die gebeure betrokke was – en self nie gesing of gevuur het nie – self weens 'n onregmatige daad aanspreeklik gehou kan word waar nadeel uit die gesingery of geskietery ontstaan het.

59 Veral Van Rensburg *Juridiese kousaliteit en aspekte van aanspreeklikheidsbeperking by die onregmatige daad* (LLD-proefskrif Unisa 1970) 36 ev en De Wet en Swanepoel *Strafreg* (1985) 64 gee toe dat dit so is.

60 Die vb wat hulle gebruik, is waar twee daders onafhanklik van mekaar maar gelyktydig elkeen 'n koeël deur die oorledene se kop gejaag het, en vasgestel word dat twee koeëls deur die kop altyd dodelik is.

61 Volgens die "direct common sense approach of the man in the street" (nav *Portwood v Swamvur* 1970 1 SA 8 (RA) 15).

62 Neethling, Potgieter en Visser 163.

63 *Skadevergoedingsreg* (1993) 83–84.

hierdie tipe gevalle gaan, en op dit wat "raadsaam en billik" sal wees as dit oor die bepaling van die betaalbare bedrag handel.

4 3 McKerron

McKerron verwys na die moontlikhede dat die optrede van twee onafhanklike daders dieselfde nadeel kon veroorsaak het, of dat die eiser bydraend nalatig kon gewees het. Na sy mening berus aanspreeklikheid in hierdie gevalle dan daarop dat die betrokke handeling "a material factor in bringing about the damage" was.[64] Wanneer daar aan die vereiste van wesenlikheid voldoen sal word, sê hy nie. Uit hoofde van die gesag waarna hy verwys,[65] is dit egter duidelik dat die vraag is of die betrokke optrede "a significant factor in producing the damage . . ." was – en dit is iets wat volgens die omstandighede van elke geval kan verskil.

Teen die agtergrond van die skaal wat ter sprake is by die soort groepsgedrag waaroor hierdie ondersoek handel, maak die "significant factor"-element wat McKerron voorstaan daardie maatstaf minder aanwendbaar. In elk geval berus dit op 'n *petitio principii* – as aangetoon kan word dat iemand se optrede 'n wesenlike (kousale) bydrae tot die intrede van die nadeel gemaak het, ontstaan die probleem immers nie. Met die oplos van gevalle waar juis geen sodanige bydrae aangetoon kan word nie, help dit ons nie.

4 4 Van Rensburg (Boberg)

Van Rensburg toon oortuigend aan dat die *conditio sine qua non*-leer onbruikbaar is in gevalle van gesamentlike veroorsaking. Die benadering wat deur hom[66] voorgestaan word, is om in die lig van die getuienis te bepaal wat die gewraakte gevolg veroorsaak het. Die voorbeeld wat hy gebruik om sy standpunt te verduidelik, is een waar wel genoegsame getuienis oor die kousale verloop gepostuleer word om sy gevolgtrekking te ondersteun. Wat moet gebeur waar juis nie ander getuienis bestaan oor die kousale verband as dat die aangesprokene deel was of gebly het van 'n groep waaruit nadeel onregmatig toegebring is nie, bring Van Rensburg se siening ons ongelukkig nie verder nie.[67]

Boberg[68] konstateer dat daar algemene instemming is oor die noodsaaklikheid van die vereiste van 'n feitelike kousale verband. Hy sluit hom sterk by Van Rensburg se uiteensetting oor die korrekte benadering tot kwessies in verband met feitelike kousaliteit aan,[69] en verklaar dat dit daarin slaag om die probleem

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64 McKerron *The law of delict* (1971) 138.

65 *Shell Tankers Ltd v SAR & H* 1967 2 SA 666 (OK) 676A.

66 Van Rensburg *Juridiese kousaliteit* 49–50.

67 Kyk ook Van Rensburg "Nog eens *conditio sine qua non*" 1977 *TSAR* 101 102 104; Van Rensburg "'n Kritiese beskouing van die conditio sine qua non-oorsaaklikheidsteorie soos uiteengesit deur ons Suid-Afrikaanse skrywers" in *Huldigingsbundel Daniel Pont* (1970) 397–398.

68 Boberg 383 ev.

69 Van Oosten 1982 *De Jure* 4–33 24 vind Van Rensburg se bydrae "nie so indrukwekkend nie" en meen dat dit vatbaar is vir kritiek.

van gesamentlike veroorsaking ("concurrent causes") op te los. Dit bring ons dus ook nie verder in die gevalle wat ons hierin oorweeg nie.

4 5 Whiting

Whiting[70] meen dat die kwalifisering van gedrag as *'n bydraende faktor* by die intrede van die nadeel genoegsaam is om 'n feitelike kousale verband daar te stel waar dit oor die plaasvind van iets ("a positive result") handel; handel dit oor die nie-plaasvind van iets ("a negative result"), moet die gedrag *'n noodsaaklike voorwaarde* daarvoor wees alvorens 'n feitelike kousale verband sal bestaan. Ten spyte van kritiek teen hierdie benadering,[71] bied dit 'n moontlikheid om in die gevalle wat hierin ondersoek word met betrekking tot die kwessie van feitelike kousaliteit vorentoe te kom. Wat dan vereis sal moet word, is dat die aangesprokene se deelwees of -bly van 'n groep waaruit nadeel onregmatig toegebring is, 'n bydraende faktor tot die intrede van daardie nadeel moet wees. Hierna word later teruggekeer.

5 SAMEVATTENDE RESULTATE

5 1 Probleemstelling

Die probleemstelling is omlyn, as synde die vraag na die aard van en vereistes vir deliktuele aanspreeklikheid weens nadeel wat toegebring is deur 'n onbekende dader vanuit 'n groep waarvan die aangesprokene deel was of gebly het.

5 2 Hipoteses en voorlopige gevolgtrekkings

Verskillende hipoteses is gestel en enkele voorlopige gevolgtrekkings is bereik, te wete dat:

- die aanwending van die regsvergelykende metode hier tot verrykende resultate vir die Suid-Afrikaanse reg kan lei;
- by die aanwending van die regsvergelykende metode nie slegs met die funksionele benadering gewerk word nie, maar dat ook buite-juridiese faktore in ag geneem word by die bepaling van die element(e) aan die hand waarvan die ondersoekveld geanaliseer word om die identifisering van ooreenkomste en verskille tussen regstelsels met die oog op die bereiking van 'n sintese te vergemaklik;

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70 Whiting "Factual causation in perspective" in Kahn (red) *Fiat justitia: essays in memory of Oliver Deneys Schreiner* (1983) 370.

71 Boberg 386 meen dat Whiting se benadering neerkom op *ex post facto* rasionalisering oor oplossings wat hy op onuitgesproke gronde as wenslik beskou. 'n Soortgelyke siening word deur Mundell "Causation in delict: do the means justify the ends?" 1987 *THRHR* 379–397 gehuldig. Mundell verklaar dat die oogmerk wat in elke soort geval met aanspreeklikstelling primêr nagestreef word, bepalend is vir die siening van die aard van die kousaliteitsvereiste in daardie geval. Afgesien van wat moontlik van die ekonomiese analise van die deliktereg gesê kan word, beklemtoon Mundell 396–397 tereg dat iets soos die kousaliteitsvereiste nie los van die oogmerke met aanspreeklikstelling ingevolge die deliktereg – in 'n vakuum dus – beskou mag word nie.

- sommige begrippe en leerstukke uit die strafreg moontlik as voorbeelde kan dien van hoe oplossings vir die onderhawige dilemma gekry kan word;
- sekere aspekte van die groepsdinamika in ag geneem moet word wanneer die optrede van 'n lid van 'n groep en van 'n groep as sodanig beoordeel word;
- 'n persoon wat deel was of deel gebly het van 'n groep waaruit iemand aan die eiser onregmatig nadeel teweeggebring het, in gepaste gevalle op grond van 'n eie onregmatige daad vir sodanige nadeel aanspreeklik gehou behoort te kan word;
- die tradisionele benaderingswyses, begrippe en tegnieke van die skadevergoedingsreg ontoereikend is om talle kwessies in verband met aanspreeklikheid vir nadeel in groepsverband toegevoeg, sinvol mee te hanteer; en dat
- die vaktegniese aspekte weliswaar korrek behartig moet word, maar dat die fundamentele reg op vrye meningsuiting en demonstrasie veral deeglik in ag geneem moet word wanneer daar oor aanspreeklikheid vir nadeel in groepsverband deur demonstrasies aangerig, besin word.

PUBLIKASIEFONDS HUGO DE GROOT

Uit hierdie fonds word finansiële hulp vir die publikasie van regsproefskrifte en ander verdienstelike manuskripte verleen.
Aansoeke om sodanige hulp moet gerig word aan:

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Migrerende egpare se huweliksgoedereprobleme: *common law*- en gemengde regstelsels

(*vervolg*)*

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5 'N SLUIMERENDE KATEGORISERINGSKONFLIK

Voordat artikel 7(9) gepromulgeer is, was die kategoriseringskonflik in die Suid-Afrikaanse internasionale privaatreg sluimerend in artikel 7(3)–(8). In die voorbeeld hierbo kon Wilma op Empire-reg óf Suid-Afrikaanse reg in haar egskeidingspleit steun. Mits 'n Suid-Afrikaanse domisilie bekom is na huweliksluiting kon die eis gebaseer word op die bekende reël dat egskeidingsaksies, die gronde vir egskeiding, die voorwaardes tot verlening van 'n egskeidingsbevel en die eise bykomend hiertoe of verbandhoudend hiermee – byvoorbeeld 'n eis om herverdeling van huweliksgoedere – ingevolge die hof se eie reg[97] beslis word. Omdat eise wat met egskeiding in verband staan direk verband kan hou met die gades se finansiële posisie, kon so 'n eis ook gebaseer word op die regskeusereël dat die vermoënsregtelike gevolge van die huwelik bepaal word deur die reg van die man se domisilie ten tyde van huweliksluiting.

Op internasionale vlak moes die "korrekte" kategorie bepaal word, wat 'n regsvergelykende oorsig van die reël in die sisteem waarvandaan dit kom en van die gevolge van plasing in 'n bepaalde kategorie sou verg.

Daar is allerweë uitgesien na 'n aansuiwering van artikel 7(3) van die Egskeidingswet 70 van 1979 om 'n sogenaamde billike bateverdeling deur middel van 'n beroep op die regterlike bevoegdheid daartoe vir die Henry-en-Wilma-tipe feitestel moontlik te maak.[98] Alle voorstelle in dié verband het op niks

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* Sien 1995 *THRHR* 194–218.

97 *Qua lex fori* of *lex domicilii*.

98 A 22 van die Swart Administrasiewet 38 van 1927 is eers met ingang 1988-12-02 gewysig sodat swartes op die herverdelingsbevoegdheid van die hof aanspraak kan maak. Die Wysigingswet op Huweliks- en Huweliksgoedereregt 3 van 1988 voeg a 7(3)(b) by die Wet op Egskeiding in en herroep sowel a 22(6) van die Swart Administrasiewet van 1927 as a 25(1) van die Wet op Huweliksgoedere 1984. Die hof moet ag

vervolg op volgende bladsy

uitgeloop nie[99] en die toepassingsgebied van artikel 7(3)–(8) het 'n unilaterale aangeleentheid gebly.

Bedelings word vandag geïdentifiseer volgens die graad van onafhanklikheid gedurende die huwelik, die mate van deling tydens en by ontbinding van die huwelik en die strekwydte van die diskresie. Die mate van deling by ontbinding definieer dikwels juis die huweliksgoederebestel en omlyn die reëls wat geld vir die vermoënsregtelike verhouding tussen die egpaar vanaf die oomblik van huwelksluiting en *stante matrimonio*. Die herverdelingsbevoegdheid het betrekking op die bevoegdheid om regte te vestig, eiendom te tipeer en ooreenkomstig die tipering te verdeel. By ontbinding kan die verdeling 'n streep deur die aanvanklike huweliksgoederebedeling trek. Die vasstelling van regte en die verdeling van eiendom ingevolge die regterlike bevoegdheid kan geklassifiseer word as 'n vermoënsregtelike gevolg van 'n bepaalde huwelik.[100] Assosiasie van die finansiële gevolge van egskeiding (soos deur die verdelingsbevoegdheid vasgestel) met vermoënsregtelike gevolge van huwelksluiting (eerder as met egskeidingsaangeleenthede en gevolge van die huwelik op persoonlike vlak) was nie vergesog nie vir sover die Egskeidingswet aangeleenthede reël wat integrerend deel van die huweliksbedeling uitmaak.[101] Nogtans het die wisselwerking tussen bedeling-diskresie in die regstelsels onder bespreking voldoende ruimte gelaat vir die teenargument dat die funksie van die *forum* se diskresie in samehang met ander *forum*-wetgewing vervul moet word.[102] Plaaslike howe kon

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slaan op enige verpligting wat 'n man teenoor sy vrou mag hê ingevolge 'n huwelik gesluit ingevolge die ou a 22(7) Swart Administrasiewet van 1927.

99 SA Regskommissie "Hersiening van die Egskeidingsreg" Werkstuk 26 November 1988; "Verslag oor die wysiging van artikel 7(3) van die Wet op Egskeiding 70 van 1979" Projek 1990-06-12; Costa "A plea for the reform of s 7(3) of the Divorce Act 70 of 1979 as amended" 1990 *De Rebus* 916; Clark en Van Heerden "Asset redistribution on divorce – the exercise of judicial discretion" 1989 *SALJ* 243; Roodt "Artikel 7(3) van die Egskeidingswet: talle vroue feitlik sonder remedie" 1988 *De Rebus* 59.

100 Neels 1992 *SALJ* 337–338.

101 Een van die aannames wat hierdie ontleding onderlê, is dat "regterlike diskresie" in die sg *hard cases* wel bestaan (Barak 34–35; *contra* Dworkin). Omdat 'n onbeperkte aantal variasies ingevolge die diskresie tov herverdeling moontlik is, val dit te betwyfel of partye 'n vermoënsreg kan hê op huweliksgoedere wat ingevolge die diskresie verdeel moet word. Mi verleen die diskresie tov die vermoënsregtelike posisies van 'n egpaar wanneer hulle skei nóg 'n remedie in 'n kontraktuele situasie, nóg 'n reg wat naas die kontrak bestaan. Die Ontario Family Law Act, 1990 impliseer in a 5 en a 7(2) dat die regterlike diskresie geen belang in eiendom skep in die afwesigheid van 'n a 9-hofbevel nie, en bepaal dat die aanspraak by egskeiding 'n persoonlike een tussen die gades is. Die statutêre diskresie kan eerder beskryf word as 'n onvoltooide persoonlike reg wat tot 'n aandeel of 'n reg op kapitale genot ontwikkel sodra 'n billike herverdeling beveel is. Castel "Choice of law – matrimonial regimes" 1982 *Can Bar R* 180 186–187 verwys reeds na die reg op die verdeling van bates op 'n billikheidsgrondslag as 'n *new substantive right*.

102 Thomashausen 1985 *De Rebus* 168 beskryf die Egskeidingswet as 'n "backdoor"-benadering om aanwasbeginsels tov sekere huwelike in te voer. Sien ook die verwarring in die reg van Wisconsin na die promulgasie van die Wisconsin Matrimonial Property Act, 1984; Erlanger en Weisberger "From common law property to community property" 1990 *Wisconsin LR* 783.

egter die gevolgtrekking maak dat die uitoefening van die diskresie in artikel 7(3) verhinder word deur die afwesigheid van "huweliksvoorwaardes".

Die vertrekpunt by klassifikasie is die *lex fori*.[103] 'n Suiwer *lex fori*-benadering veronderstel egter dat blote feite geklassifiseer moet word terwyl feite inderdaad altyd in die lig van die een of ander regstelsel aangebied word. Op sy beurt is die reg weer alleen vasstelbaar indien basiese feite bekend is. Die hof analiseer die aard van 'n eis of 'n verweer, soos uitgedruk in 'n regsisteem in die lig van die funksie van daardie reël in daardie regsisteem. Die eis of verweer word in verband gebring met die regskeusereëls van die *forum* wat breed beskou (dit wil sê nie beperk tot konsepte van die *lex fori* nie) die betrokke eis kan dek. Nadat die ware aard en klassifikasie van die vreemde reël ingevolge sy regstelsel geanaliseer is, kan dit vergelyk word met die meganismes van die *lex fori* en ingevolge Suid-Afrikaanse internasionale privaatregskategorieë geïnterpreteer word.[104]

Terwyl die regskeusereël aandui dat die vermoënsregtelike gevolge van die huwelik deur die *lex domicilii* beheers word, klassifiseer die *lex domicilii* nie noodwendig die herverdelingsbevoegdheid as 'n vermoënsregtelike gevolg nie; dit is selfs moontlik dat dit glad nie 'n skema vir die klassifikasie van huweliksgoedere het nie. Daar sou geredeneer kon word dat in die afwesigheid van 'n klassifikasieskema vir eiendom in die potensieel toepaslike reg, daar ingevolge die *lex fori* geklassifiseer moet word. Op hierdie wyse sou weer opnuut aan Kahn en Bartin se *lex fori*-voorkeur prominensie by huweliksgoederekonflik verleen word. Daar word weer in paragraaf 5 3 teruggekom op die *lex fori* se klassifikasieskema vir eiendom.

5 1 Regspraak voor artikel 7(9) se promulgasie

In die sake waarin immigrante 'n beroep op artikel 7(3)–(8) doen,[105] is klassifikasie nie as probleem geïdentifiseer en beredeneer nie. Regspraak kon nie oortuigend aandui welke regstelsel aangewese is om die herverdeling te beheers nie. In die *Milbourn*-gewysde[106] eis die eiseres die oordrag van die helfte van haar man se bates. Daar word geen onderhoud geëis nie.

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103 Kahn (1980) 620. Vgl die *Restatement (Second)* (1971); Allarousse "A comparative approach to the conflict of characterisation in private international law" 1991 *Case Western Reserve J of Int'l L* 496 ev.

104 Vgl *Laurens v Van Höhne* 1993 2 SA 104 (W) waar 'n kosmopolitaanse uitleg aan die regskeusereëls van die *forum* gegee is en die *via media*-benadering gevolg is om die vraag of opbetaling van kapitaal van 'n maatskappy 'n materiële of formele vereiste is, te beantwoord (116I–117E). Die hof let op die aard, strekwydte en doel van die vreemde reël in die konteks van die vreemde reg. Sien ook *Laconian Maritime Enterprises v Agromar Lineas* 1986 3 SA 509 (D) 520H–521B. Ander moontlikhede sluit in Batiffol se tweeledige teorie, en Robertson en Cheshire se primêre en sekondêre klassifikasie. Vgl Forsyth "Enforcement of arbitral awards, choice of law in contract, characterization and a new attitude to private international law" 1987 *SALJ* 8–11; Faul "Klassifikasie en internasionale privaatreg" 1987 *TSAR* 246; Hahlo (1975) 578–581; Neels 1992 *SALJ* 340; en in die algemeen Allarousse 1991 *Case Western Reserve J of Int'l L* 500–502; Lipstein *Principles of the conflict of laws, national and international* (1981) 96–97.

105 Vgl Van Schalkwyk *Huweliksregbronnebundel* (1992) 320 ev.

106 *Supra*.

Regter Coetzee behandel by implikasie haar eis as een wat met egskeiding in verband staan en wys dit van die hand, steunende op die duidelike taal waarin die wetgewer sy bedoeling in artikel 7(3)(a) vervat het dat 'n kontrak 'n vereiste is. Die kontrak moet na vermoënsregte of die huweliksgoederebestel verwys maar daar word nie uitgeklaar in watter vorm die kontrak moet wees nie (65A–E). Die gaping in die reg is nie genoeg om regter Coetzee te oortuig om die betekenis van "kontrak" uit te brei nie.[107] Die kontrak moet dus 'n voorstel vir verdeling van eiendomsreg maak alvorens die hof by magte is om 'n verdeling in ooreenstemming met billikheid te kan bewerkstellig.

In *Bell v Bell*[108] word die eiseres se eis op vergelykbare feite toegestaan. Sy eis naamlik die oordrag van sekere onroerende eiendom in Suid-Afrika geleë asook 'n derde van haar man se netto bates, maar baseer haar eis op artikels 23 en 24 van die Engelse Matrimonial Causes Act van 1973, soos gewysig. Geen onderhoud of periodieke betalings is aangevra nie. Die hof, by monde van waarnemende regter Kuper, neem eenvoudig aan dat die eise van die partye geklassifiseer moet word as verbandhoudend met vermoënsregtelike gevolge van die huwelik, en dit is inderdaad hoe beide die eiseres en die verweerder hulle bedes verwoord het. Sy beroep haar op analoë vir hierdie benadering wat die Egskeidingswet en die DDR-statuut, wat in *Sperling v Sperling* ter sprake was, na haar mening bied (in die *Sperling*-gewysde is 'n bate-oordrag op gesag van buitelandse reg beveel, en wel om die vermoënsregtelike en versorgingsregtelike komponente van die eis te bevredig).[109] Op "internasionale privaatregvlak" is haar antwoord dat 'n gaping vermy behoort te word:[110]

> "If [the Milbourn decision] is correct (and I think with respect that it is, notwithstanding the judgment in Mathabathe) then it would mean – assuming the exception to be well-founded – that a person in the plaintiff's position would not enjoy her rights under the English law and would simultaneously be disbarred from enjoying like rights under the South African law. As I see the position, that consequence does not follow, because recognition can be given to ss 23 and 24 of the English legislation."

Erkenning en toepassing van die Engelse wetgewing op die gebied van verdeling van huweliksgoedere moes dus die gaping wat die *Milbourn*-saak blootgelê het, vir die besondere geval vul. Klassifikasie is egter nêrens by name genoem nie: nóg ten opsigte van die judisiële diskresie om die regte in die huweliksgoedere van die

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107 In *Mathabathe v Mathabathe* 1987 3 SA 45 (W) was die gevolge van die huwelik nie deur buitelandse reg beheers nie maar deur die ou a 22(6) van die Swart Administrasiewet 38 van 1927 wat 'n kontrak onnodig maak indien gemeenskap van goed uitgesluit wou word. Die hof het eenvoudig die betekenis van die begrip "hvk" uitgebrei tot elke soort voorhuwelikse ooreenkoms. Dit sluit in 'n ooreenkoms om in die huwelik te tree of 'n verlowingsooreenkoms (51J–52A). Die saak gee geen uitsluitsel oor buitelandse huwelike nie (*per* Stegmann R 58C–D). In *Lagesse v Lagesse supra* is bevind dat die definisie van "kontrak" wyd genoeg is om informele en mondelinge kontrakte om gemeenskap van goed uit te sluit, te dek mits derdes se regte onaangeraak bly (177J–178A).

108 *Supra*.

109 Soos in die *Sperling*-saak *supra*.

110 199I–200A.

voormalige gades aan te pas, nóg ten opsigte van die huweliksgoedere wat die fokuspunt van die onderskeie eise is. Engelse regspraak is nie ondersoek nie.

Litigasie in Engeland, in die veronderstelling dat jurisdiksionele vereistes andersins nagekom was, sou *Suid-Afrikaanse reg* in beheer gestel het van die eis vir oordrag van onroerende eiendom wat in Suid-Afrika geleë is. Die Suid-Afrikaanse egskeidingsbevel ken egter regte in onroerende goed in Suid-Afrika geleë toe op sterkte van *Engelse wetgewing* wat herverdeling moontlik maak. Die vreemde reg word dus toegepas waar die vreemde hof dit nooit sou doen nie. Te min is oor die feite bekend om die gevolgtrekking te regverdig dat die domisilie ten tyde van litigasie meer verteenwoordigend was van die feitelike, werklike en konsensuele verband. Dit is nogal ironies dat die toepassing van buitelandse reg in hierdie geval juis klassifikasie- en beslissingsharmonie opoffer. Positiewe nawerking van die beslissing sluit in dat 'n mate van sensitiwiteit vir die individu se dilemma getoon is en dat die *forum* ten gunste van herverdeling in hierdie besondere omstandighede is. Die beslissing het die bestaande "normatiewe sisteem" verander wat die benadering tot interpretasiereëls effens kon versteur. Sodoende is die behoefte aan regsekerheid net meer beklemtoon.

Lagesse v Lagesse[111] is tot op hede die enigste saak waarin immigrante met hulle aanspraak op artikel 7(3)–(8) geslaag het. Die partye het getrou terwyl die man in Mauritius gedomisilieerd was sonder om 'n formele voor- of nahuwelikse kontrak voor 'n notaris of andersins te sluit. Die verwysing in die kantlyn van die huweliksertifikaat na die ordonnansie wat gemeenskap van goed uitsluit word geag te voldoen aan artikel 7(3) se kontraksvereiste. Regter Kriek oefen die diskresie uit wat die Suid-Afrikaanse bepaling verleen op sterkte daarvan dat 'n informele ooreenkoms bestaan wat gemeenskap van goed by implikasie uitsluit. Die vraag of die huwelik binne of buite gemeenskap van goed is, is sonder meer beantwoord met verwysing na die potensiële *lex causae*; die vraag na die toepaslike sisteem om die bateverdeling te beheers, word beantwoord met verwysing na artikel 7(5) op sterkte van twee reëls: die inkorporasie-deur-verwysing-reël van die kontraktereg en die beginsel dat wetsbepalings sover moontlik uitgelê behoort te word dat almal gelyk daardeur geraak word. Regter Kriek verklaar dat die vermoënsregtelike gevolge van die huwelik beheer word deur die reg van die man se domisilie ten tyde van huweliksluiting.[112] Die reg van Mauritius erken 'n ooreenkoms wat as kantlynaantekening bestaan. Artikel 7(3) is ooreenstemmend uitgelê.[113]

Die reg van Mauritius was benewens die *lex domicilii* van die man ten tyde van huweliksluiting ook die *lex loci contractus*, en die reg met die betekenisvolste

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111 *Supra*.

112 175D–E. Forsyth *Private international law* (1990) 249 meld die geldigheid van die hvk as 'n vermoënsregtelike gevolg van die huwelik. Vrancken 1993 *TSAR* 183 meen daarenteen dat die kategorie eerder die formele geldigheid van die hvk is.

113 *Per* Kriek R 178G. *Ex parte Senekal et Uxor* 1989 1 SA 38 (T) steun 'n "wye gelding" van a 36 van die Huweliksgoederewet. Hierdie saak wys die potensiaal vir probleme in veranderde omstandighede uit. Neels kritiseer die uitspraak ooreenkomstig sy siening dat a 7(3) 'n geskikte basis slegs vir onderhoud – die versorgingsregtelike aspek van 'n eis – kan wees waar die *lex domicilii matrimonii* nie die Suid-Afrikaanse reg is nie. Vgl Neels 1992 *SALJ* 341.

verhouding met die kontrak en die partye. Om mee te begin, was die kanse klein dat 'n kategoriseringskonflik rondom die *Lagesse*-feitestel kon ontwikkel: die reël van die *forum* is vergelykbaar met die instelling wat die *lex causae* ken. Die saak verhelder nie die toepassing van artikel 7(3) in gevalle waar die *lex domicilii* gemeenskap van goed uitsluit, maar 'n vorm van deling by ontbinding aan die regterlike diskresie oorlaat nie, en kon nie potensiële kategoriseringskwellings aanspreek nie.

Al die bogenoemde sake toon dieselfde neiging na 'n meganiese en kumulatiewe toepassing van regskeusereëls.[114]

5 2 Verskille tussen artikel 7(3)–(8) en die *common law*-diskresie

Dit is duidelik uit paragraaf 4 hierbo dat die Anglo-Amerikaanse regterlike diskresie vandag 'n matigende interpretasie aan vaste omskrewe regsreëls gee. Die diskresionêre toesegging van 'n billike aandeel is voorts bekend in Afrikalande soos Zimbabwe, Zambië en Malawi.[115] Daar is 'n natuurlike neiging in die *common law*- sowel as *civil law*-tradisies om 'n korrektief vir die man se volle en uitsluitlike beheer oor die gemeenskaplike fonds daar te stel. Hierdie oogmerk word *stante matrimonio* bereik, óf deur vaste reëls dat die bestuursfunksie verdeel word tussen die eggenote, óf deur volkome gemeenskap of winsdeling by ontbinding te laat intree, óf deur die diskresionêre verdeling deur die hof by ontbinding. Gemengde bedelings van gemeenskap van aanwinste, uitgestelde gemeenskap van aanwinste of gemeenskap van toegevalle winste (*accrued gains*) wat gekoppel word aan 'n diskresie om van gelyke deling af te wyk, is algemeen bekend.[116]

In die Engelssprekende wêreld vorm die diskresie deel van 'n oorkoepelende billikheidsbegrip. Huwelike sluit *ex lege* gemeenskap van goed uit en kontrakte tot die teendeel word aan regterlike toetsing onderwerp. Elke gade se eiendom is onderworpe aan 'n billikheidseis van die ander gade, of aan onvoltooide regte wat materialiseer in geval van egskeiding of dood van die eienaar-eggenoot.[117] In baie van die *common law*-lande kom die diskresionêre verdeling amper neer op 'n uitgestelde gemeenskap van aanwinste (met behulp van die regterlike diskresie wat van die gesinsbateteorie[118] gebruik maak of billikheidsoorwegings wat in die *trust*-konsep opgesluit is[119]).

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114 Symeonides 1987 *Am J Comp L* 274 ev. Sy besware teen die "tradisionele" metode is net so geregverdig waar die onveranderlikheidsleerstuk aangehang word.

115 Ncube "Dealing with inequities in customary law: action, reaction and social change in Zimbabwe" 1991 *Int'l J of Law and the Family* 72 ev; a 11(1) Zambian High Court Act Cap 50; a 4 Malawi Divorce Act Cap 25:04.

116 Vgl die gemengde gemeenskap van winste soos beskryf deur Freedman *et al* 26–30.

117 Symeonides 1987 *Am J Comp L* 275.

118 Bates wat deur 'n egpaar verwerf is om voortdurend tot die gesin se beskikking te wees in almal se gesamentlike voordeel, kan *stante matrimonio* en na ontbinding van die huwelik as gemeenskaplike bates hanteer word. Familiebates is daardie bates wat bestem is vir die huidige en toekomstige gemeenskaplike gebruik van die gesin. Vgl *Wachtel v Wachtel supra* 90; *Gissing v Gissing* [1971] AC 886; en *contra Pettitt v Pettitt supra* 817A–G *per* Lord Upjohn.

119 Vgl *supra* vn 83; Ontario se reg en Skotse reg.

Volgens artikel 7(3)–(8) kan 'n billike aandeel toegewys word slegs waar die partye 'n verdelingsreëling getref het. Terwyl die Suid-Afrikaanse huweliksvoorwaardekontrak voorsiening mag maak vir verdeling in ooreenstemming met eiendomsreg in bates, laat artikel 7(3)–(8) 'n verdeling toe wat nie hiermee ooreenstem nie hoewel dit met elkeen se onderskeie bydrae rekening moet hou. Die verbeurdverklaring van vermoënsvoordele of 'n gedeelte daarvan hou ingevolge artikel 9 weliswaar met billikheid (behoorlikheid) verband en mag beveel word selfs waar daar geen kontraktuele reëling getref is nie, maar het slegs betrekking op daardie aandeel wat 'n party ingevolge die toepaslike bedeling toeval. Geen bates mag uit een boedel aan 'n ander oorgedra word nie. Waar 'n verbeurdverklaringsbevel verleen word, kan die verweerder niks méér neem as daardie bates wat hy self bygedra het nie.[120] Die moontlikheid van 'n eis vir "onmiddellike verdeling" op 'n billikheidsgrondslag van die gemeenskaplike boedel of 'n boedel onderworpe aan aanwasdeling kom slegs ter sprake waar die huwelik nie ontbind word nie.[121]

Die klaarblyklike eenvoud van huweliksbedelings kan dus besondere reëls en materiële verskille versluier. Terwyl artikel 7(3)–(8) onvoltooide persoonlike regte verleen ten opsigte van 'n gade se "eiegoed",[122] verleen die statutêre gemeenskap van goedere-bestel gedurende die huwelik reeds 'n eiendomsbelang in die helfte van dit wat deur die ander gade bekom word, en erken geen regte ten opsigte van 'n gade se eiegoed nie. In die afwesigheid van 'n kontrak ondersteun die reg deur middel van 'n vermoënsregtelike reëling: partye het die geleentheid om eiendomsbelange te vestig in meeste van die eiendom wat tydens die duur van die huwelik bymekaargemaak is. Dus hoef die verdelingsreëls nie *ook* op beskerming gerig te wees nie. Die Engelse reg weer verleen beskerming ingevolge die verdelingsreëls, en tipeer eiendom nie as gemeenskaplik gedurende die bestaan van die huwelik nie. Hoewel alle huwelikseiendom afsonderlik besit word in *common law*-sisteme (wat die gevaar kan skep dat 'n huweliksgoederebedeling beskou kan word as een wat *stante matrimonio* geen voorsiening vir gemeenskap van goed, deling van wins en verlies en aanwasdeling maak nie), behoort hierdie feit nie as basis vir nie-verdeling te kon dien in 'n stelsel wat gemeenskap van goed as statutêre bedeling het en wat eiegoed in hierdie bedeling vry van enige eise in die ander gade se guns ag nie. Dit kon geen sin hê om die *common law* se tipering van goed as eiegoed te aanvaar nie omdat die *common law* nie die onderskeid tussen afsonderlike en gemeenskaplike huweliksgoedere ken nie. 'n Vrou wat relatief min op haar naam het

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120 In die onlangse appèlafdelinguitspraak *Wijker v Wijker* 1993 4 SA 720 (A) is die *lex fori* toegepas om verbeurdverklaring van voordele teen die applikant te verhinder. Die klassifikasieproses is onduidelik omdat soveel fasette van die *lex fori* met dié van die *lex causae*, Nederlandse reg, saamgeval het.

121 Die gedrag moet belange in die gesamentlike boedel benadeel en derdes se belange moet nie deur so 'n bevel benadeel word nie. Ingevolge a 20(2) kan die hof verder gaan en 'n ander huweliksgoederebedeling onder voorwaardes wat hy goedvind van toepassing maak.

122 Hier is "eiegoed" nie vergelykbaar met eiendom wat in die – statutêre – gemeenskap van goederebedeling as eiegoed getipeer kan word nie. Eg kan lg insluit.

omdat sy 'n nie-verdienende gade was wat na die huishouding omgesien het, behoort nie gepenaliseer te word omdat sy nie lank genoeg in die *common law*-sisteem gebly het om onder daardie land se verdelingsreëls te kom nie, en omdat sy nie vroeg genoeg na die gemeenskap van goedere-sisteem beweeg het om deur daardie land se tipering van eiendom beskerming te verkry nie. Tipering van eiendom en die verdeling daarvan is in beide sisteme geïntegreer, terwyl beide sisteme beskerming bied aan nie-verdienende gades en tuisteskeppers – bloot op ander maniere en tye in die huweliksverhouding en selfs in die afwesigheid van formele beplanning vir die toekoms.

Die oplossing kon natuurlik in klassifikasie self gesoek gewees het. Aanpassing (*adaptation*) kon aan artikel 7(3)–(8) 'n uitleg gee wat aan die partye alles laat toekom wat hulle sou gehad het indien die Suid-Afrikaanse hof se herverdelingsdiskresie wel op die partye betrekking gehad het. Daar kon naamlik geredeneer word dat die klassifikasie van die herverdelingsbevoegdheid as 'n aangeleentheid wat met egskeiding verband hou, 'n subsidiêre klassifikasie daarvan as 'n vermoënsregtelike aangeleentheid insluit vir daardie gevalle waar herverdeling nie kan plaasvind nie omdat buitelandse egskeidingsreg nietoepaslik geag word. Kategorisering van die regterlike diskresie in een geval beteken nie dat dit vir alle toekomstige doeleindes in dieselfde kategorie moet val nie.[123] Waar die potensieel toepaslike *lex causae* se tipering nie leiding gee nie, kon die *lex fori* se tipering die deurslag gegee het. Die *lex fori* se klassifikasieskema vir eiendom veronderstel gemeenskaplike huweliksgoedere in afwesigheid van 'n kontrak. Die *lex fori* se tipering van eiendom is globaal gesien, uitsonderlik (aanvanklik, voor die 1984-wet, 'n eenvoudige onderskeid tussen gemeenskaplike goed en eiegoed en later die erkenning van deling deur die aanwasbedeling, wat as 'n vorm van skeiding van goed beskou is). Die funksie van die diskresie is egter iets wat die Suid-Afrikaanse reg met al die regsfamilies gemeen het: om regte in eiendom vas te stel en te verdeel. Indien die *lex fori* weens sy rigiede vereistes vir diskresie-uitoefening nie die verdeling kon rig nie, moet die verdeling geskied soos dit in die potensiële *lex causae* sou geskied. Dit is immers onlogies om te bevind, soos in die *Bell*-saak, dat sekere voormalige buitelanders geen herverdelingsaanspraak het nie waar beide die *lex fori* en die potensiële *lex causae* die herverdelingsbevoegdheid ken. Die *lex fori* moet die beskikbaarheid van die regterlike diskresie aan Henry en Wilma erken en daarmee omgaan soos die *forum*-reg vereis.

Daar sou onderskei kon word tussen die bestaan van 'n remedie en die aard van 'n remedie. Indien die diskresie in sowel die *lex fori* as die potensiële *lex causae* bestaan, kon die aard daarvan as 'n prosessuele aangeleentheid beskou word sodat die detail van die verdeling aan die *lex fori* oorgelaat word.[124]

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123 Vgl Allarousse 1991 *Case Western Reserve J of Int'l L* 512 met verdere verwysing; in die algemeen Bennett "Cumulation and gap: are they systemic defects in the conflict of laws?" 1988 *SALJ* 444.

124 Hierdie redenasie sluit aan by die vereiste dat vreemde reg gedingsvatbaar moet wees alvorens die howe van die *forum* dit sal erken. Hier bestaan egter twyfel of a 7 'n ware

vervolg op volgende bladsy

Dit was ook moontlik om die klassifikasiemeganisme as ontsnappingsmeganisme in te span in 'n resultaatgerigte benadering.[125] Genadelose logika is nie die enigste faktor wat die kategorie bepaal nie.[126] Hierdie benadering sou veronderstel het dat klassifikasie gesien word as metode en ontleding, terwyl die regskeusereël as tegniek onder verdenking staan.[127] Dit sou ook vereis het dat daar erken word dat die inhoud van die vreemde reg dwarsdeur die proses van klassifikasie daarop inwerk en deurentyd deur die litigante in gedagte gehou word; dat die substantiewe regsbelang 'n invloed op die proses uitoefen.

Die proses behoort plooibaar genoeg te wees om die tekortkominge wat uit die sisteem of orde van die substantiewe reg kan blyk nadat regsvergelykend gewerk is, aan te spreek en te beperk. Howe in *common law*-, *civil law*- en gemengde regstelsels het meganismes ontwikkel, soos permutasies op die veranderlikheidsleer, om potensiële onbillikheid in die Henry-en-Wilma-tipe feitestel te beperk. Daarenteen het die Suid-Afrikaanse howe die Wilma-en-Henry-tipe feitestel onder bestaande kategorieë ingetrek, sonder om aanpassings te maak.

Kommentatore kon niks beter aan die hand doen nie. Kahn het voorgestel dat indien onderskei kan word tussen reëls wat die vermoënsregtelike verhouding tussen die egpaar vanaf die oomblik van huweliksluiting *stante matrimonio* reël en reëls wat 'n egpaar se vermoënsregtelike posisie reël wanneer hulle skei, slegs eersgenoemde reëls as vermoënsregtelike gevolge van die huwelik aangesien moet word. Die funksie van die diskresie in die Engelse reg is om regsbystand by egskeiding te bied, wat versoenbaar is met die funksie van die diskresie in die *lex fori*. Volgens Kahn moes die *Bell*-saak op artikel 7(3) gefokus het met as enigste korrekte gevolgtrekking dat daar 'n gaping is, en 'n herverdelingsbevel gevolglik nie verleen mag word nie.[128] Vir Kahn was die beskikbaarheid van die *forum* se herverdelingsmeganisme afhanklik van die bestaan van 'n ooreenkoms (uitdruklik, by implikasie of stilswyend). Sy siening stel billikheid afhanklik van 'n verdelingsreëling. As die eiendom nie geklassifiseer word nie omdat die huwelik vermoënsregte basies onaangetas laat en 'n ooreenkoms vanaf regsweë onnodig is om dit so te hou, kan die meganisme nie werk nie. Daar kan geargumenteer word dat dit Engelse immigrante vrystaan om te kontrakteer as hulle huweliksgoedere wil deel by egskeiding. Die logiese uiteinde van die argument wat Kahn voorstel, sou wees dat individue wat huwelike ingevolge *common law* gesluit het (of dit nou voor of ná 1 November 1984 was) geen aanspraak sou kon hê op die herverdelingsmeganisme nie; en so ook swart immigrante vanuit *common law*-lande of state wat voor 1988 buite gemeenskap van goedere getroud is anders as uit hoofde van die ou artikel 22(6) van die Swart Administrasiewet.[129]

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remedie daarstel omdat daar nie net een verdelingsmoontlikheid nie, maar talle in 'n aansoek om herverdeling bestaan.

125 Juenger "Conflict of laws: a critique of interest analysis" 1984 *Am J Comp L* 32.

126 Vgl bv *Grant v McAuliffe* 41 Cal 2d 859, 264 P 2d 944 (1953); Silberberg 1973 *CILSA* 363–364.

127 Allarousse 1991 *Case Western Reserve J of Int'l L* 514–516.

128 Kahn 1991 *Annual Survey of South African Law* 588.

129 *Mathabathe v Mathabathe supra.*

Neels het gemeen dat die herverdeling van kapitale bates (vermoënsregte, geklassifiseer ingevolge die *lex fori*) telkens na die vreemde reg verwys moet gewees het. Vreemde reg moet die eis wat gebaseer is op die eiser se bydrae tot die boedel van die ander eggenoot beheer. Beide die tipering en die verdeling van kapitaalgoedere moet deur die potensiële *lex causae* beheer word. Verdeling van sowel kapitale as inkomstebates ingevolge die buitelandse reg sou weliswaar 'n skoon breuk moontlik kon maak, maar omdat onderhoud deur die *lex fori* beheer word, moet hierdie soort "holistiese" gedagtegang laat vaar word in die Henry-en-Wilma-tipe feitestel.[130] Hy sê nie hoeveel van die vreemde reg toegepas moet word nie en of vreemde regspraak hierby ingesluit moet wees nie.

In 'n vinnig veranderende wêreld kan die regs*corpus* kwalik diggeweef genoeg wees om vir alle gevalle wat kan voorkom, voorsiening te maak. Gapings ontstaan deels as gevolg van 'n onbuigsame en onverfynde klassifikasieproses wat nie daarmee rekening hou dat verskillende regsinstellings dieselfde sosiale doel nastreef en deur verskillende regskeusereëls beheer word ingevolge die *lex fori* nie. Bestaande beginsels en aanknopingspunte bied nie altyd voldoende dekking nie.[131] Beide Kahn en Neels pas die onveranderlikheidsleerstuk ongekwalifiseerd toe.[132] Albei beroep hulle op die belangrikheid van partye se regmatige verwagtings. Kahn se benadering ontken die interafhanklikheid van die klassifikasie en verdelingsreëls binne elke regsisteem, en die onderliggende verantwoordelikheid van regstelsels om vir eggenotes in Wilma se posisie 'n oplossing te probeer vind wat internasionale uniformiteit respekteer. Dit is met 'n mate van sinisme wat 'n mens hierdie doelwit van die internasionale privaatreg oorweeg in die lig van beslissings soos die *Bell*-uitspraak. Neels se siening van die metode wat in internasionale privaatregsake gebruik is voordat artikel 7(9) gepromulgeer is, bevat elemente van sowel die tradisionele metode as die "speurmetode" en is meer progressief as meeste ander sienings. Hoe meer vreemde reg-gerig 'n siening egter is, hoe meer potensiële probleme word ervaar in die blootlegging, bewys en toepassing van vreemde reg.

5 3 Kommentaar op die posisie ingevolge artikel 7(9)

Ingevolge artikel 7(9) kan 'n Suid-Afrikaanse hof aanspraak daarop maak dat dit dieselfde bevoegdhede oor huweliksgoedere mag uitoefen as 'n egskeidingshof van 'n egpaar se eertydse domisilie. Artikel 7(9) konsentreer op verdeling: as 'n verdeling van 'n spesifieke *ratio* 'n behoorlike beslissing sal wees ingevolge die

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130 Neels 1992 *SALJ* 341. Die feit dat vergoeding 'n invloed kan hê op die omvang van versorgingsaansprake beteken dus nie noodwendig dat onderhoud as 'n deel van die huweliksgoedereg bereg moet word nie. Soos hy dit verstaan, is "holisme" net moontlik in gevalle soos in *Lagesse v Lagesse supra* waar a 7(3) as basis vir die versorgingsregtelike eis kan dien.

131 Aristoteles *Ethica Nicomachea* Boek V 10 (vert Sir David Ross) (1925) 1137 sien *equity* as regsteller van reg wat onvolkome is agv die universaliteit daarvan. Sien ook *Wachtel v Wachtel supra* 829 838. Voet 1 1 6 meen dat billikheid by onvolledige reglementering te verkies is bo streng reg en oordrewe eksakte argument.

132 Symeonides 1987 *Am J Comp L* 274–276.

reg van die eertydse domisilie, kan die Suid-Afrikaanse hof 'n soortgelyke verdeling beveel. Dit stel nie die verdeling van huweliksgoedere afhanklik van die klassifikasie daarvan ingevolge die potensiële *lex causae* nie. *Common law*-sisteme klassifiseer in elk geval nie die partye se eiendom nie.[133]

By implikasie gee artikel 7(9) toe dat dit vreemd sou wees om op 'n kontrak aan te dring om gemeenskap uit te sluit in die geval van voormalige buitelanders wat nie nodig gehad het om te kontrakteer om bates afsonderlik te hou nie. Die handelingsbevoegdheid van die partye word immers nie deur hulle migrasie geraak nie, sodat geargumenteer kan word dat die gades 'n *prima facie* reg het (wat tussen 1 November 1984 en 31 Oktober 1988[134] 'n statutêre reg was) om die bestel te verander. Die feit dat die hof by egskeiding 'n ander verdeling mag beveel, of dat die partye 'n bate as gemeenskaplike eiendom verkry, verander niks hieraan nie.[135] Daar is geen sprake van enige verandering in die vrou se handelingsbevoegdheid wat teenoor derdes effektief gemaak behoort te word nie. Artikel 7(9) vertoon egter nie genoeg sensitiwiteit vir die feit dat mense wat onlangs na Suid-Afrika geïmmigreer het, nie vir alle doeleindes in dieselfde posisie is as mense wat reeds ou inwoners is wat die geleentheid gehad het om die *forum* se gemeenskap van aanwinste of goedere te kies en hul beplanning dienooreenkomstig in te rig nie. Louisiana se reg bied aan almal wat daar 'n domisilie vestig vir 'n jaar lank die geleentheid om te kontrakteer om eiendom "apart" te hou, dit wil sê vry van eise ten aansien daarvan, anders word die afwesigheid van 'n kontrak geag op 'n vorm van gemeenskap van goed te dui. Die *prima facie* reg waarvan Douglas praat, sou op soortgelyke wyse beperk kon word.

Ofskoon dit in artikel 7(9) om verdeling eerder as klassifikasie gaan, en die artikel deel uitmaak van die Egskeidingswet, koppel die artikel tog die herverdelingsbevoegdheid aan die vermoënsregtelike gevolge van die huwelik. Dit verleen statutêre magtiging aan die *Bell*-toepassing. Hiermee is die waarskynlikheid verhoog dat vreemde reg toepassing kan kry in 'n eis om bateverdeling ingevolge die regterlike diskresie. 'n Gebiedende of dwingende uitleg ten aansien van *common law*-huwelike kan uiteindelik die klassifikasieproses neutraliseer. In ieder geval het die Suid-Afrikaanse internasionale privaatreg nog nooit verhinder dat die herverdelingsdiskresie as 'n aspek van huweliksgoedereg geklassifiseer word nie. Waarom die Egskeidingswet hierdie kategorie aktief onderskryf, is onverstaanbaar. Klassifikasie worstel direk met die mate van *forum*-beheer oor die faktore wat die vreemde reg dwingend maak. Klassifikasie ingevolge die *lex fori* bring logistieke eenvoud mee. Sinvolle aanwending van die reg van die *forum* kan heelwat probleme voorkom.

Amerikaanse teorieë ten aansien van interstaatlike regskonflik sluit in substantiewe keusereëls (*proper law*) van Cavers; *interest analysis* van Currie; funksionele analise van Von Mehren en Trautman; eklektisisme en die "beter

133 Symeonides 1993 *Rabels* 489.
134 GK R2114 *SK* 10481/1986.
135 Douglas 1991 *De Rebus* 210.

reg"-benadering.[136] Die oplossing in huweliksgoederekonflikte word in *forum*-beheer gesoek. Die "kwasie-gemeenskapmetode" wat in Kalifornië ontwikkel is, laat sowel die klassifikasie as verdeling aan substantiewe *forum*-reg oor. Die eiendom word geag verkry te gewees het waar die gemeenskap van goed geld. In geval van egskeiding en dood word dit om die helfte verdeel. Hierdie metode is vir interstaatlike konflikte ontwerp. Kommentatore het getoon dat oneweredighede te dikwels deurglip, onder meer omdat 'n mate van arbitrêre en onbillike verdeling volg uit die verskille in die Amerikaanse state se tipering van eiendom.[137] Die metode sou beter resultate kon lewer indien die state met vorme van gemeenskap van goed almal dieselfde definisie van gemeenskaplike goedere gehad het.

Artikel 3526 van die nuwe Louisiana-kodifikasie is meer gesofistikeerd. Dit magtig klassifikasie ingevolge die *lex fori* by huweliksgoederekonflik. Wat die vasstelling van regte in of die verdeling van die huweliksgoedere betref, word alle eiendom wat ingevolge die *lex fori* as gemeenskaplik getipeer is, ingevolge die *lex fori* verdeel.[138] Vir sover die interne *forum*-reg die eiendom tipeer en verdeel in 'n buigsame proses wat ook van gevestigde regte kennis neem, herinner dit aan die *modus operandi* van die Australiese howe.[139]

Belange-ontleding (*interest analysis*)[140] sal toepassing van die reg van die huweliksdomisilie ten tyde van die verbrokkeling van die huwelik voorstaan aangesien hierdie staat waarskynlik die nouste geraak sal word deur die uitwerking van die huweliksgoederevraag. Aangesien gevestigde eiendomsbelange egter beskerming vereis, word die huweliksdomisilie ten tyde van verkryging van die eiendom in Amerika as 'n werkbare kompromis aanvaar.[141]

'n "Regstelling" van die oorsig wat die Suid-Afrikaanse substantiewe reg ten opsigte van sekere tipes feitestelle begaan het, sou in die vorm van 'n verborge regskeusereël in artikel 7(3) gemaak kon gewees het. Daar kon bepaal word dat artikel 7(3) aangewend moet word in alle sake waar die hof jurisdiksie het om aansoeke vir die verdeling van huweliksgoedere aan te hoor. 'n Verborge reël sou by implikasie beide klassifikasie en verdeling aan die *lex fori* oorgelaat het. Die voordele hiervan sluit in dat immigrante wie se *lex domicilii* nie herverdeling moontlik maak nie, ook hierdeur bevoordeel sou kon word. Dit is voorts in lyn met die uitbreiding van die diskresie na alle huwelike, ook binne

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136 Direkte toepassing en unilateralisme het baie veld gewen. Vgl in die algemeen Wasserstein-Fassberg "The forum: its role and significance in choice-of-law" 1985 *Zeitschrift für Vergleichende Rechtswissenschaft* 27–34; Juenger "General course on private international law" *Recueil des Cours* 1985 IV (1986) 123 191 213 ev; Kegel *International encyclopedia of comparative law* vol 3 hfst 3 pars 17–52; Lipstein (1981) 39–42.

137 Symeonides 1987 *Am J Comp L* 277 ev.

138 Symeonides 1993 *Rabels* 489.

139 Nygh 386.

140 Davie 1993 *ICLQ* 864 ev; die belange-ontleding en verbandsbenadering in *In re Estate of Crichton supra*. Davie verskaf 'n goeie oorsig oor die impak van die belange-ontledingteorie op Amerikaanse internasionale privaatreg.

141 Davie 1993 *ICLQ* 878.

gemeenskap en wanneer ook al voltrek, met as enigste vereiste die oordeel van die hof dat die feite van die betrokke geval billikheidshalwe 'n herverdeling vereis.[142]

Ongelukkig sou so 'n formulering verdeling van alle tipes eiendom en in alle gevalle aan die *forum* oorlaat, want dit let nie op hoe die potensiële *lex causae* regte allokeer en goedere verdeel nie, byvoorbeeld om selfonderhoudenheid te verseker.

6 GEREGTIGHEID IN DIE INTERNASIONALE PRIVAATREG

Nasionale aanwysingsregsisteme is veronderstel om 'n regverdige gesagsverdeling tussen state as identiese gelykes te reflekteer. Hierdie onpartydigheid waarborg onder meer dat 'n *forum* aan sy eie reg voorkeur sal verleen alleen as sy internasionale privaatreg dit vereis. Die internasionale privaatreg beoog uiteindelik, hoewel indirek, ook geregtigheid tussen individue. Abstrakte geregtigheid word deur billikheid gekwalifiseer.

Voor die invoeging van artikel 7(9) was Neels se opinie dat *Milbourn v Milbourn* verkeerdelik artikel 7(2) oorgesien het as basis vir die beslegting van die versorgingsregtelike eis, en nagelaat het om artikel 7(3) in beginsel te beperk tot 'n versorgingsregtelike eis. Engelse reg moes na sy mening die vermoënsregtelike eis beheer het. Hy was ook van mening dat *Lagesse v Lagesse* verkeerdelik van artikel 7(3) gebruik gemaak het om die vermoënsregtelike eis te besleg.[143] Neels se standpunte bring die kwessie van *dépeçage* op die voorgrond. Is dit wenslik dat een regstelsel se huweliksgoederereëls eiendom tipeer en 'n ander regstelsel die verdeling daarvan (wat op diskresie kan berus) bepaal? Steun artikel 7(9) *dépeçage* van vermoënsregtelike en versorgingsregtelike reëls sover dit Henry se miljoen betref?

6 1 Onderhoud: *Dépeçage* of *compéçage*

Sekere internasionale feitestelle en situasies kan 'n splitsing en aparte oorweging van aspekte en die toepassing van meerdere aanwysingsreëls vereis ("picking-and-choosing on the basis of an issue-by-issue analysis").[144] Amerikaanse howe erken *dépeçage*. Dit is 'n natuurlike maar nie noodwendig noodsaaklike gevolg van die beleidsgeoriënteerde benadering tot regskeuse nie. Daar word ook toegegee dat verbandhoudende aspekte van 'n saak die toepassing van 'n samehangende stel reëls kan noodsaak. Op die Vasteland neig die metodologie tot die veronderstelling dat partye verwag dat 'n enkele regstelsel toegepas sal word.[145]

Sonnekus toon aan dat alimentasie (onderhoud, oudagsversorging of die versorgingsregtelike aanspraak wat 'n onveranderlike gevolg van die huwelik is waaruit partye nie mag kontrakteer nie) in die Suid-Afrikaanse reg op ander beginsels berus en in beginsel heeltemal onafhanklik is van die herverdeling van

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142 Clark en Van Heerden 1989 *SALJ* 248.
143 Neels 1992 *SALJ* 341.
144 Hay "Flexibility versus predictability and uniformity in choice of law" *Recueil des Cours* 1991 I 376.
145 *Idem* 377.

bates of "sakeregtelik beheerste bateverdeling by ontbinding van die huwelik" met die oog op die berekening van 'n billike deel. Die alimentasie-aansprake tussen gades tydens die huwelik en tussen voormalige gades na ontbinding van die huwelik berus ook op verskillende beginsels.[146]

In internasionale sake kan dit uiters onwenslik wees om meerdere regstelsels op verskillende aspekte van dieselfde saak toe te pas. Die mate waarin potensieel toepaslike reëls verweefd is, is 'n belangrike aanduiding van onwenslikheid: wanneer die reël van een stelsel wat vir toepassing uitgesonder word so 'n noue verwantskap het met 'n ander reël van daardie stelsel dat die toepassing van die een sonder die ander die balans wat die reëls gesamentlik meebring drasties versteur, behoort *dépeçage* vermy te word. Tweedens moet oorweging geskenk word aan die beleidsoogmerke wat die regskeusereëls in beide stelsels ten grondslag lê omdat *dépeçage* dit onbedoeld kan ondergrawe en verwring.

Normaalweg is daar geen twyfel nie dat die *lex fori* onderhoud moet beheer. Versorgingsregtelike norme, sensitief vir veranderde gemeenskapsopvattings, is deel van die welsynsbeleid van die *forum*. Artikel 7(9) weerlê dit nie. Daar word immers vermoed dat statuut die gemenereg niks meer wysig as wat uitdruklik aangedui is nie. Indien hierdie reël van uitleg in gedagte gehou word, asook die onwenslikheid daarvan om onderhoud na die potensiële *lex causae* te verwys deur gebruikmaking van 'n substantiewe, relatief statiese wetsbepaling, moet volg dat artikel 7(9) die versorgingsbehoeftes uitsluitlik in die *lex fori* se hande laat maar *dépeçage* goedkeur.

Wat wel twyfel laat, is die verwringing van die *lex causae* wat kan intree indien die vermoënsregtelike eis ingevolge die *lex domicilii* bereg word en die versorgingsregtelike eis ingevolge die *lex fori* beoordeel word. Neels toon byvoorbeeld aan dat die beginsel van selfonderhoud van die Engelse reg net toevallig sou resulteer indien onderhoud ingevolge artikel 7(2) oorweeg word.[147] Indien alle eise wat met die finansiële posisie by egskeiding verband hou ingevolge die *lex domicilii* ten tyde van huwelksluiting bereg word, waar hierdie stelsel die herverdeling van bates in 'n vermoënsregtelike en versorgingsregtelike konteks reël, word die "eenheid" en die integriteit van die vreemde regstelsel gerespekteer. *Compéçage*[148] (as die skikking deur 'n enkele regstelsel beheer word) sal onpraktiese ondersoeke uitskakel. Dit sal byvoorbeeld nie nodig wees om te bepaal welke herverdeling 'n Engelse hof sou gelas as dit net rekening met die vergoedingsaspek moes hou met uitsluiting van die onderhoudsaspek nie. 'n "Kunsmatige" uitmekaarhaal van konsepte wat in die vreemde reg verweef is, kan onbillik werk. As 'n *forum*-reël in die geslote buitelandse regsisteem ingevoer word, sal daar noodwendig ander aanpassings in belang van die voortdurende

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146 Vgl Sonnekus "Artikel 36 van die Wet op Huweliksgoedere 88 van 1984" 1985 *De Rebus* 331; "Pensioenverwagtings en onderhoud na egskeiding in versorgingsregtelike in plaas van vermoënsregtelike konteks" 1989 *TSAR* 226 ev; "Pensioendeling, billikheid én egskeidingsreg is onversoenbaar" 1994 *TSAR* 48.

147 Neels 1992 *SALJ* 345.

148 Term geleen van Ehrenzweig/Jayme *Private international law* vol III (1977) 9.

harmonie tussen regsisteme gemaak moet word.[149] *Dépeçage* is nie sonder verdere aanpassing geskik vir die Henry-en-Wilma-tipe feitestel nie. Die besluit vir of teen *dépeçage* moet resultaat-georiënteerd wees. Die kompensasie wat aan die verdienstelike nie-verdienende eggenoot gebied word, tesame met 'n oorweging van toekomstige onderhoudsbehoeftes, behoort deurslaggewend te wees.

Dit val nie te betwyfel nie dat elke enkele bate-item deur die een of die ander regstelsel, toegepas in sy totaliteit, beheer moet word: net een regstelsel behoort regte in 'n spesifieke bate te bepaal. Dit laat 'n keuse tussen veranderlikheid en onveranderlikheid. 'n Oplossing soos dié van artikel 3526 van die nuwe Louisiana-kodifikasie is nog oop vir ondersoek: om al Henry en Wilma se huweliksgoedere ingevolge die *lex fori* te klassifiseer, en dit wat ingevolge die *lex fori* as gemeenskaplik geklassifiseer is, ingevolge die *lex fori* te verdeel. Hierdie is een van die mees progressiewe antwoorde op dié soort probleem. Oorbeskerming behoort nie as 'n fundamentele en onoorkomelike probleem beskou te word nie. Te veel is hier verkiesliker as te min[150] en toepassing van die *lex fori* ten aansien van die totale eis behoort "oorkompensasie" te kan beperk tot relatief min gevalle.

Waar *forum*-reg onbillike beperkings bevat, kan regverdigheid vereis dat 'n oorsig in die reg onmiddellik reggestel word vir 'n besondere saak sodat die regterlike diskresie aangewend kan word tot tyd en wyl ondervinding, soos ontwikkel deur rede of wetgewing, 'n regsbeginsel geformuleer het.[151] Die verhouding tussen diskresie, billikheid en regskeusereëls word belig in wat volg.

6 2 Regskeusereëls en billikheid in die internasionale privaatreg

Regskeusereëls wat na die klassifikasieproses geïdentifiseer is, verdien respek omdat hierdie reëls die beste aangewese oplossing of allokasie in die oë van die *forum* is.

> "The threshold for departures from existing conflicts rules due to interests having shifted or weakened should be considerably higher than for a 'free' formulation of a suitable new rule."[152]

Alle regskeusereëls bevorder nie substantiewe beleid in dieselfde mate as wat sekere moderne kodifikasies (soos die Switserse internasionale privaatregstatuut) dit doen nie. Nietemin, die terrein van die huweliksgoedere smag na beleidsgeoriënteerde regskeuse. Regskeusereëls mag nie langer blind wees vir die resultaat van hul toepassing nie.

Een van die algemene vereistes, van prosessuele aard, vir billikheid is dat soortgelyke sake op dieselfde wyse beslis moet word. Substantiewe geregtigheid in die individuele geval word deels bevredig deur die waarborg wat die proses

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149 Neels 1992 *SALJ* 343; Roodt 1988 *De Rebus* 63–64; Silberberg 1973 *CILSA* 339; sien teks by vn 88.

150 Symeonides 1987 *Am J Comp L* 284–5; 1993 *Rabels* 489–490.

151 Pound 1960 *NY Univ LR* 298–299.

152 Vonken "Balancing processes in international family law" in Centrum voor Buitenlands Recht en Internationaal Privaatrecht *Forty years on: the evolution of postwar private international law in Europe* (1990) 192.

verleen dat ander *fora* tot dieselfde resultaat sal kom waar die inhoud van regskeusereëls universeel is. Voor die 1992-toevoeging van subartikel 7(9) was daar nie sprake van konsekwente toepassing daarvan in die Witwatersrandse Plaaslike Afdeling nie, hoewel al die beslissings volkome regmatig was. Billikheid vereis ook gehoorsaamheid aan die statuut as uitdrukking van die wetgewende wil, ofskoon die statuut aan herinterpretasie en herformulering in ooreenstemming met die onderliggende beginsel in 'n saak onderworpe bly.[153] Die *Milbourn*- en *Bell*-gewysde is nie deur 'n enkele bepaalde reël beheer nie en het 'n afweging vereis van die gewig van die relevante beginsels wat op daardie tydstip gegeld het. Die gewig van 'n beginsel berus egter op alle bewese feite in 'n konkrete saak (wat dit van 'n reël onderskei) en die aanwending van een beginsel tot die uitsluiting van 'n ander berus op persoonlike oordeel.

Die diskresie ingevolge die Suid-Afrikaanse reg is in pas met regsinstellings in ander gedeeltes van die wêreld: artikel 7(3) is ontwerp met billikheid in die omstandighede van die individuele geval voor oë en die *common law*-stelsels streef 'n vergelykbare doel na. Indien die doel van die proses dan billikheid teenoor die partye is, moet billikheid ook getoets kan word aan hoe getrou die *forum*-bevel 'n bevel ingevolge die *lex causae* naboots. Artikel 7(9) toon nie genoeg sensitiwiteit vir die wyse waarop die vreemde hof sy reg toepas nie. *Dépeçage* en klassifikasie is instrumente waarmee rasionele oplossings bewerk kan word. Artikel 7(9) erken nie een van die twee vir wat hulle is nie.

Daar word ten slotte nog kortliks gekyk hoe artikel 7(9) inpas by die metodologie van die internasionale privaatreg.

7 ARTIKEL 7(9) EN INTERNASIONALE PRIVAATREGMETODOLOGIE

Met artikel 7(9) toon die Suid-Afrikaanse reg 'n bewustheid dat veranderde omstandighede as gevolg van migrasie problematies kan wees. Die tegniek van wetsopstelling wat hier aangewend is, laat egter heelwat vrae ontstaan. Lê dit 'n vaste reël neer of bloot 'n *open-ended* reël of benadering? Is dit aanwysend en inhoudsgerig of dwingend en jurisdiksiegerig? Watter implikasies hou dit vir *renvoi* in? Hoe beïnvloed dit die ruimtelike werking van wette en die aard en perke van die aanwysingsproses?

Artikel 7(9) bepaal nie welke regsisteem aanwending moet verkry nie maar poog om die bevoegdhede van die Suid-Afrikaanse hof te omlyn wanneer 'n vreemde hof 'n bepaalde bevel mag gee. Dit is dus geen unilaterale of multilaterale regskeusereël nie maar bevat 'n bepaling aangaande 'n aanwysingsreël. Dit verleen dieselfde bevoegdheid as wat "'n bevoegde hof van die betrokke vreemde staat op daardie tydstip sou hê . . ." (daar is natuurlik nie noodwendig op die tydstip van litigasie wél 'n bevoegde hof in die buiteland nie – hierdie absurditeit laat ons egter daar). Artikel 7(9) wil die resultaat op die meriete

153 Sien Allan "Justice and fairness in law's empire" 1993 *Cambridge LJ* 74–75 86–88 se kritiek op Dworkin.

beheer. Hierdie bepaling stel rigtinggewende beginsels daar wat net die buitenste grense van beslissings vir sekere voormalige buitelanders aandui. Dit is by uitstek gemik op die Henry-en-Wilma-tipe sake. Om die waarheid te sê, die artikel is slegs sinvol waar die vreemde regstelsel 'n diskresionêre verdelingsbevoegdheid verleen.

Op die oog af dui artikel 7(9) geen voorkeur ten opsigte van die *lex fori* of die *lex causae* aan nie. Ofskoon die gebruik van die woord "hof" eerder as "regstelsel" as 'n *forum*-benadering gesien kan word, is die norme van billikheid en regverdigheid soos dit in die potensiële *lex causae* toepassing kry, allesbehalwe uitgesluit. Een van die onsekerhede op 'n praktiese vlak is of dit moontlik is om 'n vreemde regstelsel getrou weer te gee met verwysing na wetgewing alleen. Alhoewel dit geen uitgemaakte saak is dat die uitoefening van die diskresie onderworpe moet wees aan regspresedente nie, kan 'n ondersoek van presedente wat aandui hoe die vreemde hof sy magte interpreteer 'n getrouer aanduiding van die regsmilieu gee (dis nie alle buitelandse presedente wat van billikheid jeens die ekonomies minder aktiewe party spreek nie[154]). Hoe minder vergelykbaar die potensiële *lex causae* met Suid-Afrikaanse reg is, hoe groter die nut wat buitelandse presedente sal hê.

Die praktiese probleme met die vasstelling van die inhoud en betekenis van relevante buitelandse wetsbepalings spreek ten gunste van 'n magtigende interpretasie. Die bewoording van die memorandum tot Wet 44 van 1992, om die hof in Henry-en-Wilma-tipe gevalle "met 'n wyer bevoegdheid te beklee", steun 'n magtigende interpretasie. Voorts dui die plasing van subartikel 9 aan dat dit bykomend tot subartikels 3–8 bedoel is. 'n Dwingende interpretasie in internasionale sake sou subartikels 3–8 oorbodig maak.

'n Magtigende uitleg sal egter net sinvol wees as daar terselfdertyd van die onveranderlikheidsleerstuk wegbeweeg word omdat hierdie leerstuk op sy beurt duur en tydrowende ondersoeke na vreemde reg nodig maak, probleme verbonde aan die bewys en die toepassing van vreemde reg meebring en die kans op 'n foutiewe toepassing van vreemde reg verhoog. Die veranderlikheidsleerstuk kan ook problematies wees. Selfs egpare wat hulle nahuwelikse domisilie net eenmaal verander het, kan voor feitlik onoplosbare administratiewe en logistieke probleme te staan kom indien die eiendom bekom onder die vroeëre domisilie vervleg geraak het met later verkreë eiendom. Die vraag in watter mate die eenheidbeginsel in die pad staan van 'n ontwikkeling in die rigting van veranderlikheid verdien verdere navorsing.

Die vertrekpunt van die Suid-Afrikaanse reg ten aansien van *renvoi* is dat verwys word na die *lex causae* se interne reg tensy billikheid, gerief en beslissingsharmonie gedeeltelike *renvoi* nodig maak en daar geen statutêre bepaling is wat hiermee strydig is nie.[155] Die domisiliêre reg soos deur die Suid-Afrikaanse regskeusereël ten aansien van vermoënsregtelike gevolge van die

154 Bv die beslissings van die Zimbabwe High Court in *Mujati v Mujati* HC-H-505–87 en *Masocha v Masocha* HC-H-183–87.

155 Spiro (1973) 63.

huwelik aangedui, verwys slegs na interne reg. Artikel 7(9) verwys by implikasie na die resultaat wat voor die vreemde hof verkry kan word. Dit wil lyk of daar ruimte vir *renvoi* gelaat word – 'n leerstuk wat in sy eenvoudige en volkome vorme talle kombinasies moontlik maak.[156] Die idee was dalk om iets van die *foreign court theory* van die Engelse howe weer te gee, naamlik dat huweliksgenote dieselfde regte behoort te hê as wat hulle sou gehad het in die land waarvandaan hulle hul huweliksgoederebestel verkry het, en dat hulle onderworpe behoort te wees aan dieselfde beperkings ten aansien van huweliksgoedere as waaraan hulle in daardie land sou wees.[157] Die *foreign court theory* as leerstuk van volkome *renvoi* sou beteken dat die Suid-Afrikaanse hof die reëls moet toepas wat die hof van die *lex causae* sou toepas indien die feitekompleks hom dáár sou voordoen. Die klem sou moes val op die buitelandse regskeusereëls en die buitelandse hof se benadering tot *renvoi*.

Die Louisiana-kode se selektiewe toepassing van *renvoi* is besonder interessant. Wanneer die wetgewer die regskeuse maak, word *renvoi* geag uitgesluit te wees tensy die teendeel duidelik blyk. Wanneer die regskeuse aan die regterlike diskresie oorgelaat word, word *renvoi* nie uitgesluit nie (artikel 3517).

Artikel 7(9) kies nie uitdruklik vir of teen *renvoi* nie. Nietemin is dit miskien meer sinvol om *renvoi* hier uit te sluit. Daar is 'n beweging in hierdie rigting ten opsigte van *renvoi* in sy gedeeltelike en volkome vorme omdat die universele aanvaarding daarvan kwalik tot internasionale uniformiteit van beslissing lei.[158] Die interpretasie wat die plaaslike howe aan 'n regskeusereël heg wat met hierdie artikel geassosieer word, bevestig hierdie tendens. Vir sover artikel 7(9) die *Bell*-toepassing steun, lui dit die doodsklok vir internasionale eenvormigheid van beslissing. Dit sanksioneer naamlik 'n ander hantering as wat die buitelandse hof sou volg wat die leerstuk van splitsing aanhang.

In beginsel behoort interne en vreemde privaatreg gelyke behandeling te geniet. Terwyl geen hof verplig is om die wetsbepalings of die regsbeslissings van die vreemde reg onvoorwaardelik toe te pas nie, bly *forum*-reg ook die gerieflikste, goedkoopste, dikwels die mees praktiese om toe te pas en dien dit dikwels die algemene belang die beste. Dit is altyd beskikbaar, bekend en toeganklik. Moderne teorie ken selfs aan die *lex fori* 'n primêre rol toe (sodat die toepassing van die vreemde reg as uitsondering beskou word). Die groter beheer van die *forum* en die *lex fori* sluit in die beheer oor die keuse van die beter reg. Iets van hierdie benadering word teruggevind in die "kwasie-gemeenskapsbenadering" of uitgebreide veranderlikheid en in veranderlikheid soos die Louisiana-kodifikasie dit kwalifiseer.

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156 Lipstein (1981) 104; Edwards "Locus regit actum" 1986 *THRHR* 152 ev.

157 Vgl in die algemeen Silberberg 1973 *CILSA* 338.

158 Wet op Domisilie 3 van 1992 a 4; Wysigingswet tot Wysiging van die Erfreg 43 van 1992 a 2; EEC Convention on the Law Applicable to Contractual Obligations 1980-06-19 (80/934/EEC) *OJEC* 1980L266/1 a 15; die benadering van Engelse howe om *renvoi* uit te sluit by kontrakte.

8 GEVOLGTREKKING

Vir sover artikel 7(9) buigsaamheid aan die hof in sy soeke na die toepaslike reg verleen, bied dit beskerming aan sekere nie-verdienende eggenotes wat op die reg van die vorige domisilie steun. Dit verleen naamlik erkenning aan die regte en aansprake wat ander regstelsels ten opsigte van die verdienende gade se eiegoed mag erken. Artikel 7(9) is beleid-bewus. Dit sou 'n waardevolle hervorming kon wees indien dit sou kon lei tot belange-ontleding en 'n strewe kon wakkermaak na formulering van 'n beleidsgerigte regskeusereël. Soos dit tans staan, harmonieer die artikel nie volkome met Suid-Afrikaanse internasionale privaatreg nie. Teen 'n teoretiese agtergrond beskou, is artikel 7(9) oorbodig.

- Die klassifikasieproses het 'n potensiaal wat ryk genoeg is om die gewaande probleme in internasionale feitestelle te voorkom. Om van 'n kategorie wet te maak, ontneem dit van sy potensiaal om rasionele oplossings te bewerk op 'n kasuïstiese basis en onder 'n buigsame proses. As leiding op wetgewende vlak dan noodsaaklik word, moet bestaande aanwysingsregteorie en regsvergelykende modelle hiervoor benut word.
- Artikel 7(9) gee geen leiding oor die toepassing van die bestaande regskeusereëls nie.
- Artikel 7(9) kies nie vir of teen *renvoi* nie.
- Artikel 7(9) kies nie vir of teen die toepassing van vreemde reg nie.
- Artikel 7(9) dui geen beleidsrigting vir of teen die gedeeltelike veranderlikheidsleer wat plek laat vir verkreë regte, beskerming en verwagtings wat ingevolge die reg van die vorige domisilie bestaan nie. Indien artikel 7(9) gesien kan word as 'n terugverwysing na die vroeëre domisiliêre reg, bevestig dit die onveranderlikheidsleerstuk. In geval van beide veranderlikheid en onveranderlikheid bly vele kombinasies moontlik wat van alle internasionale of meerstaatlike sake noodwendig *hard cases* maak.
- Nóg 'n gebiedende uitleg, nóg 'n aanwysende uitleg van artikel 7(9) sal die belang van regsekerheid en voorspelbaarheid in huweliksgoederedispute dien. 'n Gebiedende uitleg beteken nie dat internasionale sake outomaties *easy* of *intermediate cases* word, omdat die regmatige oplossings tot een oplossing die toepassing van die vreemde reg op die herverdeling verminder nie. Die regter moet steeds kies: om vreemde reg toe te pas ten aansien van die verdeling van kapitale bates of die verdeling van bates daar verkry; om vreemde reg toe te pas ten aansien van die tipering van die eiendom; om *dépeçage* te weier sodat die potensiële *lex causae* of die *lex fori* alle aspekte van die eise beheer of om dit toe te pas; hoeveel van die vreemde reg om toe te pas; om 'n bate-vir-bate of formeel separatistiese benadering te volg by die oorweging van die meriete van die onderskeie eise en 'n bevel ten aansien van elk se eis; om 'n bevel te maak wat 'n algemene verduideliking van die toedeling van goed, of een wat 'n matematiese formule vir die berekening van kapitaal en onderhoud bevat. Indien artikel 7(9) as adviserend beskou word, as 'n benaderingsvoorstel eerder as 'n reël, word die keuses nie noodwendig minder of makliker nie. 'n Skematiese vergelyking van beginsels en metodes

sal gou toon dat regsadvies 'n veel groter spektrum van moontlikhede moet dek as wat behoorlikerwys verwag kan word!

Regsvergelykende studie wys dat fyn omlynde reëls besig is om die algemene en wydomsluitende tradisionele reëls van die verlede te vervang. Dit is betekenisvol dat moderne teorieë neig tot groter *forum*-beheer, diskresie en substantiewe oorweging al is dit beperk tot interstaatlike konflik soos in Amerika. Die regsvergelykende analise wat hierbo gedoen is, verwys na die waarde daarvan om die *lex fori* toe te pas ten aansien van klassifikasie van kapitale bates en die verdeling van kapitale bates wat ingevolge die reg van die *forum* as gemeenskaplike bates getipeer is. Alhoewel dit voordelig kan wees om te let op die tipering van inkomstebates ingevolge die *lex causae*, is die *lex fori* veral geskik om versorgingsregtelike aansprake en die verdeling van inkomstebates te beheer. In die Suid-Afrikaanse bedeling wat vanaf regsweë aanwending vind, is daar as reël nie kapitale bates wat as eiegoed geklassifiseer sal word nie, sodat die Louisiana-model sal beteken dat vreemde reg in steeds minder gevalle toegepas sal moet word.[159] Die party wat die vreemde reg se beskerming soek, betaal die prys daarvoor aangesien hy of sy verantwoordelikheid dra vir die bewys daarvan.[160] *Forum*-reg behoort nie sekondêr gemaak te word by herverdelingsbevele nie. Per slot van sake kan geen bepaling ooit 'n hof in staat stel om 'n ander diskresie as net sy eie uit te oefen nie.

Die substantiewe sy van internasionale privaatregsteorie word tradisioneel deur 'n proses omlyn. Die proses bevredig die regverdigheidsin indien 'n beslissing aan toepaslike reëls beantwoord en 'n regstelsel "korrek" aangewys is al beteken dit dat die toepaslikheid van die bron belangriker geag word as die meriete van die reg wat as toepaslik beskou word. Oplossings behoort egter in ooreenstemming te wees met die doelstellinge van beide die internasionale privaatreg en die substantiewe huweliksgoedereregs.

Die vraag na regshervorming op die gebied van die familiereg is dringend. Gekodifiseerde aanwysingsreg het in baie wêrelddele 'n realiteit geword. Die leiding wat 'n internasionale privaatregkode hier kan gee, onder meer om die fragmentariese benadering ten opsigte van internasionale privaatregwetgewing

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159 Vreemde reg sal in die gewone gang van sake onder die regter se aandag gebring word in die pleitstukke. Ingevolge die Wysigingswet op die Bewysreg 45 van 1988 a 1 kan geregtelike kennisname daarvan geneem word waar die inhoud van vreemde reg maklik en met voldoende sekerheid vasgestel kan word. Indien dit nie die geval is nie, geld die feiteleerstuk en moet deskundige getuienis gelei word. Dit is waarskynlik ook toelaatbaar vir die regter om *sua sponte* die toepaslikheid van 'n vreemde reël te ondersoek. Die hof het 'n diskresie om die getuienis toe te laat. Vgl Edwards "Book Review" 1991 *THRHR* 855; in die algemeen Edwards 1986 *THRHR* 147 ev 168–171 oor die bewys van vreemde reg; ook Spiro (1973) 39.

160 Die vermoede dat die inhoud van vreemde reg dieselfde is as dié van die *forum* indien die inhoud daarvan onseker is, steun die status van gelykheid tussen die *lex fori* en buitelandse reg. *Forum*-reg en buitelandse reg is egter steeds nie vir alle doeleindes gelyk nie want die hof het nie die volledige verantwoordelikheid om die inhoud van vreemde reg vas te stel nie.

te besweer, en om die uitwerking van die Huweliksgoederewet en Egskeidingswet op die internasionale privaatreg uit te spel, kan onskatbare waarde hê. Kodifikasie hoef immers nie onbestaanbaar te wees met die neerlegging van 'n benadering (teenoor regsreëls) nie.[161] Dit het veral tyd geword om regsvergelykende modelle ernstig op te neem vir sover hulle 'n begeerliker oplossing tot 'n spesifieke meerstaatlike probleem verskaf. Regsvergelykende modelle en ontwikkelings ter versoening van die *civil law* en *common law*, wat raamwerke vir interaksie tussen die regsfamilies skep en wat duidelike parameters stel, kan nie langer oor die hoof gesien word nie. Wetenskaplike regshervorming het dalk 'n luukse in die wetgewende proses geword maar dit bied steeds die enigste hoop op 'n *nugget of pure truth*.

I agree, and I firmly believe, that freedom of expression and of the press are potent and indispensable instruments for the creation and maintenance of a democratic society, but it is trite that such freedom is not, and cannot be permitted to be, totally unrestrained. The law does not allow the unjustified savaging of an individual's reputation. The right of free expression enjoyed by all persons, including the press, must yield to the individual's right, which is just as important, not to be unlawfully defamed. I emphasise the word 'unlawfully' for, in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what another says about you, the law has devised a number of defences, such as fair comment, justification (ie truth and public benefit) and privilege, which if successfully invoked render lawful the publication of matter which is prima facie *defamatory . . . The resultant balance gives due recognition and protection, in my view, to freedom of expression* (per Corbett CJ in *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 2 SA 1 (A) 20).

161 Edwards 1986 *THRHR* 165. Vgl Bodenheimer "Is codification an outmoded form of legislation?"1982 *Am J Comp L* (Supp Law in the USA for the 1980s) 15; Symeonides 1993 *Rabels* 461.

AANTEKENINGE

ENKELE OPMERKINGS OOR DIE WERKING VAN DIE RISIKO-REËL BY DIE KOOP ONDERWORPE AAN 'N OPSKORTENDE VOORWAARDE EN SOORTGELYKE BEDINGE

In die Suid-Afrikaanse reg geld 'n besondere reëling van risiko by die koop onderworpe aan 'n opskortende voorwaarde. Voor vervulling van die voorwaarde dra die verkoper die risiko vir die toevallige vernietiging en beskadiging van die saak. Indien die voorwaarde vervul word, dra die koper die risiko vir beskadiging van die saak reeds voor vervulling van die voorwaarde asook die risiko van vernietiging vanaf die oomblik van vervulling. 'n Aantal bedinge word by die bespreking van risiko in die Romeinse reg en nog meer uitgebreid in die Romeins-Hollandse reg aan die opskortende voorwaarde gelykgestel. Hierdie bedinge is nie suiwer opskortende voorwaardes wat hulle werking betref nie. Die vraag is nou waarin hierdie gelykstelling geleë is. Beteken dit dat voor nakoming van die beding die koopkontrak bloot nie *perfecta* is nie of beteken dit ook dat die oorgaan van die risiko op dieselfde wyse as die opskortende voorwaarde gereël word? Moderne Suid-Afrikaanse skrywers en regspraak gee geen uniforme antwoord op hierdie vraag nie.

Die Suid-Afrikaanse reëling van risiko is hoofsaaklik gebaseer op die Romeins-Hollandse reg (Hamman *Die risiko by die koopkontrak in die Suid-Afrikaanse reg* (1938) 305–306). Die gemeenregtelike skrywers volg weer die Romeinsregtelike reëling van risiko, soos wat hulle dit verstaan het (Schorer *ad Gr* 3 14 34; Voet 18 6 6; Groenewegen *De Leg Abr Inst* 3 23(24) 3; Zimmermann "Der Kaufvertrag" in Feenstra en Zimmermann (reds) *Das römisch-holländische Recht* (1992) 169; Hamman 1 75–76). Verdere ontwikkeling vind wel in die gemenereg plaas (Zimmermann "Der Kaufvertrag" 169; Hamman 1) en afwykende menings kom ook onder die gemeenregtelike skrywers voor (Hamman 76). 'n Historiese ondersoek van die vraag, wat in die vorige paragraaf gestel word, is dus van pas.

1 Romeinse reg

Die reëling van risiko in die klassieke Romeinse reg is onseker. Al wat wel vasstaan, is dat die klassieke tekste, wat in die *Digesta* opgeneem is, bewerk is (vir 'n onlangse bespreking sien Ernst *Das klassische römische Recht der Gefahrtragung beim Kauf: periculum est emptoris* (1981)). Slegs die risiko-reëling

van die *Corpus juris civilis* sal bespreek word weens hierdie onsekerheid en die feit dat die reëling van die koopkontrak in die moderne Suid-Afrikaanse reg hoofsaaklik op hierdie kodifikasie gebaseer is (Hamman 1).

Die algemene reël is dat die verkoper die risiko vir die toevallige vernietiging en beskadiging van die koopsaak dra voordat die koop *perfecta* is en dat die risiko op die koper oorgaan sodra die koop *perfecta* is (*D* 18 6 8*pr*). Die koop is *perfecta* sodra die identiteit, kwaliteit en kwantiteit van die koopsaak bepaald is, die prys bepaald is en die koop onvoorwaardelik is (*ibid*).

1 1 Koopkontrak onderworpe aan 'n opskortende voorwaarde

Die Romeine verstaan onder 'n voorwaarde slegs die opskortende voorwaarde, al ken hulle die ontbindende voorwaarde (De Zulueta *The Roman law of sale* (1945) 29; Hamman 41).

Paulus bespreek in *D* 18 6 8*pr* die oorgang van die risiko waar die koopkontrak aan 'n opskortende voorwaarde onderworpe is (bevestig in die baie kort *Frag Vat* 16 Pap 3 resp: vir 'n bespreking sien Seckel-Levy "Die Gefahrtragung beim Kauf im klassischen römischen Recht" 1927 *ZSS* 154–178; Ernst 35–50; Hamman 45–48). Die koopkontrak is voor vervulling van die opskortende voorwaarde nog nie *perfecta* nie. Indien die voorwaarde nie vervul word nie, is daar geen koop nie. Indien die voorwaarde wel vervul word, dra die koper die risiko. Waar die koopsaak vernietig word voor vervulling van die voorwaarde, kan die betaalde prys teruggeëis word en die vrugte van die saak kom die verkoper toe. Daarenteen, indien die saak nog bestaan maar in waarde verminder voor vervulling van die voorwaarde, dra die koper die verlies.

Hoewel dit voorkom of die Romeine by die vervulling van die opskortende voorwaarde die risiko vir vernietiging en waardevermindering aan die koper en verkoper onderskeidelik toewys, is dit nie die geval nie. Dit is bloot die gevolg van die werking wat die Romeine aan 'n opskortende voorwaarde koppel (Seckel-Levy 1927 *ZSS* 174 177–178; Ernst 38). Vir hulle kom die koopkontrak vanaf kontraksluiting tot stand wanneer die voorwaarde vervul word (*D* 18 6 8*pr*; Ernst 44). Waar die koopsaak egter vernietig word voor vervulling van die voorwaarde, kan 'n koopkontrak nie so tot stand kom nie, omdat een van die vereistes vir 'n geldige koopkontrak (die bestaan van 'n koopsaak) ontbreek (Ernst 45; Seckel-Levy 1927 *ZSS* 174). Indien die saak beskadig word, kan die koopkontrak wel tot stand kom (daar is 'n koopsaak) en daarom dra die koper die risiko van beskadiging van die saak (Ernst 45–46; Seckel-Levy 1927 *ZSS* 174).

Vele moderne skrywers aanvaar dat die koper die risiko van waardevermindering in Justinianus se tyd dra (Moyle *The contract of sale in the civil law* (1892) 78–79; Hamman 46 49; Ernst 37–38; Seckel-Levy 1927 *ZSS* 154–178; Sohm *The institutes of Roman law* (1907) 402 vn 5; Buckland *A text-book of Roman law from Augustus to Justinian* hersien deur Stein (1966) 494–495). De Zulueta 32 spreek egter twyfel hieroor uit. Hy meen dat *D* 18 6 8*pr* die enigste teks is wat dit bepaal. Hy meen ook dat daar nie uitgespel word of dit ook van toepassing is op gevalle waar die saak of prys onbepaald is nie. Soos reeds aangetoon, is daar 'n verband tussen die risiko-reëling en die werking van die

opskortende voorwaarde. Die reëling sal nie op die gevalle wat De Zulueta noem, toepassing kan vind nie omdat daar nie van 'n voorwaarde in daardie gevalle sprake is nie. Zimmermann werp weer twyfel op die reëling van risiko by waardevermindering met 'n verwysing na skrywers wat die vraag bespreek of dit in die klassieke Romeinse reg voorgekom het (*The law of obligations* (1990) 284 vn 76). Daar is ook skrywers wat in hulle bespreking van die risiko-reëling by die opskortende voorwaarde die reëling ten aansien van waardevermindering glad nie noem nie (bv Rodger "Emptio perfecta revisited: a study of Digest 18, 6, 8, 1" 1982 *TvR* 349–350; Van Zyl *Geskiedenis en beginsels van die Romeinse privaatreg* (1977) 291; Lee *The elements of Roman law* (1952) 311). Hieruit kan egter geen afleiding gemaak word oor wat hulle standpunt ten aansien van die reëling van risiko by waardevermindering is nie.

1 2 Koop ad mensuram

In so 'n koopkontrak word 'n bepaalde koopsaak, soos 'n hooimied, verkoop teen 'n bepaalde prys per eenheid (Hamman 23; De Wet en Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* vol 1 (1992) 348–349). Die koopsaak is bepaald maar nie die aantal eenhede nie (*D* 18 1 34 5). Die koopprys kan eers vasgestel word nadat die koopsaak geweeg, gemeet of getel is (Hamman 23; De Wet en Van Wyk 349).

Gaius is volgens *D* 18 1 35 5 van mening dat dit 'n omstrede vraag is of die koop *perfecta* word voordat afweging, meting of telling plaasvind. Hy verwys na Sabinius en Cassius wat die vereiste van afweging, meting of telling as 'n soort voorwaarde beskou. Hulle meen daarom dat die koopkontrak eers *perfecta* word nadat afweging, meting en telling plaasgevind het. Die doel van die meting is volgens Paulus om die hoeveelheid vas te stel en nie om die hoeveelheid te vermeerder of verminder nie (*D* 18 1 34 5). Die ander standpunt van die meningsverskil word nie in die *Digesta* weergegee nie en daaruit kan die afleiding gemaak word dat Justinianus die standpunt van Sabinus en Cassius verkies (Seckel-Levy 1927 *ZSS* 188; De Zulueta 32).

Gaius dui egter nie aan wat Sabinus en Cassius in hierdie verband ten aansien van die oorgang van die risiko uitspel nie (Seckel-Levy 1927 *ZSS* 185). Dit gee aanleiding tot meningsverskil onder moderne skrywers. Ten aanvang is dit duidelik dat die beding van afweging, meting of telling nie 'n suiwer voorwaarde is wat die werking van die hele koopkontrak opskort nie, maar slegs die *perfecta*-wording van die koopkontrak (Hamman 23–24; Mostert, Joubert en Viljoen *Die koopkontrak* (1972) 85 vn 1; Hackwill *Mackeurtan's sale of goods in South Africa* (1984) 186). Sommige moderne skrywers is van mening dat die oorgaan van risiko net soos by die opskortende voorwaarde behandel moet word (Seckel-Levy 1927 *ZSS* 185–186; De Zulueta 32; Hamman 25). Seckel-Levy (1927 *ZSS* 185) se argument is dat Gaius waarskynlik vroeër die oorgaan van risiko by die opskortende voorwaarde bespreek het en dit daarom nie weer hier doen nie.

Ander moderne skrywers meen daarenteen dat die volle risiko van vernietiging en beskadiging eers by afweging, meting en telling op die koper in die Romeinse reg oorgaan (Sohm 402 vn 6; Moyle 85–86; Thomas *Textbook of*

Roman law (1981) 289, "Marginalia on certum pretium" 1967 *TvR* 83–86; Morice *Sale of goods in Roman-Dutch law* (1919) 82 (by implikasie)). Hierdie skrywers steun op verskillende tekste as gesag.

Sohm (402 vn 6) en Thomas (*Textbook* 289) verwys na *D* 18 1 35 5–7 as gesag. In dié tekste word *perfecta*-wording by die koop *ad mensuram*, koop *per aversionem* en die genuskoop bespreek (Mackintosh *The Roman law of sale* (1907) 76–77). Die koop *per aversionem* kom voor waar 'n groep sake soos 'n hooimied of trop skape vir 'n globale prys verkoop word. By die beperkte genuskoop word 'n aantal eenhede uit 'n groter geheel teen 'n bepaalde prys per eenheid verkoop; by hierdie koop word die beding van meting, telling of weging nie as 'n soort voorwaarde beskou nie en die verkoper dra die risiko totdat die meting, telling of weging plaasvind (*D* 18 1 35 7). Risiko sluit by die beperkte genuskoop risiko vir beskadiging en vernietiging van die koopsaak in (Hamman 32–33). Thomas (1967 *TvR* 83–86) voer aan dat *D* 18 1 35 5–7 nie gelees moet word as 'n voorwaardelike koop nie. Hy meen dat die term *imperfectus* gebruik word om beide aan te toon dat die koopkontrak nog nie bestaan nie en dat die voorwaarde nog nie vervul is nie (83). Die koop *ad mensuram* is hiervolgens nog nie *perfecta* alvorens die saak gemeet, geweeg of getel word nie omdat daar geen koopprys is nie en die koopkontrak dus nog nie bestaan nie (86). Zimmermann stem met hierdie standpunt saam (*The law of obligations* 286–287).

Moyle (85–86) steun weer op *C* 4 48 2 as gesag. Dié koop, wat in *C* 4 48 2*pr* genoem word, lyk met die eerste oogopslag weliswaar na 'n koop *ad mensuram* maar is in werklikheid 'n beperkte genuskoop (Seckel-Levy 1927 *ZSS* 197–199; Hamman 30). In *C* 4 48 2*pr* word gesê dat die koper nie die risiko van verslegting van die wyn dra by die verkoop van wyn teen 'n bepaalde prys per houer nie totdat die wyn gelewer word. Die koop in *C* 4 48 2 1 word as 'n teenstelling tot hierdie eerste koop genoem en is duidelik 'n koop *per aversionem*. Hieruit kan die afleiding gemaak word dat die wyn, wat in *C* 4 48 2*pr* verkoop word, eers van die ander wyn in die pakhuis afgesonder moet word en dat dit dus gaan om 'n beperkte genuskoop.

1 3 Koop ad gustum

In die antieke tyd is wyn veral blootgestel aan die gevaar dat dit suur of muf kan word (vir 'n uiteensetting van wynverkope sien *D* 18 6 1 en 4: Zimmermann *The law of obligations* 284–287). Daarom word wyn dikwels gekoop onderworpe aan die beding dat die koper die kans sal hê om eers die wyn te proe (*D* 18 6 1*pr*). Dit wil voorkom dat die koper slegs die wyn mag afkeur indien dit inderdaad suur of muf is en dat hy hierdie diskresie verder soos 'n redelike man moet uitoefen (*D* 18 6 5; Mackintosh 66–67; Zimmermann *The law of obligations* 286–287 en veral vn 93). Die verkoper dra voor goedkeuring die risiko van verslegting van die wyn en die koper die risiko daarna (*D* 18 6 1*pr*). Indien 'n beding van goedkeuring nie in die kontrak voorkom nie, dra die koper onmiddellik die risiko vir beide die verslegting en vernietiging van die wyn (*D* 18 6 1*pr*).

Hierdie beding word deur sommige skrywers as 'n opskortende voorwaarde beskou (Buckland 495–496; so ook a 1587 van die Franse *Code Civil* – Mackintosh 67). Ander sien dit weer as 'n ontbindende voorwaarde (Mackintosh 67; Hamman 62–63). Die aard van die beding sal 'n verskil maak by die beantwoording van die vraag wie die risiko vir die vernietiging van die wyn voor vervulling van die voorwaarde dra. Indien die voorwaarde opskortend is, dra die verkoper hierdie risiko maar indien dit ontbindend is, die koper (Mackintosh 67). Uit *D* 18 6 4*pr* is dit duidelik dat die beding soortgelyke werking as 'n voorwaarde kan hê (*quasi sub condicione vernierint*) en, soos gesien, verstaan die Romeine onder 'n voorwaarde 'n opskortende voorwaarde. Ulpianus meen in dieselfde teks dat indien die bedoeling van die partye nie vasgestel kan word nie, die koop bly voortbestaan indien die koper nie binne die afgespreekte tyd proe nie. Die versuim is immers aan die koper te wyte.

2 Romeins-Hollandse reg

Die mening van moderne skrywers oor wat die Romeinsregtelike reëling behels het, is van geen belang by die vasstelling van wat die gemeenregtelike skrywers gesê het oor die risiko-reël nie. Die vraag is hoe die gemeenregtelike skrywers die Romeinse reg verstaan het. Die Romeinse reg vorm wel die agtergrond waarteen die gemeenregtelike skrywers gelees moet word.

2 1 Koopkontrak onderworpe aan 'n opskortende voorwaarde

Die gemeenregtelike skrywers ken beide die opskortende en die ontbindende voorwaarde maar bedoel met voorwaarde meestal die opskortende voorwaarde (Hamman 93–94). Die ouer skrywers soos De Groot en Van der Linden ken slegs die opskortende voorwaarde (Hamman 96). Die opskortende voorwaarde het dieselfde werking as in die Romeinse reg. Die koopkontrak bestaan nie voor vervulling van die voorwaarde nie en het dus geen werking nie (*Hollandsche consultatien* deel 3 cons 59 no 2). Die koop is voor vervulling van die opskortende voorwaarde onseker maar na vervulling asof die voorwaarde reeds vanaf kontraksluiting vervul is (De Groot 3 14 29; Van Leeuwen *CF* 1 4 19 8).

Die oorgang van die risiko by die opskortende voorwaarde word net soos in die Romeinse reg hanteer. Voor vervulling van die opskortende voorwaarde is die koopkontrak *imperfecta* (Van der Linden *Koopmans handboek* 1 15 8) en daarom dra die verkoper die risiko vir die toevallige beskadiging en vernietiging van die koopsaak (Huber 3 5 24; Van Leeuwen *CF* 1 4 19 8, *RHR* 4 17 2; De Groot 3 14 35; Van der Keessel *Praelectiones ad Gr* 3 14 35). Na vervulling van die voorwaarde dra die koper die volle risiko (Van Leeuwen *CF* 1 4 19 8). Die koper dra die risiko van beskadiging van die saak reeds voor vervulling van die opskortende voorwaarde indien die voorwaarde wel vervul word (Van Leeuwen *CF* 1 4 19 8; Voet 18 6 5; De Groot 3 14 35; Van der Keessel *Praelectiones ad Gr* 3 14 35; Scheltinga *ad Gr* 3 14 29). Die koop kan immers terugwerkend vanaf kontraksluiting gelding verkry omdat daar aan die geldigheidsvereiste van die bestaande koopsaak voldoen word. Waar die saak egter hangende vervulling van die voorwaarde vernietig word, kan die voorwaarde nie vervul word nie omdat die koopsaak nie meer bestaan nie en die voorwaarde daarom nie terugwerkend gelding kan kry nie (Voet 18 6 5).

2 2 Koop onderworpe aan goedkeuring

In die gemenereg word die spesiale reëling, wat vir die verkoop van wyn in die Romeinse reg gegeld het, op alle vervangbare sake soos wyn en olie van toepassing gemaak (Voet 18 6 3; Huber 3 5 25–26). Die risiko van kwaliteitsvermindering (bv dat die wyn suur of muf kan word) rus vanaf kontraksluiting op die koper by die verkoop van vervangbare sake wat gewoonlik onderworpe aan die koper se goedkeuring verkoop word (Voet 18 6 3). Waar die koop aan goedkeuring van die koper onderworpe is, gaan die risiko dat dit suur of muf word eers na goedkeuring op die koper oor (Voet 18 6 3; Huber 3 5 26). Die verkoper dra nog die risiko van vernietiging totdat die weging, meting of telling daarvan plaasvind waar laasgenoemde 'n vereiste is (Voet 18 6 4). Voet 18 6 3 meen dat die beding van goedkeuring 'n opskortende voorwaarde is maar betwyfel dit of die risiko op die koper oorgaan waar die dag vir goedkeuring verbygaan sonder dat die koper sy goedkeuringsreg uitoefen. Daarteenoor meen Huber 3 5 26, in ooreenstemming met die Romeinse reg, dat die risiko in so 'n geval op die koper oorgaan.

2 3 Koop ad mensuram

Voet 18 6 4 meen dat waar al die wyn in 'n vat verkoop word en daar 'n beding is dat die prys aangepas sal word afhangende van die maat wat deur meting vasgestel sal word, die risiko van die kwaliteit en hoeveelheid onmiddellik op die koper oorgaan net soos in die geval van die koper *per aversionem*. Hier het die beding van meting, weging of telling dus nie die werking van 'n opskortende voorwaarde nie, maar van 'n *modus* en is bloot 'n aanduiding van die hoeveelheid wyn wat verkoop word. Daarom gaan die risiko onmiddellik op die koper oor. Voet se uiteensetting rym nie met die Romeinsregtelike risiko-reëling by die koop *ad mensuram* nie (Morice *Sale in Roman-Dutch law* 82). Twee moderne skrywers aanvaar sonder kritiek of kwalifikasie hierdie uiteensetting as dié van die risiko van die koop *ad mensuram* (Nathan *The common law of South Africa* vol 2 (1913) 830–831; Morice "The risk of the thing sold" 1912 *SALJ* 241). Uit die *Digesta*-tekste wat Voet as gesag aanhaal, wil dit egter voorkom of hy nie 'n koop *ad mensuram* in gedagte het nie maar 'n koop waar die aantal eenhede ongeveer bekend is – 'n koop *per aversionem* dus (Hackwill 186; sien ook *Jamieson & Co v Goodliffe* 1880 SC 206 220–221; Wessels *The law of contract in South Africa* vol 2 (1937) 1314).

'n Aantal gemeenregtelike skrywers verklaar bloot dat die koop van vervangbare sake eers *perfecta* word nadat die koopsaak afgetel, geweeg of gemeet word sonder om uitdruklik te verklaar wie die risiko van waardevermindering dra (Huber 3 5 25; Van Leeuwen *CF* 1 4 19 9, *RHR* 4 17 2; Van der Linden *Koopmans handboek* 1 15 8). Hierdie uiteensetting is natuurlik vir beide die koop *ad mensuram* en die beperkte genuskoop korrek. Geen afleiding kan gemaak word uit die feit dat hulle nie die risiko van waardevermindering bespreek nie. Dit is egter onseker of hierdie skrywers die beperkte genuskoop, die koop *ad mensuram*, of beide in gedagte het:

(a) Huber 3 5 25 dui nie aan welke koop hy in gedagte het nie, maar uit sy verdere bespreking (3 5 26) lyk dit of hy slegs die beperkte genuskoop in die oog het.

(b) Van Leeuwen meen dat die risiko op die koper rus asof die koop onderworpe is aan die voorwaarde dat die koopsaak getel, geweeg of gemeet moet word (*CF* 1 4 19 9, *RHR* 4 17 2). Van Leeuwen verwys na *D* 18 1 35 5 en *C* 4 48 2 as gesag. Uit hierdie gesag is dit duidelik dat hy sowel die koop *ad mensuram* as die beperkte genuskoop in gedagte het. Sy standpunt oor die gelykstelling van die beding aan die opskortende voorwaarde gaan dus verder as die Romeinse reg wat die beperkte genuskoop betref.

(c) Van der Linden verwys net soos Van Leeuwen na *D* 18 1 35 5–7 en *C* 4 48 2 as gesag (*Koopmans handboek* 1 15 8), maar sonder om die beding as 'n soort opskortende voorwaarde te sien.

Die Franse skrywers Pothier en Troplong word dikwels deur ons howe en skrywers in verband met risiko aangehaal. Nogtans moet onthou word dat hulle oor die Franse reg skryf. Pothier meen dat die beperkte genuskoop eers *perfecta* word nadat meting, weging en telling plaasgevind het, omdat die koopsaak dan eers vasstaan (*Vente* 309). Hy meen dat dit ook dieselfde by die koop *ad mensuram* is omdat die hoeveelheid van die koopsaak en die prys dan eers vasstaan (*ibid*). Pothier baseer sy uiteensetting op die Romeinse reg maar verwys nie na die gelykstelling aldaar tussen die beding by die koop *ad mensuram* en die opskortende voorwaarde nie. Pothier (*idem* 312) sit in teenstelling hiermee die oorgaan van risiko by die opskortende voorwaarde net soos die Romeinse reg uiteen. Troplong deel Pothier se beskouing in die algemeen (Hackwill 185).

Kersteman (*Hollandsch rechtsgeleert woordenboek sv* "Koop") beskou die beding van afmeting, weging en telling as 'n opskortende voorwaarde sonder om aan te dui of hy die beperkte genuskoop of die koop *ad mensuram* of beide in gedagte het. Hy meen dat die verkoper die risiko van vernietiging dra alvorens die afmeting, weging en telling plaasvind. Hy swyg egter oor wie die risiko van beskadiging of waardevermindering dra.

Voet 18 6 4 dui aan dat in die geval van die beperkte genuskoop, waar vervangbare sake geweeg, gemeet of getel moet word uit 'n groter geheel, die risiko van die hoeveelheid (vernietiging) eers op die koper oorgaan nadat die weging, meting en telling plaasgevind het. Die implikasie van Voet 18 6 3–4 is dat die risiko van kwaliteitsvermindering reeds voor die tyd by die koper rus. As voorbeeld noem hy die geval waar 'n hoeveelheid wyn uit 'n vat, en nie al die wyn daarin nie, verkoop word (sien ook Huber 3 5 26). Voet 18 6 4 meen dat die koopkontrak onderworpe is aan die voorwaarde van afmeting en alvorens die wyn afgemeet is, is dit asof dit nog nie verkoop is nie. Hierdie teks van Voet kan op twee wyses verstaan word. Aan die een kant is dit moontlik dat Voet uitdruklik, in teenstelling met die Romeinse reg, die beding van meting, weging of telling by die beperkte genuskoop as 'n opskortende voorwaarde beskou. Aan die ander kant moet Voet verstaan word teen die agtergrond dat vervangbare sake verkoop word en dat die risiko van kwaliteitsvermindering reeds vanaf kontraksluiting daarom op die koper rus omdat geen goedkeuringsbeding voorkom nie. Laasgenoemde is die aanvaarbaarste verklaring van hierdie teks van Voet.

De Groot 3 14 35 bespreek ook die risiko-reëling waar sake verkoop word wat gemeet, getel of geweeg word. Die risiko van beskadiging maar nie vernietiging nie, rus op die verkoper voor meting, telling of weging (sien ook Scheltinga *ad Gr* 3 14 35). De Groot gaan verder en verklaar dat die risiko-reëling by die opskortende voorwaarde dieselfde is. Hy gee geen aanduiding of hy hier 'n beperkte genuskoop of 'n koop *ad mensuram* in die oog het nie. As gesag verwys hy na *D* 18 6 5 en 15. Belcher meen dat hierdie gesag De Groot nie steun nie (*Norman's purchase and sale in South Africa* (1972) 201). Belcher se kritiek gaan egter nie op nie. Die verkoper dra volgens *D* 18 6 5 die risiko totdat afmeting plaasvind waar 'n honderd kruike wyn uit 'n sekere wynkelder verkoop word. Die koper dra volgens *D* 18 6 15 die risiko vir kwaliteitsverandering van wyn omdat hy dit nie geproe het nie of omdat hy 'n verkeerde opinie gevorm het nadat hy dit wel geproe het. Dit gaan dus blykbaar oor die beperkte genuskoop van wyn. Dit word bevestig deur Van der Keessel (*Praelectiones ad Gr* 3 14 35) wat die voorbeeld van die koop van 'n kruik wyn uit 'n vat gee ter illustrasie van De Groot se bespreking. Van der Keessel noem die beding van meting, telling of weging 'n stilswyende voorwaarde. Morice (*Sale of goods in Roman-Dutch law* 84) meen dat De Groot die beperkte genuskoop in die oog het waar die risiko van die kwaliteit na goedkeuring op die koper oorgaan en die risiko van die hoeveelheid eers na afmeting, telling of weging. De Groot se uiteensetting stem dan ooreen met Voet 18 6 4 wat hierbo bespreek is. Hamman (90) en De Wet (De Wet en Van Wyk 349) spreek daarenteen die mening uit dat De Groot moontlik die *emptio ad mensuram* in gedagte het (so ook by implikasie Hackwill 184 vn 13). Laasgenoemde mening verklaar egter nie die gesag waarop De Groot hom beroep nie en daarom word eersgenoemde verklaring van De Groot verkies.

In teenstelling met die voorafgaande gemeenregtelike skrywers staan Van Bijnkershoek (*Obs Tum* 1326) wat dit duidelik oor 'n koop *ad mensuram* het. Die koopsaak, hooi, ondergaan in die saak wat hy bespreek, 'n waardevermindering voor weging kan plaasvind. Dit is 'n koop *ad mensuram* aangesien al die hooi op 'n bepaalde land verkoop word. Van Bynkershoek merk op dat hy en van die ander raadshere van mening is dat geen koop aanwesig is nie omdat 'n vervangbare saak verkoop word en die risiko eers na telling, meting of weging op die koper oorgaan.

Hierdie opvatting is egter nie die meerderheidsopvatting van die hof nie. Boonop wil dit voorkom of hier ook 'n vervangbare saak, wat gewoonlik onderworpe aan goedkeuring verkoop word, ter sprake kom. Indien dit die geval is, behoort die reëling van risiko soos deur Voet 18 6 3 en De Groot 3 14 35 uiteengesit, toepassing te vind.

Die risiko-reël wat op die *emptio ad gustum* in die Romeinse reg van toepassing is, word, soos gesien, na ander vervangbare sake uitgebrei wat gewoonlik onderworpe aan goedkeuring verkoop word. Dit lei tot 'n vervaging van die onderskeid tussen vervangbare sake wat onderworpe aan goedkeuring gekoop word en ander vervangbare sake wat per gewig, maat of getal verkoop word. Verder vervaag die onderskeid tussen die risiko-reëling by die beperkte genuskoop en die koop *ad mensuram* skynbaar by skrywers soos Van Leeuwen

(*CF* 1 14 19 9, *RHR* 4 17 2) en Kersteman (*Hollandsch rechtsgeleert woordenboek sv* "Koop").

Die risiko-reël by die koop *ad mensuram* word geensins duidelik in die gemenereg uiteengesit nie. Daarom moet dié uiteensetting teen die agtergrond van die Romeinse reg gesien word. Die analogie en selfs gelykstelling van sekere bedinge en die opskortende voorwaarde, wat in die Romeinse reg ten aansien van die koop *ad mensuram* 'n aanvang neem, word in die gemenereg voortgesit. Uit Voet 18 6 3–4 en Van der Keessel (*Praelectiones ad Gr* 3 14 35) se uiteensettings is dit duidelik dat hierdie analogie of gelykstelling daarin geleë is dat die risiko-reël by koopkontrakte met hierdie bedinge dieselfde werking as by kope onderworpe aan 'n opskortende voorwaarde het. De Wet kom ook tot dieselfde gevolgtrekking (De Wet en Van Wyk 349). Die Romeinsregtelike reëling van risiko by die koop *ad mensuram* moet dus saam met die gevolg wat die gemenereg aan hierdie gelykstelling heg, gelees word. Daarom kan die gevolgtrekking gemaak word dat die koop *ad mensuram* net soos 'n voorwaardelike koop in die gemenereg gehanteer word vir sover dit risiko betref (De Wet en Van Wyk 349; Hamman 25 89–90 92–93 220–224).

2 4 Koopkontrak waar die goedere na die koper vervoer moet word

Van Leeuwen is die enigste skrywer wat hierdie soort koop bespreek. Hy (*RHR* 4 17 2) bespreek eers die risiko-reël by die voorwaardelike koop voordat die voorwaarde vervul word. Hy meen dat waar iemand op 'n ander plek wyn of graan koop wat in Holland of elders gelewer moet word en die wyn of graan word tydens die vervoer vernietig ("verongelukkende"), die verkoper die verlies moet dra. Van Leeuwen sê nie uitdruklik wie die risiko dra indien die wyn of graan in kwaliteit verminder nie. Uit die gesag wat hy aanhaal (*C* 4 48 6 en *D* 18 6 8), is dit duidelik dat hy die koop onderworpe aan 'n vervoerbeding as 'n voorwaardelike koop beskou (Hackwill 197 vn 15). Kersteman verstaan Van Leeuwen ook so (*Hollandsch rechtsgeleert woordenboek sv* "Koop").

Die beding van vervoer is nie 'n egte opskortende voorwaarde nie omdat die koop voor vervulling van die beding van vervoer tot stand kom (Morice *Sale in Roman-Dutch law* 78). Die afleiding wat uit die gelykstelling met die opskortende voorwaarde gemaak kan word, is dat die koper die risiko dra waar die wyn of graan wel gelewer word, net soos by die voorwaardelike koop (Hamman 83). In teenstelling hiermee meen Hamman 83 dat dit onwaarskynlik is dat Van Leeuwen in gedagte kon gehad het dat die verkoper die risiko vir vernietiging en waardevermindering dra van goedere wat vervoer moet word en wat onderweg beskadig of vernietig word. Hamman gee hiermee nie die uitwerking van 'n opskortende voorwaarde op die risiko korrek weer nie. Hy (83) noem twee moontlikhede wat Van Leeuwen na sy mening in gedagte kon gehad het. Die eerste is dat die goedere verkoop word onderworpe aan die voorwaarde dat die goedere veilig by hulle bestemming aankom. Die tweede moontlikheid is dat die wyn of graan nog onbepaald is of eers by lewering aan die koper bepaald word. Hamman se standpunt berus op die geldige veronderstelling dat die vervoerbeding nie 'n egte opskortende voorwaarde is nie. Morice (*Sale in Roman-Dutch law* 78) en De Wet (De Wet en Van Wyk 351 vn 236) huldig onomwonde die standpunt dat hierdie nie 'n egte opskortende voorwaarde is nie.

3 Suid-Afrikaanse reg

3 1 Koopkontrak onderworpe aan 'n opskortende voorwaarde

Die regspraak en skrywers aanvaar almal dat die moderne risiko-reëling by die koop onderworpe aan 'n opskortende voorwaarde dieselfde is as die gemeenregtelike reëling (Hackwill 180; Belcher 196; De Wet en Van Wyk 350).

3 2 Koop ad mensuram

Hamman 224 meen dat daar geen saak is waar die Romeinsregtelike reël die grondslag vir die beslissing vorm nie. Hy meen dat daar wel aanduidings vir die erkenning daarvan in drie sake is (220–223):

(a) In *Jamieson & Co v Goodliffe supra* 220 stel die een regter (Smith R) die algemene reël dat die koop nie *perfecta* is alvorens die prys vasgestel is nie en dat die koop eers *perfecta* word nadat afweging, meting of telling plaasgevind het. Die regter aanvaar ook Voet 18 6 4 se uiteensetting van die risiko by die koop *ad mensuram* (220–221).

(b) In *Page v Blieden & Kaplan* 1916 TPD 606 610–611 koppel regter Wessels ten onregte (Hamman 220–223) die vraag of eiendomsreg in 'n koop *ad mensuram* op die koper oorgegaan het aan die vraag of die risiko op die koper oorgegaan het. Regter Wessels verkies die standpunt van die Franse skrywers (Pothier en Troplong) oor die koop *ad mensuram* bo dié van Voet 18 6 4. Regter Wessels se uitspraak is die meerderheidsbeslissing wat *ratio* betref. In hierdie saak word die ander gemeenregtelike gesag glad nie bespreek nie en dit is dus twyfelagtige gesag vir die aanvaarding van die Franse skrywers se standpunt. Die kwessie van waardevermindering kom ook glad nie ter sprake nie.

(c) In *Montgomerie v Rand Produce Supply Co* 1918 WLD 167 170 bevind die hof dat dit onnodig is om te beslis wat die risiko-reël by die koop *ad mensuram* is (sien egter Mostert, Joubert en Viljoen 86). Die hof meen dat die VOS-beding (vry op spoor) deurslaggewend is. Tog bevind die hof dat die hoeveelheid mielies eers vasstaan wanneer die verkoper die mielies per spoor versend het (170). In hierdie geval het die mielies voor versending muf geword.

In geeneen van hierdie sake word die regsposisie in die gemenereg volledig ondersoek nie. Verder huldig die *Jamieson*- en *Page*-saak botsende menings. Die posisie in die gemenereg behoort dus van deurslaggewende belang te wees.

Desnieteenstaande is die invloed van die *Page*-saak en die Franse skrywers duidelik te bespeur onder die moderne Suid-Afrikaanse skrywers. Kerr haal Pothier se uiteensetting sonder meer aan as synde ons reg (*The law of sale and lease* (1984) 156–157). Belcher volg die uiteensetting van die Franse skrywers, Pothier en Troplong, en 'n Engelse saak (*Norman's purchase and sale in South Africa* (1972) 197). In teenstelling hiermee meen hy dat 'n beding van afweging, meting of telling wel 'n opskortende voorwaarde is (178). Hackwill (184 185) meen bloot dat die risiko by 'n koop *ad mensuram* eers op die koper oorgaan na afweging, meting of telling, terwyl hy na De Groot se standpunt oor waardevermindering slegs in 'n voetnoot (184 vn 13) verwys. Verder beroep hy hom op die Franse skrywers, Troplong en Pothier, in die teks.

Wessels meen dat die koop wel voorwaardelik is maar stel dit bloot dat die risiko eers na afmeting, weging of telling op die koper oorgaan sonder om aan te dui wat die posisie by waardevermindering is (1313–1314). Lee weer stel dit bloot dat die koop nie *perfecta* voor afmeting, weging of telling is nie en dat die risiko by die verkoper rus (*An introduction to Roman-Dutch law* (1953) 293). Lee huldig egter dieselfde mening oor die risiko-reël by die opskortende voorwaarde.

Die skrywers wat op die gemenereg steun, meen weer dat die koop *ad mensuram* 'n voorwaardelike koop is en dat die risiko-reëling dieselfde as by die voorwaardelike koop is. De Wet (De Wet en Van Wyk 349) verklaar dan ook:

> "Dit kom ook daarop neer dat die koper die risiko vir verslegting en beskadiging dra. Hierdie houding is verklaarbaar; word die goed slegs beskadig, of versleg dit slegs in kwaliteit, kan die meting, weging of telling nog plaasvind, en kan die prys nog bepaal word. Dus sal slegs 'n onheil, wat die uiteindelike berekening van die koopprys heeltemal belet, die koper bevry van die risiko."

Hamman (25 89–90 92–93 220–224) huldig 'n soortgelyke standpunt.

3 3 Koop onderworpe aan goedkeuring

Daar is geen regspraak oor die koop van goedere wat gewoonlik onderworpe aan 'n goedkeuringsreg verkoop word nie. Die gemenereg behoort hier deurslaggewend te wees.

3 4 Koopkontrak waar die goedere na die koper vervoer moet word

Die blote feit dat 'n verkoper onderneem om die koopsaak op 'n bepaalde plek te lewer, beteken nie dat die verkoper die risiko op hom neem tot by lewering nie. Die risiko gaan reeds voor lewering op die koper oor (*Stein v Eckersley* 7 HCG 4; *Arkell v Nourse* 1897 OR 435; Hamman 272 274; Belcher 205–206 208). In *Jamieson & Co v Goodliffe supra* het die koopkontrak 'n beding bevat dat die mielies in die hawe van Kaapstad gelewer moet word of langs 'n sekere vaartuig in Algoa Baai indien die vaartuig na Port Elizabeth kan voortgaan. Die hof bevind dat die partye nie met hierdie beding oor lewering in Algoa Baai bedoel het om 'n opskortende voorwaarde te skep nie (221–222 225). Die mielies is vir doeleindes van die vervoer vanaf Kaapstad na Port Elizabeth bepaalde goedere (Hamman 268). In geeneen van hierdie sake word na Van Leeuwen *RHR* 4 17 2 verwys nie.

Na 'n bespreking van die sake meen Hamman dat die risiko-reëls wat internasionaal vir koopkontrakte met KAV (koste assuransie vrag), VAB (vry aan boord) en VOS-bedinge (vry op spoor) geld, stilswyend ook toepassing op gewone koopkontrakte vind (Hamman 276–305 306). Die verkoper dra die risiko totdat die koopsaak aan boord of op spoor geplaas word. Slegs in twee van hierdie sake word na Van Leeuwen verwys:

(a) In *Birkbeck v Hill* 1915 CPD 687 708–710 bevind die hof dat die KAV-beding 'n opskortende voorwaarde uitmaak. Die hof verwys na Van Leeuwen *CF* 1 4 19 5–8 en beslis dat die verkoper die risiko van nie-nakoming (vernietiging) van die goedere dra.

(b) In *Montgomerie v Rand Produce Supply Co supra* kom 'n VOS-beding in 'n koop *ad mensuram* van mielies voor. Die mielies word muf voor versending per spoor. Regter Ward se beslissing is gebaseer op alternatiewe redes (169). Een van die alternatiewe redes is die bevinding dat die verkoper die risiko van beskadiging van die mielies dra in die stadium toe dit muf geword het (170–171). Die hof verwys na Van Leeuwen *RHR* 4 17 2 se opmerking oor die risiko waar die koopsaak vervoer moet word (170), en beslis (170–171):

> "I think that under our law in a contract such as the present the risk is with the seller at any rate until the goods are delivered on the railway. Until that is done the quantity is actually unknown. The liability to pay for the goods does not arise under the contract until the rail-note is delivered, and consequently if the property were *totally destroyed* before being delivered to the railway no obligation to pay can arise" (my kursivering).

Die hof wil verder die uitsondering wat Voet 18 6 3 op die koper se aanspreeklikheid vir waardevermindering noem, slegs toepas op die tydperk nadat die mielies by die spoorweë vir versending gelewer is (171). Die *Montgomerie*-saak is nie 'n korrekte toepassing van die risiko-reëls by opskortende voorwaardes nie en is daarom vatbaar vir kritiek (Hackwill 197 (versigtig)). Die hof se toepassing van Van Leeuwen is nie korrek nie omdat Van Leeuwen slegs van vernietiging praat.

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DIE BESTE BELANG VAN DIE KIND BY EGSKEIDING – ENKELE GEDAGTES NA AANLEIDING VAN *McCALL v McCALL* 1994 3 SA 201 (K)

1 Inleiding

Die beslissing in *McCall v McCall* 1994 3 SA 201 (K) het opnuut aspekte rakende beheer en toesig oor kinders by egskeiding onder die loep geneem. *In casu* het daar 'n oorlog (by wyse van spreke) geheers tussen geskeide gades oor wie die toesig oor hulle twaalfjarige seun moet verkry (230D). 'n Faktor wat die beslissing enigsins bemoeilik het, is die feit dat die hof sonder 'n sweem van twyfel bevind dat albei ouers geskik en bevoeg is om toesig oor die kind te hê en dat die enigste motivering vir die voortsetting van die aangeleentheid daarin geleë is dat hulle die kind se beste belang voorop stel. Daarteenoor is die taak van die hof vergemaklik deurdat die seun in 'n gesprek in kamers met die voorsittende regter ondubbelsinnig sy voorkeur uitgespreek het om eerder by sy vader te bly en onder sy toesig te wees (207J).

Die hof gee gevolg aan die uitgesproke wens van die seun nadat hy 'n reeks faktore oorweeg om vas te stel wat in sy beste belang sal wees. Dié reëling word onderworpe gestel aan die toesig van die betrokke gesinsadvokaat (209B). (Die reeks faktore word hierna die kontrolelys genoem.)

In hierdie aantekening word die volgende aspekte wat uit die beslissing vloei, van nader bekyk:

- dat 'n rigiede en ongekwalifiseerde voortsetting van die reël om 'n bevel rakende kinders by egskeiding te maak, nie noodwendig hulle beste belang dien nie;
- dat die kontrolelys van faktore wat die hof aanwend om die beste belang van die kind te bepaal, 'n gesonde ontwikkeling is; en
- dat die hof sy eie taak inderdaad aansienlik vergemaklik deur die uitgesproke wense van die kind op deurdagte wyse in aanmerking te neem.

2 Die noodwendigheid van 'n hofbevel om die posisie van kinders by egskeiding te reël

In sy uiteensetting van die feite van die saak, verwys die hof na 'n groetekaart wat in Amerika gebruik word en wat lui: "[T]he war is over, we are divorced". In hierdie geval is die egskeiding reeds afgehandel, "but sadly the war is not over" (203D). Teen dié agtergrond skyn dit 'n geldige vraag te wees of die reël dat 'n bevel by egskeiding gemaak word dat die kind aan een ouer (en in uitsonderlike gevalle aan albei) toegeken word, nie daartoe meewerk dat die ouers nie tot 'n vergelyk kan kom nie, en dat ouers in der waarheid die gevraagde bevele aangaande die kinders gebruik om die oorlog voort te sit.

Die situasie in die *McCall*-saak is nie uniek nie. In *Van Vuuren v Van Vuuren* 1993 1 SA 163 (T) 167 maak die hof byvoorbeeld die volgende opmerking:

> "Dit is welbekend dat omdat so 'n skikking ook finansiële geskille tussen partye bylê, die een party soms onbehoorlike druk op die ander te pas mag bring om toegewings ten opsigte van of die beheer en toesig van die kinders, of sy toegang tot die kinders te maak."

In hierdie saak het dit in wese gehandel oor skikkingsonderhandelinge tussen die partye waartydens toegangsregte tot die kinders "part of the package" geword het. Na aanleiding van die *Van Vuuren*-saak is opgemerk dat dit moontlik selfs te betwyfel was of dit enigsins nodig was om 'n hofbevel aangaande die beheer en toesig oor die kinders en die meegaande toegangsregte te maak. Dit sou meebring dat die kinders nie 'n strydpunt sou wees in die skikkingsonderhandelinge tussen die partye nie (Robinson "Divorce settlements, package deals and the best interests of the child" 1993 *THRHR* 495) en dat die onderhandelinge bes moontlik met veel minder emosie afgehandel sou kon word.

Artikel 6(3) van die Wet op Egskeiding 70 van 1979 bepaal dat 'n hof wat 'n egskeidingsbevel verleen, volgens sy diskresie ook 'n bevel rakende die voogdy, bewaring of toegang tot 'n minderjarige kind gebore uit die huwelik *kan* verleen. In ten minste twee sake, te wete *Kastan v Kastan* 1985 3 SA 235 (K) en *Venton v Venton* 1993 1 SA 763 (D) bevind die howe dat dié subartikel 'n wye diskresie aan die hof verleen. Daar is egter geen gesag dat die subartikel nie só uitgelê moet word dat die hof nie verplig is om 'n bevel te maak nie. Trouens, Joubert verduidelik na aanleiding van *Willers v Serfontein* 1985 2 SA 591 (T) dat wanneer 'n huwelik deur 'n egskeidingsbevel ontbind word, "*sal*" die hof altyd 'n gepaste bevel maak om die posisie ten aansien van die ouerlike gesag oor die minderjarige kinders van die huwelik te reël (Van der Vyver en Joubert *Persone- en*

familiereg (1991) 616). Verder sê hy, "*sal*" die hof bevele uitreik aangaande die bewaring en voogdy oor die kinders.

Die konflikpotensiaal rondom kinders by egskeiding hang verder saam met 'n terughoudendheid by ons howe om 'n bevel te maak wat gesamentlike beheer en toesig oor die kinders aan albei ouers by egskeiding toesê (*Willers v Serfontein supra* 599; *Schlebusch v Schlebusch* 1988 4 SA 548 (OK)). So word daar in *Edwards v Edwards* 1960 2 SA 623 (D) beslis dat dit duidelik is dat so 'n bevel nie deur 'n hof gemaak behoort te word nie, want dit is 'n "legal impossibility that the legal custody of a child could be shared equally between two individuals" (524F). In die *Schlebusch*-saak verduidelik die regter dat hy "view with concern any trend towards the granting of joint custody orders" (551I). Hierdie benadering steun sterk op uitsprake soos dié in *Heimann v Heimann* 1948 4 SA 926 (W) waar regter Murray sê dat dit wenslik is dat slegs een ouer by egskeiding beheer en toesig oor die kind sal hê. Die motivering vir hierdie terughoudendheid by die howe om sodanige bevele te verleen (en wat meteen ook as motivering dien om wel 'n bevel aangaande die kind te maak), word soos volg in *Kastan* uiteengesit (236B):

> "Orders for joint custody are rare. Such few examples as can be gleaned from the law reports would seem to point emphatically in a direction away from orders of this nature and the reason for this, I would think is clear. Custody of children involves day to day decisions and also decisions of longer and more permanent duration involving their education, training, religious upbringing, freedom of association and generally how best to ensure their good health, welfare and happiness. To leave decisions of this nature to the joint decision of parents who are no longer husband and wife could be courting disaster, particularly where the divorce has been preceded by acrimony and disharmony between the parents."

Die hof kom egter tot die gevolgtrekking dat dit eerder in die beste belang van die betrokke kinders sal wees indien hy die voorstel van twee deskundige getuies aanvaar en 'n bevel maak wat gesamentlike beheer en toesig aan albei ouers verleen. Dit sou in belang van die kinders wees aangesien uitgerekte litigasie andersins sou volg wat 'n destruktiewe resultaat by die partye tot gevolg sou hê en hulle sou polariseer (237B–C). Hierdie gevolgtrekking word ondersteun. Bevele rakende kinders kan stigmatiserend wees, veral in die geval waar beheer en toesig oor 'n jong kind nie aan die moeder toegeken word nie. Daarbenewens kan so 'n bevel tot gevolg hê dat 'n gesonde band wat die kind het met die ouer wat nie beheer en toesig oor hom het nie, ten gronde gaan. Trouens, talle regspraktisyns sal kan getuig van gevalle waar kinders deur bewarende ouers dermate negatief jeens die ander ouer beïnvloed is dat 'n aanvanklike goeie verhouding totaal tot niet gegaan het.

Daar word ter oorweging gegee dat enersyds die reël wat ontwikkel het en andersyds die uitleg wat aan artikel 6(3) gegee word, naamlik dat 'n hof 'n bevel rakende beheer en toesig oor en toegang tot kinders by egskeiding *moet* maak, nie noodwendig in die beste belang van die kind is nie. Die volgende aanbevelings word gemaak:

(a) Dat kennis geneem word van artikel 1(5) van die Engelse Children Act 1989. Dié artikel lui soos volg:

> "Where a court is considering whether or not to make one or more orders . . . with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child, than making no order at all."

In paragraaf 3.2 van hulle verslag spreek die Engelse Law Commission (hierna die regskommissie genoem) sy twyfel uit oor die praktyk wat ontwikkel het om in alle gevalle van egskeiding waar daar kinders betrokke is, 'n bevel aangaande sodanige kinders te maak. Daarmee word egter nie te kenne gegee dat daar nie gevalle is waar bevele wel toepaslik sal wees nie. So 'n bevel kan, indien toepaslik, tot regsekerheid lei en die beste belang van die kind dien deurdat daar stabiliteit aan reëlings oor sy verblyf en ook die posisie van die ouers verleen word. Die regskommissie wys egter daarop dat dit moontlik is dat ouers uitmekaar kan gaan sonder om te skei en dat daar in sodanige gevalle dan geen bevele rakende die kinders gemaak word nie. Dit kan ook gebeur dat ouers nie wil hê dat daar 'n bevel rakende die kinders gemaak word nie. Die regskommissie se beswaar daarteen dat daar in alle egskeidingsgevalle bevele rakende die kinders gegee word, is soos volg verwoord:

> "Where a child has a good relationship with both parents the law should seek to disturb this as little as possible. There is always a risk that orders allocating custody and access . . . will have the effect of polarising the parents' roles and perhaps alienating the child from one or other of them."

(b) In aansluiting by die vorige paragraaf word aanbeveel dat die Wet op Bemiddeling in Sekere Egskeidingsgedinge 24 van 1987 gewysig word om te bepaal dat eers as dit vir die gesinsadvokaat duidelik is dat dit in die lig van die omstandighede van die geval in belang van die kind sal wees dat daar 'n bevel gemaak word, en die gesinsadvokaat só aan die hof aanbeveel, die hof 'n bevel aangaande die kind sal maak. Op dié wyse kan verseker word dat die beste belang van die kind beskerm word deurdat hy/sy sover doenlik buite die litigasie-arena gehou word.

3 'n Kontrolelys om die beste belang van die kind te bepaal

Die tweede aspek wat na aanleiding van die *McCall*-saak aan die orde kom, is die "metode" wat deur die hof aangewend word om die beste belang van die kind te bepaal. Die aanwending van die lys word gebruik om vas te stel welke van die twee ouers eerder geskik is om na die kind se fisiese, emosionele, geestelike en morele welsyn om te sien (204J). In die lys word daar 13 faktore genoem maar die hof waarsku dadelik dat daar oorvleueling tussen sommige van die faktore kan voorkom en dat die faktore nie in 'n volgorde van belangrikheid gerangskik is nie. Behalwe om te verduidelik dat die faktore bloot kriteria is aan die hand waarvan bepaal kan word welke ouer eerder geskik sal wees om beheer en toesig oor die kind te verkry (sodat die beste belang van die kind daardeur bevorder kan word), gee die hof geen aanduiding op welke wyse met die lys faktore omgegaan moet word nie. Daar word betoog dat die uiteensetting van so 'n lys 'n gesonde regsontwikkeling is en dat die verpligte oorweging van faktore wat in só 'n lys genoem word, statutêr opgeneem behoort te word.

Die bedoeling is nie om die faktore wat in die lys genoem word, individueel te ontleed nie. Eerder word daarop gewys dat so 'n tabulering van faktore in pas is met die sogenaamde "statutory checklist" wat in die Engelse Children Act, 1989 opgeneem is. Die waarde van so 'n kontrolelys word soos volg in paragraaf 3.18 van die verslag van regskommissie uiteengesit:

> "It was perceived as a means of providing greater consistency and clarity in the law and was welcomed as a major step towards a more systematic approach to

> decisions concerning children . . . [i]t would help to ensure that the same basic factors were being used to implement the welfare criterion by the wide range of professionals involved, including judges, magistrates, registrars, welfare officers and legal advisers . . . it would be particularly useful when advising magistrates in making decisions in contested custody cases and in formulating reasons in the event of an appeal. It would also provide a practical tool for those lacking experience and confidence in this area. Perhaps, most important of all, . . . such a list would assist both parents and children in endeavouring to understand how judicial decisions are made. At present, there is a tendency for advisers and their clients (and possibly even courts) to rely on rules of thumb as to what the court is likely to think best in any given circumstances. A checklist would make it clear to all what, as a minimum, would be considered by the court. At the very least it would enable parties to prepare and give relevant evidence at the outset, thereby avoiding the delay and expense of prolonged hearings or adjournments for further information. Moreover . . . solicitors find the checklist applicable to financial matters most useful in focusing their clients' minds on the real issues and therefore in promoting settlements. Anything which is likely to promote the settlement of disputes about children is even more to be welcomed."

Die regskommissie waarsku egter teen 'n té rigiede toepassing van die faktore wat in die kontrolelys genoem word. Dié faktore behoort slegs die wesenlikste aspekte aan te spreek en die hof behoort steeds 'n diskresie te hê om enige ander relevante oorweging in aanmerking te neem. As die kontrolelys té gedetailleerd sou wees, sou die risiko vir appèl veel groter wees waar 'n hof in gebreke sou bly om elke individuele faktor noukeurig te oorweeg en op te weeg ten einde sy beslissing te motiveer.

Teen bovermelde agtergrond word die laaste faktor wat deur regter King in *McCall* gemaak word, naamlik dat die hof enige ander relevante faktor ten opsigte van die geval voor hande mag oorweeg, sterk ondersteun.

Die voorstel word gemaak dat dit in die beste belang van die kind is dat artikel 6(3) van die Wet op Egskeiding, gelees met die bepalings van die Wet op Bemiddeling in Sekere Egskeidingsgedinge 24 van 1987, gewysig word om vir so 'n kontrolelys voorsiening te maak. In die, weliswaar ongelukkige, omstandighede waar dit dan volgens die gesinsadvokaat se oortuiging inderdaad nodig is dat 'n hofbevel wel aangaande die kinders gemaak moet word, sal die verpligte gebruikmaking van die kontrolelys veel daartoe bydra om by die partye duidelikheid aangaande die relevante oorwegings te bring.

4 Die uitgesproke wense en voorkeure van die kind

In die derde plek word kortliks aandag gegee aan 'n faktor wat sowel in die kontrolelys van die Children Act as die uiteensetting van die *McCall*-saak na vore kom. Dit is naamlik dat die "ascertainable wishes and feelings" van die kind, inaggenome sy ouderdom en begripsvermoë, in aanmerking geneem moet word. Dit is 'n ontwikkeling wat, indien dit met versigtigheid en begrip toegepas word, die taak van die howe eweneens kan vergemaklik.

Die benadering van die Suid-Afrikaanse howe getuig van 'n enigsins skeptiese ingesteldheid in dié verband. 'n Sprekende voorbeeld hiervan is te vinde in *Greenshields v Wyllie* 1989 4 SA 898 (W) 899 waar regter Flemming die benadering soos volg uiteensit:

> "Because the Courts know that children grow up, that their perspectives change, that their needs change, a Court is not inclined to give much weight to the

> preferences of children of 12 and 14. It is not because what they say is not important but because the Courts know that there is more to it than the way they respond emotionally at this stage. It is therefore not that a court simply ignores their desire, but, as a father sometimes tells a child 'no', the Court, as the children's super father, can tell both them and their father and mother 'no' when it is necessary."

Dit blyk dat die hof *in casu* nie negatief daarteenoor staan dat die wense van kinders in aanmerking geneem word nie, maar dat hy van oordeel is dat kinders van onderskeidelik 12 en 14 jaar te jonk is dat hulle voorkeure in aanmerking geneem kan word. Dit het in hierdie geval gehandel oor die wysiging van 'n bevel van beheer en toesig. Daar word geen aanduiding in die hofverslag gevind dat die hof hom van deskundige getuienis laat bedien het om die wense van die kinders te evalueer nie. Inteendeel, die hof wend hom tot oorwegings wat "have been proven through the generations by the experience of psychologists, social workers and ordinary individual experience" (899C). Die hof wys daarop dat almal weet dat kinders *storm en drang* beleef en dat hulle op die ouderdom van 12 en 14 dit besonder moeilik vind om hulle eie identiteit vas te stel. Hulle uitgesproke voorkeur by wie hulle wil bly, kan derhalwe nie met erns bejeën word nie.

Die hof behoort na my oordeel die wense van die kinders wel in aanmerking te geneem het. Dit kon hy doen deur die getuienis van deskundiges wat die posisie van die kinders asook hulle uitgesproke wense en voorkeure beoordeel het, aan te hoor. Dit sou die hof, as oppervoog van alle minderjariges in sy jurisdiksie, se taak vergemaklik het deurdat hy nie die kunsgreep van algemeenheid ("experience of psychologists, social workers and ordinary individual experience") hoef toe te pas nie, maar inderdaad die wense van die kinders wetenskaplik kon laat evalueer.

Daar word aan die hand gedoen dat die oorweging van die kinders se uitgesproke wense, in ag genome hulle ouderdom en begripsvermoë en behoorlik sielkundig en sosiaal-maatskaplik wetenskaplik geëvalueer, 'n stap in die regte rigting is. Die gevare daaraan verbonde dat kinders hulle voorkeure rakende beheer en toesig oor hulleself uitspreek, is welbekend. Dit gebeur somtyds dat hulle bepaalde skuldgevoelens ontwikkel, of voel dat hulle die nie-toesighoudende ouer verwerp of selfs gedragsprobleme ontwikkel. Dit kan selfs gebeur dat 'n kind vanweë negatiewe en selfs skadelike oorwegings by 'n bepaalde ouer wil bly. Dit is derhalwe onontbeerlik dat die gesinsadvokaat hierdie gevare deeglik voor oë sal hou wanneer sy haarself van die wense van die kind vergewis. Indien die uitgesproke wense en voorkeure van die kind met die nodige versigtigheid hanteer word, kan dit inderdaad die hof se taak in 'n beduidende mate vergemaklik.

5 Slot

Artikel 30(3) van die Grondwet van die Republiek van Suid-Afrika Wet 200 van 1993 lui dat in alle aangeleenthede rakende 'n kind, sy of haar beste belang voorop gestel word. Die voorstel word gemaak dat dié bepaling aanduidend is van 'n bepaalde hiërargie van fundamentele regte. Die begrippe "alle aangeleenthede" en "voorop gestel" dui inderdaad op 'n bedoeling dat die beste belang van

die kind in alle omstandighede die oorheersende oorweging sal wees. Die Engelse uitdrukking in dié verband lui dat die kind se beste belang "shall be paramount". Die oorheersende gewig van die artikel kan tot gevolg hê dat die proses by egskeiding waar die belange van kinders ter sprake is, ingrypend kan wysig juis omdat die adversatiewe stelsel van bewyslewering die belange van kinders kan benadeel. Die *Van Vuuren*-saak *supra* is aanduidend van dié spesifieke moontlikheid. Die oorweging deur die hof in *McCall* van faktore wat in 'n kontrolelys genoem word en in besonder die oorweging van die wense en voorkeure van die kind, word sterk ondersteun. Dit is duidelik dat dié aspekte van die beslissing in pas is met die voorskrifte van artikel 30(3) van die Grondwet van Suid-Afrika.

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ASPEKTE RAKENDE DIE STRUKTUUR EN VERLOOP VAN GRONDWETLIKE GESKILLE

Blykens die prominensie wat grondwetlike regspraak tot dusver in die hofverslae geniet het, gaan grondwetlike litigasie sonder twyfel van soveel belang word dat geen regspraktisyn dit sal kan ignoreer nie. Veral die moontlike impak van hoofstuk 3 van die Grondwet van die Republiek van Suid-Afrika Wet 200 van 1993 (Fundamentele regte) sal in feitlik alle litigasie oorweeg moet word. Om dié rede word op 'n enigsins tentatiewe basis 'n paar gedagtes uitgespreek oor die struktuur en verloop van 'n konstitusionele dispuut waarin hoofstuk 3 ter sprake is.

Artikel 33(1) van die Grondwet, dit wil sê die beperkingsklousule ten opsigte van fundamentele regte, het alreeds in 'n aantal grondwetverwante beslissings gefigureer (*S v Fani* 1994 1 BCLR 43 (OK) 48G; *S v Smith* 1994 1 BCLR 63 (SOK) 69; *Qozeleni v Minister of Law and Order* 1994 1 BCLR 75 (OK) 88 ev; *Rudolph v The Commissioner of Inland Revenue* 1994 2 BCLR 9 (W) 11E ev; *S v Sefadi* 1994 2 BCLR 23 (D) 27D ev 28F ev 37A ev; *S v Majavu* 1994 2 BCLR 56 (CkGD) 83 ev; *Khala v The Minister of Safety and Security* 1994 2 BCLR 89 (W) 97 ev; *S v Botha* 1994 3 BCLR 93 (W) 102F ev; *Phato v The Attorney-General, Eastern Cape* 1994 5 BCLR 99 (OK) 66 ev; *Shabalala v The Attorney-General of the Transvaal* 1994 6 BCLR 85 (T)). Aangesien heelwat grondwetlike dispute juis sal wentel om die vraag of 'n inbreuk op 'n fundamentele reg op 'n geregverdigde beperking neerkom, vereis dit geen profeet om te voorspel dat artikel 33(1) nog dikwels oorweging van die howe sal vereis nie. In die bespreking wat hierna volg, word egter gefokus op twee aspekte wat buite die bestek van artikel 33(1) val en wat tot dusver min of geen aandag gekry het nie maar tog belangrik vir grondwetlike litigasie is.

1 Twee tipes grondwetlike dispute

Breedweg kan twee tipes grondwetlike dispute onderskei word:

(a) Die *volskaalse grondwetlike dispuut* – hier gaan die dispuut in die geheel oor 'n grondwetlike aangeleentheid. Dit sal voorkom waar 'n litigant in die hoedanigheid van 'n applikant (reël 10 van die reëls van die konstitusionele hof) die hof nader om wetgewing of 'n administratiewe handeling ongeldig te verklaar op grond van die feit dat dit onbestaanbaar is met een of meer van die fundamentele regte vervat in hoofstuk 3.

(b) Die *interlokutêre grondwetlike dispuut* kom voor gedurende die verloop van gewone siviele of straflitigasie, waar dit langs 'n verskeidenheid van weë die hof se aandag kan vereis, byvoorbeeld deurdat 'n grondwetlike aspek gedurende die verloop van die hofverrigtinge by wyse van betoog geopper word. Enkele voorbeelde ter illustrasie is die volgende:

- In die verloop van 'n borgondersoek beweer die verdediging dat die Grondwet (a 25(2)(d)) meebring dat die bewyslas na die staat verskuif;
- ten aanvang van 'n strafverhoor maak die verdediging aanspraak op alle inligting in die polisiedossier op grond van artikels 23, 25(3)(b) en (d);
- in 'n lastergeding baseer die verweerder sy verdediging onder meer op artikel 15(1) van die Grondwet waarin die reg op vryheid van spraak verskans word.

In nie een van bogenoemde gevalle wentel die dispuut *in die geheel* om 'n grondwetlik verwante aspek nie. Nogtans vereis die afhandeling van die saak telkens dat die hof benewens ander aangeleenthede, ook oor die grondwetlike punt uitspraak moet gee alvorens die litigasie afgehandel kan word.

Enige party – die eiser, verweerder, eksipiënt, beskuldigde of vervolging – kan 'n grondwetlike punt opper, anders as by die volskaalse grondwetlike dispuut waar die party wat die grondwetlike punt aanhangig maak, dit reg vanuit die staanspoor in die hoedanigheid van applikant doen.

2 Die prosedure van die dispuut

Met betrekking tot die verloop wat die dispuut aanneem, is al verklaar dat 'n grondwetlik verwante dispuut in twee fases uiteenval (Cachalia *et al Fundamental rights in the new Constitution* (1994) 106 ev; Basson *South Africa's interim Constitution* (1994) 50; *Qozeleni supra* 87CD): 'n eerste fase waartydens die applikant moet aantoon dat daar op 'n reg inbreuk gemaak is, gevolg deur 'n tweede fase waartydens die respondent (gewoonlik die staat) op grond van die beperkingsklousule (a 33(1)) 'n saak moet probeer uitmaak dat 'n inbreuk kragtens die vereistes van die gemelde artikel toelaatbaar is. Die stelling is soos *infra* aangedui word, 'n veralgemening wat in baie gevalle nie steek hou nie.

Dit is weliswaar korrek dat in bepaalde gevalle – veral by die volskaalse grondwetlike dispuut (*supra* 1) – die dispuut hierdie tweeledige verloop sal neem. In sodanige gevalle sal die applikant in die normale verloop van sake die bewyslas dra om op 'n oorwig van waarskynlikheid aan te dui dat daar 'n inbreuk op 'n grondwetlike reg plaasgevind het of dat dit sal plaasvind indien die hof nie die gevraagde regshulp verleen nie.

Dit kan ook die posisie wees by *sommige* interlokutêre grondwetlike dispute, maar in die meerderheid gevalle van 'n interlokutêre grondwetlike dispuut sal die geding 'n heel ander verloop neem. In die geval van 'n verweer in 'n lastergeding op grond van artikel 15(1) (die derde voorbeeld hierbo), sal die verweerder (soos by enige verweer wat onregmatigheid kan uitsluit), die bewyslas op 'n oorwig van waarskynlikheid dra (sien bv *Mabaso v Felix* 1981 3 SA 865 (A) 871H ev). Die ligging van die bewyslas sal telkens deur die aard van die geskil bepaal word. Die kwyt van die bewyslas kom daarop neer dat die verweerder bloot aandui dat hy kragtens een van sy fundamentele regte gehandel het. Dit is egter nie gerig op feitelike substansiëring van 'n bewering dat daar op van sy regte inbreuk gemaak is nie.

Die grondwetlike dispuut wat ter sprake kom by borgtog waar dit handel oor die ligging van die bewyslas, handel nie met die inbreuk op 'n reg nie en vereis nie van die verdediging dat 'n saak uitgemaak moet word dat 'n fundamentele reg geskend is nie. Inteendeel, dit handel met die uitleg van 'n bepaling wat op grond van *argumente* besleg word. Nóg die kwessie van 'n beweerde inbreuk op 'n reg, nóg die kwyt van 'n bewyslas (soos in die geval van die twee-fase grondwetlike dispute) kom hoegenaamd ter sprake.

Ook in ander gevalle sal die dispuut nie die verloop neem dat 'n party beweer dat daar op 'n reg van hom inbreuk gemaak is, of dat 'n inbreuk dreig nie, soos in gevalle waar 'n individu *ex lege* (vanuit die Grondwet) oor 'n reg beskik waarop 'n onregmatige inbreuk dreig. As voorbeeld kan artikel 25(2)(d) weer vermeld word. Die beskuldigde, soos enige ander individu, het die reg op vryheid en die meegaande reg om met of sonder borgstelling uit aanhouding vrygelaat te word, tensy die belange van geregtigheid anders vereis. Daar is egter geen sprake van enige bewyslas op die beskuldigde om 'n dreigende regsinbreuk te bewys nie; die bewyslas rus op die staat om aan te dui dat die belange van die regspleging 'n inbreuk op die beskuldigde se vryheid vereis. (Raadpleeg bv die minderheidsuitspraak in *Ellish v Prokureur-Generaal Witwatersrand* 1994 5 BCLR 1 (W).) Alternatief kom die kwyt van die bewyslas hoegenaamd nie ter sprake nie (die meerderheidsuitspraak in *Ellish*).

In geeneen van die voormelde gevalle word vereis dat die applikant hom van 'n bewyslas moet kwyt nie. Dit illustreer duidelik dat *Cachalia et al* se stelling hierbo inderdaad 'n veralgemening is wat nie die situasie met betrekking tot grondwetlike dispute getrou en volledig weergee nie.

3 Afstanddoening

In grondwetlike dispute kan die verskynsel van afstanddoening van die uitoefening van grondwetlike regte sigself ook voordoen. Die vraag wat in hierdie opsig ontstaan, is of 'n grondwetlike (fundamentele) reg wat betref afstanddoening deur ander reëls as "nie-fundamentele" regte gereguleer word. Anders gestel, het die fundamentaliteit van 'n reg 'n invloed op die regsposisie met betrekking tot afstanddoening?

'n Ondeurdagte standpunt wat soms voorkom, is dat afstanddoening nie kan figureer binne die konteks van grondwetlike regte nie. In beginsel is daar egter geen verskil tussen afstanddoening binne en buite die konteks van grondwetlike

regte nie. Die feit dat 'n reg kragtens die Grondwet die karakter van 'n fundamentele reg aanneem, het die effek dat enige regsreël, hetsy statutêr of gemeenregtelik, of enige administratiewe handeling wat met die betrokke fundamentele reg in botsing kom en wat daarmee onbestaanbaar is, nietig is (a 4(1) van die Grondwet). Dit vertoon die eiesoortige eienskap dat die soewereiniteit van die regering om op die regte inbreuk te maak, uitgesluit word. Die fundamentaliteit van die reg is derhalwe daarin geleë dat dit immuun is teen inmenging deur die owerheid. Die fundamentaliteit van grondwetlike regte raak derhalwe nie die verskynsel van afstanddoening nie.

Die gedagte dat grondwetlike regte nie vir afstanddoening vatbaar is nie, word deur die volgende drie oorwegings verydel:

(a) Die meeste fundamentele regte wat in hoofstuk 3 voorkom, geniet alreeds erkenning binne ander dissiplines van die reg, soos die privaatreg, strafreg, administratiefreg, strafprosesreg en dies meer. Die verheffing van hierdie regte tot fundamentele regte verleen aan die gemelde regte immuniteit teen inmenging en ongedaanmaking deur die owerheid maar die posisie ten opsigte van afstanddoening word kennelik steeds gereguleer deur dieselfde reëls as die reëls van die vakdissiplines waar die regte hulle oorsprong vind. Die reg op waardigheid (a 10); privaatheid (a 13); vryheid van gewete, godsdiens, denke, oortuiging en opinie (a 14(1)); vryheid van uitdrukking (a 15(1)) en bewegingsvryheid (a 18) het almal hulle oorsprong in die privaatreg en spesifiek in die persoonlikheidsreg (sien in die algemeen Neethling *Persoonlikheidsreg* (1991)). Binne die konteks van die Grondwet bly hierdie regte steeds grondliggend persoonlikheidsregte aangesien dit immers presies dieselfde regsbelange is wat hier beskerming geniet, naamlik die *corpus*, *fama* of *dignitas* van die persoon. Die regte is dus nie bloot *fundamentele* of *grondwetlike* regte nie maar fundamentele (grondwetlike) *persoonlikheidsregte*. Dit volg derhalwe logies dat dieselfde reëls met betrekking tot afstanddoening behoort te geld as wat alreeds binne die konteks van die persoonlikheidsreg geld. In die algemeen kan daar dus van die uitoefening van hierdie regte afstand gedoen word vir sover die *boni mores* dit toelaat.

'n Afstanddoening wat sal lei tot die buitensporige kwetsing van 'n persoonlikheidsreg sal as *contra bonos mores*, en dus onregmatig, aangemerk word. So 'n afstanddoening sal derhalwe nietig wees. Ten opsigte van die Grondwet sal bloot die terminologie daar anders uitsien, aangesien dit wat *contra bonos mores* is, nie soseer *onregmatig* nie maar onkonstitusioneel sal wees. Buiten die terminologiese verskil bly die posisie hetsy binne of buite die konteks van die Grondwet egter steeds dieselfde: presies dieselfde regsbelange word beskerm en daarom vereis dit die toepassing van dieselfde reëls wanneer dit kom by afstanddoening van die uitoefening van die betrokke regte.

Dieselfde wat hierbo ten opsigte van die persoonlikheidsregte gesê is, geld vir die prosessuele regte. Artikel 22 verleen soos volg grondwetlike verskansing aan die gemeenregtelike prosessuele reg van toegang tot die hof:

> "Elke persoon het die reg om beregbare geskille deur 'n geregshof of, waar toepaslik, 'n ander onafhanklike en onpartydige forum te laat besleg."

Die grondwetlike verskansing van hierdie geykte prosessuele reg bring mee dat die owerheid nie die uitoefening daarvan mag belemmer nie. Die reg verkry

weer eens immuniteit teen afwatering en inbreuke van owerheidsweë. Daarbenewens is die middele wat nog altyd vir individue beskikbaar was om beregting van geskille deur die hof uit te sluit, klaarblyklik steeds beskikbaar. Twee voorbeelde waar die kontraktereg regsfigure bevat wat telkens die effek het om toegang tot die hof uit te sluit, kan vermeld word:

(i) Die *pactum de non petendo*, 'n algemeen bekende regsfiguur in die kontraktereg (raadpleeg oa Joubert *General principles of the law of contract* (1987) 296).

(ii) *Skikkingsooreenkomste* ter beëindiging van dispute wat eweneens alledaags voorkom (sien oa Van der Merwe *et al Kontraktereg: algemene beginsels* (1994) 383; Pretorius *Burgerlike proses in die landdroshowe* (1986) 614).

Beide dié regsfigure is ongetwyfeld versoenbaar met die *boni mores* en tegelyk ook in ooreenstemming met die onderliggende etos van die Grondwet, naamlik die waardes waarop 'n demokratiese samelewing gebaseer op vryheid en gelykheid geskoei is.

Bogenoemde reëls van ons kontraktereg wat telkens die prosesregtelike neerslag het om óf die hof se beslegting van 'n geskil uitdruklik uit te sluit (die *pactum de non petendo*), óf minstens dieselfde effek te hê (soos by skikking), word nie deur die Grondwet ongedaan gemaak nie maar eerder grondwetlik bevestig en voortgesit.

Dieselfde punt kan geïllustreer word deur na artikel 25(3)(c) en (e) te verwys. In die twee subartikels (soos elders in a 25) vind ons reëls van die strafprosesreg waaraan grondwetlike verskansing verleen word. Die regte wat hierin verskans word (die beskuldigde se swygreg en die reg om deur 'n regspraktisyn van sy of haar keuse verteenwoordig te word), bly egter steeds wesenlik strafprosesreg, met die gevolg dat die reëls met betrekking tot afstanddoening wat in die strafproses van krag is, steeds binne die konteks van die Grondwet geldig bly. Alhoewel dit die beskuldigde kragtens sy reg om te swyg vrystaan om te swyg, kan hy sekerlik daarvan afstand doen eenvoudig deur te praat in plaas van om te swyg. Dit gebeur immers daagliks in die hof. Net so dikwels gebeur dit dat 'n beskuldigde afstand doen van die uitoefening van sy reg om van regsverteenwoordiging gebruik te maak deur die uitoefening van die keuse om sy verdediging self waar te neem.

Hierdie twee voorbeelde bring weer eens die eenvoudige realiteit na vore dat die feit dat 'n reg grondwetlik verskans is, oftewel 'n fundamentele reg word, nie die verskynsel van afstanddoening affekteer nie.

(b) Een van die wesenskenmerke van enige subjektiewe reg is dat die reghebbende in beginsel die keuse gelaat moet word om te besluit of hy die reg wil uitoefen al dan nie. Indien die vrye keuse van afstanddoening nie beskikbaar is nie, word die sogenaamde reg in der waarheid 'n verpligting wat op die individu geplaas word om op 'n bepaalde wyse te handel.

Elke mens beskik byvoorbeeld oor die vryheid van opinie en uitdrukking (a 14(1) en a 15(1) van die Grondwet). Indien 'n persoon nie van die uitoefening van hierdie regte sou kon afstand doen nie, is die implikasie dat hy tot die huldiging van 'n opinie asook die artikulering daarvan verplig word.

Insgelyks het elke burger gelyke politieke regte (a 21 van die Grondwet). Hy kan egter afstand doen van die uitoefening daarvan deur byvoorbeeld nie te stem nie. Die onvermoë om hiervan afstand te doen, sou weer eens impliseer dat elkeen tot die uitbring van 'n stem verplig word.

Dieselfde argument kan ook gebruik word op die gebied van die regte van die beskuldigde. Die beskuldigde beskik onder meer oor die reg om te swyg asook om nie teen homself te getuig nie (a 25(2)(c) en (d) van die Grondwet). Indien hy nie van die uitoefening van hierdie reg kan afstand doen nie, bring dit mee dat hy altyd sal moet swyg en nooit 'n erkenning, hoe vrywillig ook al, mag maak nie. Wat meer is, alle bekentenisse en les bes, selfs 'n pleit van skuldig, sal konsekwent ongrondwetlik wees aangesien dit die gevolg sou wees van die afstanddoening van die uitoefening van 'n grondwetlike reg.

Laastens: elke persoon het 'n reg op 'n gesonde omgewing (a 29 van die Grondwet). Daagliks doen talle mense egter van die uitoefening van hierdie reg afstand deur hulleself aan 'n ongesonde omgewing bloot te stel deur in 'n mynskag af te gaan, in 'n besoedelde middestadgebied te reis, in die rokersarea van 'n restaurant te gaan sit, ensovoorts. Indien 'n persoon nie van die uitoefening van 'n reg op 'n gesonde omgewing afstand kan doen nie, impliseer dit dat daar 'n verbod bestaan op al bogenoemde optredes en sodanige optrede sal, indien dit wel plaasvind, onkonstitusioneel wees.

Die gemelde voorbeelde demonstreer onteenseglik dat ook fundamentele regte noodwendig vir afstanddoening van uitoefening vatbaar moet wees. Indien nie, bevat hoofstuk 3 van die Grondwet nie 'n handves van fundamentele *regte* nie, maar 'n handves van fundamentele *verpligtinge*. Dit word tog nie deur hoofstuk 3 beoog nie. Daar word immers telkens na *regte* verwys en nie na *verpligtinge* nie.

(c) Die twee onderliggende waardes van hoofstuk 3 van die Grondwet is dié van gelykheid en van vryheid. Die vryheidsgedagte kom herhaaldelik voor. Dit maak eerstens sy verskyning in die breed geformuleerde reg op individuele *vryheid* en sekuriteit in artikel 11(1). Talle van die regte wat daarna volg, is tipiese eerste generasie-vryheidsregte, soos die reg op vryheid van denke, godsdiens, opinie en oortuiging; die reg op vryheid van assosiasie; die reg op vrye beweging; die reg om op enige plek binne die Republiek te vestig; die reg op vrye ekonomiese verkeer, en dies meer (onderskeidelik a 17 18 19 en 26 van die Grondwet).

Die vryheidswaarde manifesteer hierna ook prominent in artikel 33(1) en artikel 35(1) van die Grondwet. 'n Beperking van 'n fundamentele reg is ingevolge artikel 33(1) slegs in orde indien dit onder meer vereenselwigbaar is met die waardes van 'n oop en demokratiese gemeenskap gebaseer op *vryheid* en gelykheid. Op sy beurt bepaal artikel 35(1) dat hoofstuk 3 só uitgelê moet word dat die waardes van 'n oop en demokratiese samelewing gebaseer op *vryheid* en gelykheid bevorder word (eie beklemtoning).

Voormelde bepalings illustreer die sentrale posisie van individuele vryheid binne die konteks van die Suid-Afrikaanse Grondwet afdoende. In samehang hiermee moet in gedagte gehou word dat individuele vryheid tradisioneel en kontemporêr die swaartepunt is waarom fundamentele regte-instrumente wentel.

Individuele vryheid lê trouens aan die wortel van die hele konsep van fundamentele regte en is daarsonder ondenkbaar. Dit is 'n geykte waarheid wat male sonder tal in internasionale en regionale menseregte-instrumente bevestig word en behoef dus geen verdere betoog nie.

Wat inderdaad gebeur indien geleer word dat nie van die uitoefening van fundamentele regte afstand gedoen kan word nie, is dat een van die hoekstene van fundamentele regte, naamlik individuele vryheid, geweld aangedoen word. En omdat individuele vryheid ten grondslag lê van fundamentele regte, impliseer dit tegelyk dat die gedagte van fundamentele regte *per se* ondermyn word.

Die verskynsel dat van die uitoefening van fundamentele regte afstand gedoen kan word, is dus op sigself 'n uiting van die idee van fundamentele regte omdat die waarde van individuele vryheid hierdeur gedien word. Die teendeel, naamlik dat afstanddoening nie kan plaasvind nie, bots met die gedagte van vrye individuele besluitneming en is derhalwe die idee van fundamentele regte vyandiggesind.

In die lig van die feit dat individuele vryheid soos hierbo aangedui, herhaaldelik deur verskeie van die bepalings van hoofstuk 3 gewaarborg word, is enige leer wat meebring dat individuele vryheid aan bande gelê word en wat individue onder dwang plaas, onkonstitusioneel. Die ontkenning van die moontlikheid van afstanddoening is inderdaad so 'n leer aangesien dit juis die gedagte van individuele vryheid verydel. Dit is derhalwe ongrondwetlik.

Die slotsom is dat fundamentele regte, soos enige ander regte, *prinsipieel* vir afstanddoening van uitoefening vatbaar is. Die enigste beperking op sodanige afstanddoening sal meegebring word wanneer aan die hand van die toepassing van die objektiewe redelikheidskriterium 'n afstanddoening *onregmatig* blyk te wees. Sodanige onregmatigheid impliseer tegelyk ongrondwetlikheid, met die gevolg dat onregmatigheid en ongrondwetlikheid vir doeleindes van afstanddoening wesenlik dieselfde is. Die enigste verskil tussen die twee konstruksies is dat hulle in verskillende kontekste funksioneer: onkonstitusionaliteit funksioneer *binne* die sfeer van die Grondwet en onregmatigheid *daarbuite* (in die konteks van die verbintenisreg).

4 Mededingende fundamentele regte

Hierdie soort grondwetlike dispuut kan ook as 'n horisontale grondwetlike dispuut beskryf word omdat die staat nie daarby betrokke is nie en omdat dit oor die botsing van meerdere individuele regsbelange handel.

Volgens die geykte standpunt sal 'n party in 'n grondwetlike geding suksesvol wees indien hy kan bewys dat daar op 'n individuele reg inbreuk gemaak is en die respondent (gewoonlik die staat) nie daarin kan slaag om 'n toelaatbare beperking soos bedoel in artikel 33(1) te substansieer nie (Cachalia *et al* 106 ev; Basson 50; *Qozeleni supra* 87CD). Hierdie beskouing is egter foutief omdat die uitoefening van 'n fundamentele reg deur een persoon tegelyk die inbreuk of inperking van 'n fundamentele reg van iemand anders kan meebring. In plaas daarvan dat die hof dan die kwessie van 'n toelaatbare beperking al dan nie moet bereg, moet die botsende fundamentele regte van twee privaatpersone oorweeg en bereg word.

'n Onbeperkte aantal voorbeelde kan genoem word om hierdie verskynsel te illustreer. X se reg op vryheid van uitdrukking kan bots met Y se reg op waardigheid of privaatheid; X se reg op gelykheid kan met Y se reg op vrye assosiasie in botsing kom; X se reg op bewegingsvryheid kan teen Y se reg op eiendom te staan kom; X se reg op inligting wat deur die staat gehou word, kan strydig wees met Y se reg op privaatheid; en X se reg op inligting en om as beskuldigde voldoende besonderhede van die aanklaer teen hom te bekom, kan bots met beriggewer Y se reg op privaatheid en persoonlike sekuriteit wanneer die verstrekking van inligting aan X vir Y aan viktimisasie blootstel.

Die Grondwet skryf nie voor hoe so 'n grondwetlike geskil wat handel oor die wedywering tussen botsende individuele fundamentele regte, bereg moet word nie.

Hierdie *casus omissus* behoort egter geen probleem te skep nie en is trouens te verwelkom want ons beskik in ons bestaande reg oor die nodige beginsels om sodanige dispute te hanteer. Die kanse dat reëls om sodanige geskille te hanteer in die Grondwet ingeskryf sal word, is in elk geval skraal want die tersaaklike feite van elke dispuut sal telkens 'n deurslaggewende rol speel. Die opstel van 'n voorkeurorde van regte ten einde geskille van hierdie aard te besleg, kan nie die probleem oplos nie omdat dít juis onagsaam omgaan met die spesifieke feite van elke saak. Dit sal aanleiding gee tot 'n stuk statutêre meganika wat die relevante feite ignoreer ten koste van judisiële beslissing wat telkens die feite verreken.

Bogenoemde regsbeginsels wat beskikbaar is om die grondwetlike geskil rakende die botsing van twee persone se individuele regte te besleg, is die objektiewe redelikheidsmaatstaf van die *boni mores* soos ons dit in die deliktereg vind (sien bv Neethling *et al Law of delict* (1994) 32 ev). Hierdie maatstaf word by die opweging van regsbelange gebruik (sien bv Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 62 ev; Neethling *et al* 32 ev) en behoort aanwending te vind in die onderhawige grondwetlike geskille juis omdat hierdie geskille net soos by die deliktereg met die opweging van botsende regsaansprake handel. Binne die konteks van die Grondwet word hierdie maatstaf enigsins aangevul deur artikel 35(1) wat onder meer bepaal:

> "By die uitleg van die bepalings van hierdie Hoofstuk moet 'n geregshof die waardes wat 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid bevorder . . ."

Hierdie teleologiese interpretasiemaatstaf kan as die grondwetlike samevatting en (her)formulering van die *boni mores*-maatstaf beskou word. Toegepas op die onderhawige dispuut tussen twee botsende fundamentele regte, sal dit beteken dat so 'n dispuut besleg moet word ooreenkomstig die waardes van 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid. Net soos die *boni mores*-maatstaf van objektiewe redelikheid is hierdie maatstaf soepel (Van der Merwe en Olivier 62 ev) en behoort daarom die meeste regsbelange-botsings te kan hanteer. (Die stellings van die hof in *Gardener v Whitaker* 1994 5 BCLR 19 (OK) 37A–C (1995 2 SA 672 (OK)) waar so 'n dispuut van fundamentele regte ter sprake was, is volledig in ooreenstemming met bogemelde benadering.)

Horisontale dispute kan in enige geding voorkom en het trouens reeds ongemerk na vore gekom in sommige van die grondwetlik verwante strafsake wat tot dusver beslis is. Voorbeelde hiervan is waar die beskuldigde se aanspraak op die inhoud van die polisiedossier teengestaan is op grond van die argument dat daar

'n moontlikheid van intimidasie bestaan van diegene wie se identiteit geopenbaar word (sien bv *Khala supra* 103C ev en veral *Shabalala v The Attorney-General of the Transvaal supra* 54 ev). Wanneer die staat in 'n strafsaak weier om sekere gedeeltes van die polisiedossier aan die verdediging te openbaar op grond daarvan dat dit tot viktimisasie van getuies kan lei, is so 'n horisontale geskil inderdaad voorhande. Met die eerste oogopslag kom dit voor of die geskil slegs gaan oor 'n aanspraak op 'n beperking ingevolge artikel 33(1), maar by verdere betragting blyk dit dat die geskil nie (of minstens nie slegs) gaan oor 'n beperking nie. Die rede is dat die geskil nie net die beskuldigde se individuele regte raak nie maar ook die fundamentele regte van 'n ander persoon. Die prosesregtelike opset, naamlik dat daar in daardie stadium slegs twee partye – die staat en die beskuldigde – voor die hof is, moet dus nie gesien word as 'n aanduiding dat slegs twee substantiewe regte by die dispuut betrokke is nie. Die substantiefregtelike realiteit, naamlik dat drie regsbelange ter sprake is, word prosesregtelik verkeerd weergegee en skep 'n wanindruk van die substantiewe regsbelange wat betrokke is.

Wanneer die staat uit hoofde van voormelde oorweging dus teen die verstrekking van die inligting beswaar maak, is dit van groot belang vir die hof om presies uit te klaar wat die botsende regsbelange is waaroor 'n bevinding gemaak moet word. Handel dit bloot met 'n beperking ingevolge artikel 33(1) of vereis dit die belange-afweging van die twee wedywerende *individuele* fundamentele regte? Helderheid hieroor is van deurslaggewende belang omdat radikaal uiteenlopende benaderings van die hof vereis word.

Indien die dispuut slegs om 'n beperking kragtens artikel 33(1) wentel, sal die party wat aanvoer dat die beperking geregverdig is op 'n oorwig van waarskynlikheid moet aandui dat daar aan al vier die vereistes van artikel 33(1) voldoen is (*Qozeleni supra* 91DE; *Sefadi supra* 37CD; *Majavu supra* 86D ev; *Khala supra* 98C ev). Indien daar na aanhoor van getuienis en argument twyfel bestaan oor die wenslikheid daarvan om 'n beperking te regverdig, sal die voordeel van die twyfel die party wat die beperking teenstaan, toekom. Dit is die implikasie van die siening dat dit 'n bewyslas en nie bloot 'n weerleggingslas is nie (Schmidt *Bewysreg* (1989) 23).

In die geval van wedywering tussen twee individuele regte is die posisie enigsins ingewikkelder want dan is daar geen bewyslas ter sprake wat die hof kan help besluit wat hom te doen staan in 'n geval van twyfel nie. Die hof is dan net op 'n belange-afweging tussen twee individuele fundamentele regte aangewese. Met verwysing na die dispuut waarna hierbo verwys is, sal die hof derhalwe uitsluitsel moet gee oor 'n botsing tussen die beskuldigde se reg op 'n regverdige verhoor en om in voldoende besonderhede oor die aanklag ingelig te word (ingevolge a 25(3)), teenoor die potensieel geviktimiseerde getuie se reg op vryheid en sekuriteit van die persoon ingevolge artikel 11. Die hof behoort hom dan te laat lei deur die getuienis wat voorhande is, soos wat die waarskynlikheid van viktimisasie is, watter vorm die viktimisasie kan aanneem, en daarenteen, wat die moontlike nadelige effek vir die beskuldigde is sou die getuie se identiteit nie openbaar word nie, in welke mate die beskuldigde dalk daarsonder kan

klaarkom sonder dat dit 'n noemenswaardige invloed op die voorbereiding van sy verdediging het.

Die feite wat telkens in so 'n dispuut by wyse van getuienis op rekord geplaas word, sal van deurslaggewende belang wees. Die hof sal hom daardeur laat lei om 'n beslissing na die een of die ander kant toe te vel. Daar kan derhalwe nie *in abstracto* vooraf gesê word welke reg voorrang sal geniet op die basis dat daar 'n vaste voorkeurorde van regte bestaan nie. Die besondere feite van elke geval sal telkens bepaal welke reg voorkeur behoort te geniet of aanleiding gee tot 'n kompromie vir sover 'n kompromie moontlik is. Die juridiese maatstaf wat by so 'n horisontale dispuut aanwending vind, is, soos hierbo geargumenteer is, die waardes van 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid (a 35(1)).

Samevattend kan die verskil tussen hierdie twee dispute soos volg weergegee word:

(a) Die dispuut waarby die staat betrokke is, is 'n beperkingsdispuut; daarenteen is die dispuut waarby twee individuele fundamentele regte wedywer, 'n belange-afwegingsdispuut.

(b) By die beperkingsdispuut is die juridiese maatstaf aan die hand waarvan die dispuut besleg word, die vier vereistes van artikel 33(1); daarenteen is die juridiese maatstaf by 'n belange-afwegingsdispuut die artikel 35(1)-formulering van die waardes van 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid.

(c) By die beperkingsdispuut is die kwessie van die bewyslas van wesentlike belang. Die bewyslas rus op die party wat die beperking wil regverdig. By die belange-afwegingsdispuut is die bewyslas bloot op die eiser/applikant.

'n Eiesoortige prosessuele probleem ontstaan by 'n horisontale grondwetlike dispuut soos in die voorbeeld waarmee tot dusver gewerk is. Die vraag is wie bevoeg is om die belange van die partye by so 'n grondwetlike dispuut te behartig.

Uiteraard sal die beskuldigde se belange deur sy regsverteenwoordiger hanteer kan word. Maar wat is die posisie van die getuie wat bekendmaking van sy identiteit probeer voorkom? Is hy geregtig op 'n regsverteenwoordiger vir die doel, of kan die staatsaanklaer of staatsadvokaat wat die vervolging waarneem, sy belange behartig? In beginsel is albei opsies beskikbaar. Die aanklaer behoort dit te kan doen uit hoofde van die feit dat die belange van vervolging en getuie vereenselwigbaar is en die staatsaanklaer waarskynlik altyd deeglik oor die posisie van die getuie ingelig sal wees. Voorts skep artikel 7(4)(b)(iii) ruimte daarvoor dat die staatsaanklaer die getuie se belange kan behartig. Dit lui:

> "(b) Die regshulp bedoel in paragraaf (a) kan aangevra word deur –
>
> (iii) 'n persoon wat namens iemand anders optree wat nie in die posisie is om sodanige regshulp in sy of haar eie naam aan te vra nie."

Die getuie is klaarblyklik nie in die posisie om in eie naam op te tree nie en wil trouens juis nie sy naam geopenbaar hê nie. Die aanklaer is derhalwe die aangewese persoon om die regshulp namens die getuie aan te vra. Die staatsaanklaer vervul in elk geval die rol om die belange van die regspleging in die

algemeen te behartig (sien oa *S v Jija* 1991 2 SA 52 (OK) 67J ev) en behoort in die proses tegelyk ook na die belange van getuies om te sien vir sover dit vereis word. Die aanklaer is dus uit hoofde van sy pligte die aangewese persoon om namens die getuie op te tree.

In beginsel behoort daar egter geen beletsel daarteen te wees dat die getuie van sy eie regsverteenwoordiger gebruik kan maak nie. Sy belange, hoewel normaalweg dieselfde, is tog onderskeibaar van dié van die staat en om dié rede behoort hy sy eie regsverteenwoordiging te kan verkry.

Daar is slegs een geval waar die staatsaanklaer glad nie namens die getuie sal kan optree nie. Dit is, om na bogenoemde voorbeeld terug te keer, wanneer die aanklaer nie bekendmaking van die identiteit van die getuie opponeer nie maar die betrokke getuie wel. Daar ontstaan dan 'n belangebotsing wat die aanklaer om vanselfsprekende redes diskwalifiseer om namens die getuie te handel.

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THE ABOLITION OF THE WIFE'S DOMICILE OF DEPENDENCY: A LESSON IN HISTORY

1 Introduction

The new Domicile Act 3 of 1992 has been welcomed for the fresh life it has breathed into our common law concept of *domicilium*. One of its most welcome and long-awaited reforms is that a married woman may now establish her own domicile, independent of that of her husband (s 1(1)). Although the wife's domicile of dependency has often been criticised in the past because it did not accord with reality or was simply discriminatory, its effect on the substantive interpretation of the concept *domicilium* in our law has, to a large extent, been overlooked. Mindful of the *caveat* that lessons from the past should be heeded, it is now perhaps appropriate to trace the historical antecedents of the abolition of the wife's domicile of dependency in our law and to attempt an evaluation of this piece of legislative reform.

2 Domicile as a jurisdictional connecting factor

Domicile has, for a long time, been one of the most important jurisdictional connecting factors with regard to divorce. It is in the area of divorce jurisdiction that we find many of the definitive cases on the interpretation of the concept *domicilium* (see, eg, *Eilon v Eilon* 1965 1 SA 703 (A)); indeed, jurisdiction has been the most fertile ground for expositions on the interpretation of domicile and such cases have served as authority in all other areas of the law. A survey of our case law reveals that one of the most contentious issues in the establishment of jurisdiction in divorce cases has been the wife's domicile of dependency; a

fiction (*Mason v Mason* (1885) 4 EDC 330 351) which, in terms of the new Domicile Act (s 1(1)), no longer applies. However, to appreciate the significance of this piece of long overdue legislative reform, a brief historical survey of the role of domicile, as a jurisdictional connecting factor in divorce actions, should prove instructive.

Despite the rather bold assumption of jurisdiction on the basis of residence in *Weatherley v Weatherley* (1879) Kotzé 66, *Le Mesurier v Le Mesurier* [1895] AC 517 established the mutual domicile of the parties as the sole common law criterion for divorce jurisdiction. Since the wife followed the domicile of her husband (*Mason v Mason* (1885) 4 EDC 330 351), this meant that the only court that had jurisdiction to order a divorce was the court of the area in which the husband was domiciled at the time when the action was instituted. It is not difficult to imagine the problems encountered by a wife who wished to institute action for divorce in a case where her husband was domiciled abroad, or had abandoned the mutual domicile, never intending to return (see, eg, *Mason v Mason* (1885) 4 EDC 330). In such an instance a deserted wife would have remained tied to a marriage which existed only in name. This prompted the legislator in the colony of Natal to introduce Law 18 of 1891, in terms of which an action brought by a deserted spouse, resident in Natal for four years, who had been deserted there for an uninterrupted period of eighteen months, would not be defeated by a change of domicile on the part of the deserting spouse, provided that the deserting spouse had been domiciled in Natal at the time of the desertion. However, the other colonies did not follow suit and the wife's plight was further compounded by the existence of these separate colonies: had her husband absconded across the border to another Southern African colony, or, after Union, to another province, she was in exactly the same position as if he had gone abroad to a foreign country.

It was only in 1939, long after Union, that the legislator intervened on a national scale, but the succession of legislative extensions of jurisdictional grounds for divorce bears witness to the piecemeal attempts to alleviate the problems experienced by the deserted wife. With each attempt to provide for yet another possible fact-situation, the web of legislative enactments became so interwoven that this area of jurisdiction became a nightmare for the legal practitioner. The Matrimonial Causes Jurisdiction Act 22 of 1939 (s 1(1)) introduced residence as jurisdictional connecting factor. This act enabled a wife to institute action for divorce in the division of the supreme court in which she had been ordinarily resident for at least a year prior to commencement of proceedings, provided that her husband was domiciled in the Union of South Africa. The major defect of this section is immediately apparent: the requirement that the husband must have been domiciled in the Union precluded the wives of husbands with non-Union domiciles from divorce jurisdiction in South Africa. Thus no provision was made for the numerous cases where, for example, a non-South African male married a South African woman in this country and deserted her, never to be seen or heard of again. Although the Matrimonial Affairs Act 37 of 1953 (s 6) further extended jurisdictional criteria for divorce by requiring the husband to have been domiciled in South Africa at the date of deportation or desertion (and

not necessarily at the date of commencement of proceedings), or immediately before deportation or desertion, the case of the non-South African husband was still not settled satisfactorily, since a South African domicile was still required. This scenario was only provided for by the General Laws Amendment Act 70 of 1968 (s 21) in which the requirement of a South African domicile for the husband was abolished. In terms of this provision a wife, whose husband was not domiciled in South Africa, could institute action in a provincial or local division of the supreme court provided that she had been a South African citizen or had been domiciled in the Republic immediately before the marriage, and that she had been ordinarily resident in the Republic for one year before institution of proceedings. In 1979 the jurisdictional criteria for divorce actions were consolidated in the Divorce Act 70 of 1979 (s 2(1)). The common law ground of the mutual domicile of the parties was confirmed and the following provision enacted for cases where the wife was the plaintiff or applicant: in such a case the court would have jurisdiction if she was ordinarily resident in the area of the court's jurisdiction on the date on which the action was instituted and had been ordinarily resident in the Republic for one year immediately prior to that date, plus one of the following additional requirements: (1) she was domiciled in the Republic, or (2) she must have been domiciled in the Republic immediately before cohabitation between her and her husband had ceased, or (3) she must have been a South African citizen or must have been domiciled in South Africa immediately prior to her marriage. If this brief survey of the legislative extensions of the grounds of divorce jurisdiction seems daunting, it must be borne in mind that to make matters worse all references to the domicile of the wife (with the exception of references to her pre-marital domicile), were, in actual fact, references to the domicile of her husband in terms of the domicile of dependency. With the abolition of the wife's domicile of dependency, the grounds for divorce jurisdiction are now set out clearly:

> "A court shall have jurisdiction in a divorce action if the parties are or either of the parties is–
>
> (a) domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or
>
> (b) ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date" (s 2 of the Divorce Act 70 of 1979 as amended by the Domicile Act 3 of 1992 s 6).

The question might well be asked why the real obstacle, that is the wife's domicile of dependency, was not addressed earlier. Would not proper and timeous reform in this regard have prevented this labyrinth of legislative extensions of jurisdictional grounds for divorce?

3 The fiction of the domicile of dependency

As early as 1885, the doctrine of the wife's domicile of dependency was criticised and exposed for what it was:

> "It is only by a legal fiction that the plaintiff can be said to follow the domicile of her husband . . . by a legal fiction an existing law is eluded rather than annulled; its integrity is preserved in appearance, although it may be broken in effect . . . A

> legal fiction is in itself a feeble device . . ." (*Mason v Mason* 1885 4 EDC 330 351; see also *Gilbert v Gilbert* (1901) 22 NLR 201 204).

Mason v Mason was a prime example of the difficulties encountered by a deserted wife in regard to divorce jurisdiction. The husband was a rolling stone who never succeeded at making a proper living and providing for his family. After each failed venture he would send his family back to his mother-in-law. Eventually he was arrested for debt, but escaped to Delagoa Bay from where he intended going to Australia. It was clear that Mr Mason could not, by any stretch of the imagination, have retained his domicile in the Cape Colony, but, since that was the only way in which Mrs Mason could establish jurisdiction, it was held that Mr Mason had indeed retained his domicile in the eastern part of the Cape Colony and therefore the court of the Eastern Districts assumed jurisdiction in the divorce matter (see 353 ff 356). In the wake of the discovery of diamonds and gold, as well as during the Anglo-Boer Wars and the two World Wars this kind of problem situation was often encountered by our judges: foreign fortune-seekers married South African women and left after they had either made a fortune or lost all their money; British soldiers married while based here and then left, never to return. Invariably, the deserted wife was left without a remedy – unless she was able to pin her estranged husband down to a South African domicile at one time or another, no South African court would have assumed jurisdiction in the matter (at least, until 1968, when provision was made for cases where the husband was not domiciled in South Africa at all – see General Laws Amendment Act 70 of 1968 s 21).

Since these jurisdictional problems stemmed directly from the wife's domicile of dependency, this doctrine was not only severely criticised, but possible exceptions were explored. In *Burnett v Burnett* (1895) 12 CLJ 147 (OFS), a case where the husband deserted his wife directly after the wedding ceremony, it was said that

> "[the court's] first duty and foremost right also are in respect of the person (in this case the wife) *bona fide* domiciled within the territory over which its jurisdiction extends, against whom the continuing offence of desertion is being perpetrated, and who claims the assistance and protection of the Court. The effect of a contrary view might in many cases be to leave a person practically without remedy against such an offence, and a wrong without a remedy in such a case would argue a helplessness of the Court and an ineffectiveness of its procedure that would be a reproach to any civilised community . . ." (147–148).

Stressing that the courts would be dead instruments in the administration of justice if they could not assist a deserted wife in such a case, the court assumed jurisdiction in accordance with the American view (quoting Bishop *Marriage and divorce*) that if the law gives the wife the right to sue, she should, by implication, be given a domicile in which to bring the suit. This "exception" to the doctrine of dependency was not accepted in our law. Although the possibility of a separate "forensic" domicile for a deserted wife was mooted on several occasions, it never really found application in our courts (see, eg, *Ex parte Kaiser* 1902 TH 164; *Ex parte Standring* 1906 EDC 169; *Hudson v Hudson* 1907 EDC 189). The possible exception that the wife did not follow her husband's domicile if he was a *vagabundus* (see *Mason v Mason* (1885) 4 EDC 330 353) likewise

did not entitle her to a separate domicile or, even, the retention of the last mutual domicile of the parties before the desertion occurred (see, eg, *Ex parte Kaiser* 1902 TH 165 esp 172; *Laughlin v Laughlin* (1903) 24 NLR 230).

The result of the non-acceptance of exceptions to the wife's domicile of dependency, or, alternatively, the reluctance to abolish the domicile of dependency, was that the legislator had to enact statutory extensions to the common law ground of divorce jurisdiction (ie the mutual domicile of the parties as established by *Le Mesurier v Le Mesurier* [1895] AC 517) to accommodate the deserted wife. The success of these enactments may be measured in terms of the number of amendments (1953; 1968; 1979 and, eventually, 1992 – see details above) since the first one appeared in 1939; as soon as one gap was filled, another appeared. The question arises whether such attempts at external reform, in the sense that the concept of *domicile* was left untouched, can ever be satisfactory. The fact that reform was required indicates that the concept of domicile was either lacking in some respect, or was unsuitable for purposes of divorce jurisdiction. The solution would have been to reform the concept itself (as the new Domicile Act has now done) or to substitute for it another more appropriate connecting factor, such as residence. Although residence was introduced as a jurisdictional connecting factor by the Matrimonial Causes Jurisdiction Act 22 of 1939 (s 1(1)), the additional requirement of a South African domicile for the husband nullified, in many instances, the relief brought about by the introduction of residence. In terms of the new Domicile Act residence ("ordinary residence") now constitutes an independent ground of jurisdiction for divorce, but the jurisdictional battles of the past have left their mark on our common law concept of domicile.

4 The effect of the wife's domicile of dependency on the *animus* requirement

Especially before 1968 (when provision was made for cases where the husband was not domiciled in South Africa – see *supra*), the need to assume jurisdiction in divorce cases where the court in the area where the wife resided had a very clear interest in the matter, gave rise to forced and manipulated interpretations of domicile. This, in turn, influenced the substantive interpretation of domicile, and more specifically, the interpretation of the *animus* requirement in regard to a change of domicile. In a number of cases jurisdiction was assumed on the basis of domicile when it was clear that the husband no longer had a domicile in one of the colonies, or later, in one of the provinces of the Union (after 1910), or in South Africa (after the introduction of the Matrimonial Causes Jurisdiction Act 22 of 1939). Judges and counsel alike relied heavily on the presumption against a change of domicile (see Voet *Commentarius ad Pandectas* 5 1 99) as well as on the maxim *ubi uxor, ibi domus* (where the wife is, there is the home) for the assumption of jurisdiction (see, eg, *Adams v Adams* (1882) 2 SC 24; *Mason v Mason* (1885) 4 EDC 330; *McCurrach v McCurrach* (1892) 6 HCG 256; *Etheridge v Etheridge* (1902) 23 NLR 180; *Ex parte Rowland* 1937 1 PH B8 (T)). This was highly unsatisfactory, since a domicile was imputed to a husband which could not have corresponded to his actual intentions in this regard, in order to establish jurisdiction. In *Ex parte Rowland* 1937 1 PH B8 (T) the

husband never cohabited with his wife in South Africa and after fifteen years informed her that he had no intention of living with her or providing a home for her; yet the court assumed jurisdiction on the basis of *ubi uxor, ibi domus* (see also *McCurrach v McCurrach* (1892) 6 HCG 256 for another clear example). It is apparent from a number of cases that where common sense demanded the assumption of jurisdiction in a particular case, courts went out of their way to assist the deserted wife (see, eg, *Mason v Mason* (1885) 4 EDC 330; *Ex parte Hamman* (1894) 1 Off Rep 306; *Thompson v Thompson* 1940 SR 187). However, since in most cases the crucial factor for jurisdictional purposes was whether the husband had retained his South African domicile, a very heavy burden of proof was placed upon him, should he allege that he had changed his domicile.

Although the Domicile Act 3 of 1992 now expressly states that the acquisition or loss of a domicile must be determined on a balance of probabilities (s 5), the view was often taken in the past that stronger evidence was necessary to prove a change from a domicile of origin or a well-settled domicile of choice than to prove a newly established domicile of choice (*Lewis v Lewis* 1939 WLD 140 143; see also *Webber v Webber* 1915 AD 239; *Deane v Deane* 1922 OPD 41, but see *Ley v Ley's Executors* 1951 3 SA 185 (A)). Added to this was the very strict test adopted for the establishment of a new domicile of choice: together with the requisite residence requirement, the *animus* must have excluded "all contemplation of any event on the occurrence of which the residence would cease" (*Johnson v Johnson* 1931 AD 391 398; *Eilon v Eilon* 1965 1 SA 703 (A) 719 ff). If one bears in mind that there was also a presumption against a change of domicile (see *supra*), the defendant-husband was saddled with an almost impossible burden of proof. This directly affected the interpretation of domicile, and more specifically the *animus* requirement – because most cases concerning domicile were decided in the sphere of jurisdiction, precedents on the interpretation of the concept were established along those lines. The requisite *animus* requirement was summed up as follows in *Eilon v Eilon* 1965 1 SA 703 (A) 721:

> "The *onus* of proving a domicile of choice is discharged once physical presence is proved and it is further proved that the *de cujus* had at the relevant time a fixed and deliberate intention to abandon his previous domicile, and to settle permanently in the country of choice. A contemplation of any certain or foreseeable future event on the occurrence of which residence in that country would cease, excludes such an intention. If he entertains any doubt as to whether he will remain or not, intention to settle permanently is likewise excluded."

It is clear that the retention of the wife's domicile of dependency has, via the difficulties of establishing jurisdiction in divorce cases, influenced the *animus* requirement substantially. It was certainly not the only aggravating factor that contributed to the very strict *animus* requirement, but it was a significant one. Therefore, the abolition of the wife's domicile of dependency is to be applauded, but, in order to restore credibility to the concept of domicile, reform in regard to the requisite intention should perhaps have been more far-reaching. Now that a married woman may establish her own domicile of choice, the kind of intention required (that is, to settle indefinitely) in terms of the new Domicile Act (s 1(2)) may still present an unexpected hurdle. These difficulties are certainly not

limited to women; anyone who has to establish a domicile of choice will have to satisfy the statutory intention requirement.

5 The *animus* requirement in terms of the Domicile Act 3 of 1992

In terms of the new Domicile Act (s 1(2)) the requisite intention is to settle indefinitely and not permanently. However, the term "indefinitely" will have to be defined by our courts. Will, for example, a contract-worker from a neighbouring country be able to establish a domicile of choice in South Africa even though his stay may (in terms of his contract of employment) be very definite, albeit for a lengthy period of ten years? Will contemplation of a foreseeable, yet uncertain, future event, on the occurrence of which the *propositus* will leave, defeat an intention to settle indefinitely? These are the same questions that have plagued our courts in the past, and they will continue to do so in the future. The reluctance of the majority in *Eilon v Eilon* 1965 1 SA 703 (A) to accept a more flexible and realistic interpretation of the *animus* requirement for a domicile of choice, certainly casts an ominous shadow over the progressiveness of the judiciary in this regard. It is quite ironic that "indefinitely" was exactly the term used by Rumpff JA and Williamson JA in their respective minority judgments in *Eilon v Eilon* 1965 1 SA 703 (A) 705B 716H in relation to a domicile of choice. Now, thirty years later, one can only hope that since the word "permanent" does not appear in the Domicile Act (s 1(2)), that it will similarly disappear from the law reports and that "indefinitely" will acquire the flexible meaning it is intended to have.

If domicile is to acquire a meaning that will accord with reality, the subjectiveness of the requisite intention will also have to be scrutinised closely. If the intention of the *propositus* is determined on the basis of external factors, such as where he works, where he lives, etcetera, such an intention has little or nothing to do with where he (subjectively) may wish to settle indefinitely. What courts are in actual fact attempting to do, is to connect a person to a specific jurisdiction on the basis of the facts and events of his life, and in the process they ascribe an intention to such a person. Therefore a declaration by the *propositus* as to his domicile (see *Ochberg v Ochberg's Estate* 1941 CPD 15 20 where such a declaration was made in a will) will not be accepted if it does not accord with the realities of his life; a clear indication that an intention, expressed by the *propositus* himself, is not necessarily decisive. Simply put, the courts determine a person's intention objectively by taking into account all the relevant external factors and surrounding circumstances. It is indeed a pity that the subjective character of the present criterion was not addressed by the South African Law Commission, especially since the objective test of "the place with which he is most closely connected" has been introduced for those persons (eg minors) who are not capable of acquiring a domicile of choice (Domicile Act s 2(1)). An objective test, such as the "closest connection" criterion, will not substantially affect the manner in which the courts determine someone's domicile of choice. In the past, external factors were employed to impute an intention to a person, since there was no other way to determine a person's intention but to reason that, in the light of all the relevant facts, s/he must have intended to settle in a certain

place. However, the introduction of an objective test will place the determination of a domicile of choice on a sound jurisprudential footing and ensure more flexibility, since the courts will not be forced to ascribe an intention to the *propositus*. This does not mean that a person's intention as to where he wishes to settle, will be irrelevant. On the contrary, should there be any evidence of an honest expression in regard to his intention, this may be taken into account as one of the relevant factors in the determination of his domicile of choice.

6 Conclusion

It will be interesting to see how the courts will ascribe an independent domicile to a married woman, since a married couple who live together in the same home are bound to have the same domicile. The main objective in abolishing the wife's domicile of dependency must have been to facilitate the establishment of jurisdiction in divorce actions. To escape from the labyrinth of legislative extensions of grounds for divorce jurisdiction, the abolition of the wife's domicile of dependency was the logical step to take. It seems that the wife's independent domicile will come into effect once the married couple do not share the same home, a state of affairs that often prevails at the stage when one or both parties commence divorce proceedings. Looking back, it is incomprehensible that such an exception, namely that the wife is not bound by the husband's domicile if they do not in actual fact live together, could not have found application in our law in the past.

Admittedly, it is easy to be wise after the event and to criticise with the benefit of hindsight. However, valuable lessons may be learnt from these historical antecedents of the abolition of the wife's domicile of dependency. When a problem arises, the origin of the problem should be addressed. In the case of divorce jurisdiction the root of the problem was the wife's domicile of dependency. The statutory extension of grounds for divorce jurisdiction left the wife's domicile of dependency untouched. The retention of the jurisdictional requirement of a South African domicile for the husband (since the wife's domicile depended on that of her husband), as late as 1968, led to distorted and unrealistic interpretations of the *animus* requirement in order to establish jurisdiction. A maxim such as *ubi uxor, ibi domus* and the presumption against a change of domicile, as well as the heavy burden of proof required for a change of domicile, steered the concept *domicilium* away from reality, making it cumbersome and ineffective to use as a jurisdictional connecting factor. It is hoped that with the abolition of the wife's domicile of dependency, domicile will regain credibility as a concept that reflects reality (and not fiction) and in the process regain its vitality as a jurisdictional connecting factor.

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PRIVATISM, AUTHORITARIANISM AND THE CONSTITUTION: THE CASE OF NEETHLING AND POTGIETER

Introduction

In a note on the much criticised decision of the Appellate Division in the defamation case of Lothar Neethling, Professors Neethling and Potgieter rush to the defence of the Appellate Division ("Laster: die bewyslas, mediaprivilegie en die invloed van die nuwe Grondwet" 1994 *THRHR* 513). Three conclusions are drawn by the authors: first, that the court was correct in holding that a defendant in a defamation action bears the full *onus* in regard to the defences of truth in the public benefit and of qualified privilege. Secondly, that the court correctly declined the opportunity to recognise a general media privilege. And thirdly, that the court's reasoning should remain largely unaffected by chapter 3 of the new Constitution. My critique of their position will focus on the third aspect, the effect of the new Constitution on the law of defamation.

According to the authors, the right to a good name or reputation forms part of the right to human dignity, as entrenched in section 10 of the Constitution. This right stands on equal footing with the right to freedom of expression, which is guaranteed in section 15. A requirement that the plaintiff bears the full *onus* to show why his right to a good name should not be restricted, or the recognition of a general media privilege, or the requirement of *animus iniuriandi* in defamation actions against the media, would load the dice too much in favour of freedom of speech, to the detriment of the right to a good name. The current position, as expounded in *Neethling*, seems to strike just the right balance.

No hierarchy of rights

The view that the right to a good name or reputation forms part of the right to human dignity cannot be faulted. Moreover, the view that the right to freedom of expression and the right to a good name are on equal footing is in accordance with the – generally accepted – view that chapter 3 of the interim Constitution does not establish a hierarchy of rights (see eg Cachalia, Cheadle, Davis, Haysom, Maduna and Marcus *Fundamental rights in the new Constitution* (1994) 115). The recognition that there is no hierarchy of rights can be liberating: it can free us from the kind of formalism which holds that a correct result can be logically deduced from existing rules, and that law is wholly distinct from politics. (On legal formalism, see Roberto Unger "The Critical Legal Studies movement" 1983 *Harv LR* 563.) Instead, each new case should entail a fresh reappraisal of our constitutional commitments.

Neethling and Potgieter's argument is, however, deeply conservative. The realisation that chapter 3 does not create a hierarchy of rights here results in a paralysing relativism – one right cancels the other – which comes in very handy to bracket chapter 3 as largely redundant, and to plunge back into the *status quo*. Could it be that the lingering suspicion of the private lawyer is surfacing here,

that whereas private law represents a rational, principled, and scientific enterprise, public law is unprincipled and profoundly political? That in the absence of a constitutionally defined hierarchy of rights, our only device is to resort to a private law that is untainted by the irrationality of (constitutional) politics? Consider the following statements, which were made elsewhere:

> "[T]here is a dividing line, however difficult it may be to define, between law and politics ... While the political debate is, as is to be expected, dominated by subjectivity and ideological partiality, lawyers at least should not be blinded by ideology when recommending, interpreting and formulating legal principles (Potgieter "The role of the law in a period of political transition: the need for objectivity" 1991 *THRHR* 803).

And among the reasons why "a proper bill of fundamental rights" is vital, the following grounds are mentioned:

> "(a) The relatively unsophisticated political views and attitudes of the majority of the electorate and many of their legislative representatives; (b) the lack of relevant experience of many in the executive branch of government; (c) the historical baggage of the crimes committed in the past either to preserve the *status quo* or to bring about political liberation; (d) the unfortunate fact that too many people currently in high office are tainted by criminal backgrounds; (e) the potentially harmful agendas of certain political parties in power" (Visser and Potgieter "Some critical comments on South Africa's bill of fundamental rights" 1994 *THRHR* 493).

Constitutionalism, it seems, is seen as a device to wrest matters of vital political importance from the hands of the majority, and to entrust them to lawyers. The objectivity of the rule of law is distinguished sharply from the subjectivity and arbitrariness of the rule of politics and, by implication, the rule of the people. Could it be that many South African legal academics still live in a pre-realist legal landscape, where legal objectivity and neutrality are seen as unproblematic? Are the authors here proposing different levels of constitutional scrutiny for the utterances of an "unsophisticated" legislative majority, on the one hand, and the "reasoned" tenets of the common law, as developed and expounded by legal minds, on the other? And if so, do they really fail to see that this involves a political choice on their part?

In terms of section 35(3), the common law must be interpreted to reflect the spirit, purport and objects of chapter 3. The effect of what the authors stand for, is that the constitutional guarantee of free speech is reduced to the protection afforded by the common law. Instead of measuring particular common law rules against chapter 3, the authors seem to start from a presumption that the common law already conforms to the dictates of the bill of rights. After all, the common law is a celebration of freedom and equality (1994 *THRHR* 518; cf Neethling "'n Toekomsblik op die Suid-Afrikaanse privaatreg – volwaardige naasbestaan of versoenende sintese?" in Van Aswegen (ed) *The future of the South African private law* (1994) 3:

> "[T]he apartheid era cannot be attributed to Roman-Dutch law – the blame must be placed squarely on the shoulders of the ruling minority who introduced the system of apartheid by way of legislation, and they were primarily enabled to this end by the doctrine of parliamentary sovereignty which derives from English constitutional law."

That the liberality of our common law is not reflected by the decision in *Neethling*, is not considered.

A traditional-liberal conception of rights is employed to justify a conservative outcome. This is the – essentially privatist – view of rights as individual entitlements: A's rights are weighed against B's rights, without any regard for the broader social context within which the rights adjudication occurs. The right of the *Vrye Weekblad* and *Weekly Mail* to freedom of expression is viewed in abstract from the social function of a free press in democratic countries. The actual implications of the decision for the newspapers concerned are not even considered. According to the authors (518), the court in *Neethling* did consider the "values which underlie an open and democratic society based on freedom and equality", as the court took notice of foreign case law. This is an impoverished view of what it means to apply chapter 3, the provisions of which must be interpreted within the context of the Constitution as a whole. Surely it must be borne in mind that accountability, democracy and openness are written in capitals all over the Constitution? Moreover, chapter 3 must also be interpreted in the light of our own unique history. This history includes, *inter alia*, an oppressive system of state and "private" censorship.

Admittedly, the authors qualify the use of foreign case law: it is said that our own *boni mores* may still be decisive (517). The term *boni mores* is, however, problematic: historically, it has been used to denote the convictions of the white community. Moreover, in so far as it is used to imply a broad societal consensus on important matters, the term must be used sparingly, if at all; according to Schnably ("Property and pragmatism: a critique of Radin's theory of property and personhood" 1993 *Stanford LR* 361), we must be on the lookout "for tensions in those (shared) ideals, even where – in fact, particularly where – consensus seems strongest".

That the authors fail to take the values underlying the Constitution seriously, is evident from the authoritarian overtones of the discussion. Lawyers for Human Rights, who criticised the Appellate Division for its insensitivity to freedom of expression claims in *Neethling* and two other decisions, is scolded for its "irresponsible" view of freedom of speech. This is exacerbated, in the view of the authors, by the fact that the other two decisions were written by a judge of the stature and esteem of Chief Justice Corbett, who also concurred in the *Neethling* decision. Does this mean that certain officials are beyond criticism? Did Lawyers for Human Rights expose itself to an action for defamation?

The decision in *Gardener v Whitaker*

The decision of Froneman J in *Gardener v Whitaker* 1994 5 BCLR 19 (E) – a case which also deals with an action for defamation by a public figure – stands in marked contrast to the a-historical, privatist and authoritarian views of Neethling and Potgieter. Like Neethling and Potgieter, the judge expressed the view that the right to a good name forms part of the right to human dignity, and that the Constitution does not create a hierarchy of rights. Unlike the authors, the judge takes chapter 3 seriously as a yardstick for the future development of common law, and not merely as a footnote to it.

The question whether chapter 3 should be applied horizontally, is discussed in the light of the basic values and principles underlying the Constitution. In the view of the judge,

> "the application of fundamental rights in litigation is dependent on the proper application of the deepest principles and values of the Constitution, and not on a public/private action divide" (35H; see also 30I–32C).

All aspects of the common law, including the common law of defamation, must be subjected to constitutional scrutiny; failure to do so would "perpetuate aspects of an undemocratic, discriminatory and unjust past" (32C).

The judge noted, with reference to the *Neethling* decision, that in the common law of defamation, the right to reputation and a good name has generally held the upper hand over the right to freedom of expression. The contest between these rights

> "has taken place without express reference to the effect its outcome would have on the open and democratic nature of society, nor did it occur in the context of a constitution which reigns supreme over other law" (33E–H).

Section 15 is viewed in historical context, which suggests that "the right to free speech and expression should, generally speaking, carry as much weight as the other fundamental rights set out in chapter 3 of the Constitution" (35I). In so far as the current law of defamation requires the defendant to prove defences such as truth in the public benefit, it clearly conflicts with the dictates of the Constitution; in light of section 15, the plaintiff must bear the onus.

Conclusion

That legal academics of the stature of Neethling and Potgieter are so reluctant to recognise the implications of the Constitution for their discipline, is truly disappointing. It is hoped that in future, they will use their formidable intellectual powers to assist in the transformation of our private law to reflect the deepest values and commitments of the Constitution.

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DIE REG OP EMOSIONELE TRANKILITEIT: OPMERKINGE OOR DIE DINAMIESE AARD VAN DIE PERSOONLIKHEIDSREG

1 Inleiding

In 1975 het ek die moontlikheid van die erkenning van emosionele trankiliteit (of gemoedsrus) as beskermingswaardige persoonlikheidsgoed, as regsobjek dus, geopper ("Noodweer ten aansien van nie-fisiese persoonlikheidsgoedere" 1975 *De Jure* 59–71; vgl Bergenthuin *Provokasie as verweer in die Suid-Afrikaanse*

strafreg (LLD-proefskrif UP 195) 337–339). Die feitestel van 'n beslissing van die Nederlandse Hoge Raad wat onlangs gerapporteer is, het hierdie moontlikheid 'n duidelike basis in die regswerklikheid gegee (Hoge Raad 1993-06-18, NJ 1994, 347). Die eiseres in dié saak was 'n verkragtingslagoffer. Dit blyk uit die toepaslike artikel 1401 van die Nederlandse Burgerlike Wetboek dat 'n verkragtingslagoffer daarop geregtig is dat die dader die gevolge van die misdaad sover moontlik moet beperk "dan wel door een passende vorm van schadevergoeding zoveel mogelijk zouden worden goedgemaakt". In die onderhawige saak het die slagoffer in die vrees en onsekerheid geleef dat sy moontlik met die HIV-virus besmet is. Die vraag wat die hof ter beslissing gehad het, was of die verkragtingsdader tot die onderwerping aan 'n bloedtoets in dié verband gedwing kon word. Die hof beslis dat eiseres 'n swaarwegende belang het by so snel moontlike beëindiging van hierdie onsekerheid wat 'n diepgaande effek op haar persoonlike lewe het. Wáárom dit hier wesenlik gaan, is die reg van die verkragtingslagoffer op emosionele trankiliteit, wat in 'n besondere sin in dié geval 'n relatiewe reg is aangesien dit slegs ten aansien van die betrokke verkragtingsdader geld (sien verder Labuschagne "Relatiewe kante van die subjektiewe reg" 1988 *THRHR* 377). Wat die sanksie in dié geval ongewoon maak, maar tog nie absoluut uniek nie, is die feit dat nie skadevergoeding of genoegdoening of 'n ander tradisionele deliksanksie, soos apologie, ter sprake is nie, maar dat 'n sekere "dulding" van die verkragtingsdader geverg word (vgl ook Labuschagne "Verpligte bloedtoetse by vaderskapsgedinge?" 1993 *TSAR* 486).

In 'n insiggewende artikel wys Van der Walt, met beroep in hoofsaak op die Duitser Kegel (*Haftung für Zufügung seelischen Schmerzen* (1983) 17–51), daarop dat daar 'n toenemende beskerming van die mens se geestelik-emosionele ewewig in regsontwikkeling voorkom: "Die reg strek sy aanspreeklikheid uit na gevalle waar menslike optrede skok, kommer, angs, ergernis, skaamte, woede, teleurstelling en onbehae veroorsaak" ("Skoktoediening: 'wie sal die aftreksom maak?'" in Strauss (red) *Huldigingsbundel vir WA Joubert* (1988) 247). Wat duidelik blyk, is dat die persoonlikheidsreg, meer bepaald in dié verband, 'n dinamiese aard het. Die moontlikheid van die erkenning van emosionele trankiliteit as beskermingswaardige belang, spesifiek in ons reg, word in hierdie aantekening kortliks onder die loep geneem.

2 Die konkreet-sigbare liggaamsbesering as uitgangspunt

In rudimentêre regstelsels het 'n regsanksie slegs ter sprake gekom by die veroorsaking van sintuiglik-waarneembare benadeling (sien Labuschagne "Die voorrasionele evolusiebasis van die strafreg" 1992 *TRW* 38–40 gelees met Labuschagne en Van den Heever "Die oorsprong van en onderskeid tussen die fenomene misdaad en delik in primigene regstelsels" 1991 *Obiter* 116). Wat die hedendaagse persoonlikheidsreg betref, was aanspreeklikheid aanvanklik beperk tot konkreet-sigbare besering van die menslike liggaam. Interne beserings, soos orgaanbloeding, kan in die algemeen slegs met moderne sjirurgie en instrumente opgespoor word. In die lig hiervan is dit te verstane dat psigiese besering of benadeling aanvanklik slegs kompensasiewaardig geag is indien dit 'n liggaamlike onderbou gehad het. In eerste instansie is 'n fisieke impak vereis. Die onderliggende motivering was dat die voorgee van benadeling wat nie werklik

bestaan nie, deur dié vereiste uitgeskakel kon word. Hierdie vereiste is selde in ons regstelsel in ag geneem. Van der Walt (249) vermeld in dié verband die volgende:

> "Die tweede beperking wat ontwikkel is om die agterliggende regspolitieke bedenkinge te besweer, was die vereiste dat slegs psigiese skok wat 'n fisies-organiese versteuring meebring, of omgekeerd 'n fisiese aantasting wat erkenbare psigopatologiese ongesteldheid veroorsaak, die grondslag bied vir 'n deliktuele verhaalsreg. Weer eens weerspieël dit die gedagte dat 'n fisies-organiese gevolg in die kousale ketting 'n redelike waarborg van egtheid ten aansien van die gewraakte psigiese aantasting bied."

(Sien verder *Hauman v Malmesbury Divisional Council* 1916 CPD 216 220; *Creydt Ridgeway v Hoppert* 1930 TPD 664 668; Milner "Liability for emotional shock" 1957 *SALJ* 265; Tager "Nervous shock in South African law" 1972 *SALJ* 435; Van der Vyver "Onregmatige daad – senuskok – kousaliteit – motorvoertuigassuransie" 1973 *THRHR* 169.) Daar moet vermeld word dat dit nie hier werklik gegaan het om 'n "waarborg van egtheid" nie. Trouens, daar bestaan reeds geruime tyd psigiatries-wetenskaplike wyses van verifiëring van psigiese belewenisegtheid. Die reg was bloot nog vasgevang in oorblyfsels van 'n vroeëre fase van die sosio-juridiese evolusieproses van die mens.

3 Die kentering van 1973

In 1973 met die saak van *Bester v Commercial Union Versekeringsmaatskappy van SA Beperk* 1973 1 SA 769 (A) word 'n nuwe era in Suid-Afrika ingelei. In dié saak word die menslike psige vir die eerste keer nie as sodanig aan die liggaam ondergeskik gestel nie, maar word die integrasie van liggaam en psige beklemtoon. So verklaar appèlregter Botha (779):

> "Iemand wat aan 'n angsneurose ly, wat geen rustige nagrus kan geniet nie, wie se skoolwerk merkbaar agteruitgaan, en wie se verhouding met andere versteur is, geniet geen normale fisiese gesondheid nie. Die senu- en breinstelsel is, in iedere geval, net so 'n deel van die fisiese liggaam as wat 'n arm of been is, en 'n besering aan die senu- of breinstelsel is net so 'n besering van die fisiese organisme as wat 'n beseerde arm of been is."

(Vgl *Masiba v Constantia Insurance Co Ltd* 1982 4 SA 333 (K) 342.) Omdat hierdie benadering werklikheidsgetrou en van gekunsteldheid ontbloot is, is dit gunstig deur regskrywers ontvang en word dit dikwels sonder kommentaar aanvaar (Neethling *Persoonlikheidsreg* (1991) 28 91–92; Tager "Nervous shock and mental illness" 1973 *SALJ* 123; McQuoid-Mason "Emotional shock: Shades of Descartes?" 1975 *SALJ* 19; Neethling en Potgieter "Senuskok of 'psigiatriese besering' – verhaalbaar indien voorsienbaar" 1973 *THRHR* 176; Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 329). Die begrip "corpus" wat tradisioneel as regsobjek van 'n persoonlikheidsreg geïdentifiseer word, behoort in die lig hiervan as 'n sinoniem vir biopsigiese integriteit verstaan te word (sien ook Potgieter "Delictual liability for intentional infliction of emotional distress in South African law?" 1976 (1) *Codicillus* 11).

Die psigiese benadeling hoef nie van 'n permanente aard te wees nie (sien *Muzik v Canzone del Mare* 1980 3 SA 470 (K) 474; McQuoid-Mason 1975 *SALJ* 19 se kritiek op *Lutzkie v SAR and H* 1974 4 SA 396 (W) 398). Aan die ander

kant is genoegdoening nie verhaalbaar vir 'n niksbeduidende skok of psigiese benadeling wat van 'n verbygaande aard is nie (sien *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk supra* 779; *Boswell v Minister of Police* 1978 3 SA 268 (OK) 273). Neethling en Potgieter (1973 *THRHR* 177) toon tereg aan dat hierdie veld in ieder geval deur die stelreël *de minimis non curat lex* gedek word.

In *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk supra* 779 stel die appèlhof ook 'n voorsienbaarheidsbegrensing by aanspreeklikheid vir psigiese benadeling:

> "Om bostaande redes kom ek dus tot die gevolgtrekking dat daar in ons reg geen rede bestaan waarom iemand, wat as gevolg van die nalatige handeling van 'n ander, senuskok of psigiatriese besering met gevolglike ongesteldheid opgedoen het, nie op genoegdoening geregtig is nie, mits die moontlike gevolge van die nalatige handeling voorsien sou gewees het deur die redelike persoon wat hom in die plek van die onregpleger sou bevind het."

(Sien ook Boberg *The law of delict: Vol 1 Aquilian liability* (1984) 176; Midgley "The role of foreseeability in psychiatric injury cases" 1992 *THRHR* 444; *Lutzkie v South African Railways and Harbours supra* 398; *Boswell v Minister of Police supra* 273.) Dit is insiggewend om daarop te let dat hierdie tipe voorsienbaarheidsvraag in bogenoemde Nederlandse saak nie werklik ter sake is nie.

4 Konklusie

Angsneurose en vrees vir jou eie gesondheid kan jou emosionele trankiliteit, biopsigiese integriteit, ernstig skend (sien hieroor McQuoid-Mason "Emotional shock – why the Cartesian distinction?" 1973 *THRHR* 124–126; Tager 1972 *SALJ* 438–439; Neethling, Potgieter en Visser *Law of delict* (1994) 276). Die Hoge Raad het in sy beslissing van 18 Junie 1993 die onderdaan se reg op emosionele trankiliteit, binne konteks van die betrokke saak se feitestel, erken. Die Hoge Raad het in effek beslis dat die verkragtingslagoffer se reg op emosionele trankiliteit voorkeur geniet bo die dader se reg op sy liggaamlike integriteit. So verklaar Brunner (1994 *NJ* 1602) in 'n aantekening op die Hoge Raad se beslissing soos volg:

> "Het beroep van de dader op zijn lichamelijke integriteit die zou worden aangetast indien hij zich onvrijwillig aan onderzoek van zijn bloed zou moeten onderwerpen, is door de Hoge Raad verworpen met het argument dat dat grondrecht aan beperkingen is onderworpen door art. 1401 BW (oud), in het bijzonder dat het uitzondering lijdt in gevallen waarin hij verplicht is de schade te beperken. Dat lijkt me overtuigend in een geval als dit: de ernstige aantasting van het grondrecht van de vrouw op lichamelijke integriteit rechtvaardigt alleszins dat de dader een (geringe) inbreuk op zijn lichamelijke integriteit moet dulden om de schade van zijn slachtoffer te beperken. Daar komt nog bij dat het beroep van de dader op zijn grondrecht in hypocrisie nauwelijks is te overtreffen."

(Sien ook Alkema se aantekening op dié saak 1994 *NJ* 1601.)

In 'n onlangse Suid-Afrikaanse saak, *N v T* 1994 1 SA 862 (K) 864, het die hof genoegdoening toegeken aan die moeder van 'n agtjarige dogter wat verkrag is. Die hof beslis naamlik dat, hoewel die moeder self nie as sodanig liggaamlik geskend is nie, sy uiters geskok was oor die gebeure en dat dit vir

haar voortdurend smartvol is om die kind se trauma waar te neem en te hanteer. Die moeder se reg op emosionele trankiliteit is (en word nog voortdurend) myns insiens in dié saak geskend (sien ook Labuschagne "Deliktuele aanspreeklikheid weens verkragting" 1994 *Obiter* 242).

JMT LABUSCHAGNE
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THE WORLD ASSOCIATION FOR MEDICAL LAW

The 11th World Congress on Medical Law

The Eleventh World Congress on Medical Law will for the first time be held in South Africa at Sun City from 28 July to 1 August 1996. More than a thousand persons from many countries are expected to attend the five day event.

The World Association for Medical Law (WAML) was founded in Belgium in 1967. Leading doctors, lawyers, ethicists and healthcare workers from all over the world participate in its activities. Since its inception the WAML had held a series of highly successful world congresses in cities such as Ghent, Washington, Manila, Prague and Jerusalem. The Sun City event will be the first WAML world congress to be held on the African continent. It will be co-sponsored by the World Health Organization (WHO) and the Council for International Organisations of Medical Sciences (CIOMS).

Topics such as the legality of euthanasia, abortion and surrogate motherhood, legal aspects of AIDS, the financing of health services in developing countries and the role of traditional healers will be debated at the Congress.

The current president of the World Association for Medical Law is Professor Amnon Carmi of Haifa Israel. Professor SA Strauss of the University of South Africa was a founding member in 1967 and served for a number of years as a vice-President. Professor Ferdinand van Oosten of the University of Pretoria is at present a vice-President.

Premier Popo Molefe of the Northwest will be chief Patron of the Sun City Congress.

Details may be obtained from Mrs Friedman at Mmabatho by telephoning 0140–842470/1.

VONNISSE

ENKELE GEDAGTES OOR DIE HISTORIESE INTERPRETASIE VAN HOOFSTUK 3 VAN DIE OORGANGSGRONDWET

De Klerk v Du Plessis 1994 6 BCLR 124 (T) (1995 2 SA 40 (T))

1 Agtergrond

Hierdie uitspraak handel hoofsaaklik oor die moontlike horisontale of derdewerking van die hoofstuk oor fundamentele regte (hoofstuk 3) in Suid-Afrika se oorgangsgrondwet (Grondwet van die Republiek van Suid-Afrika 200 van 1993). Die eisers dagvaar die verweerders vir laster en laasgenoemdes opper die konvensionele privaatregtelike verwere. Ná inwerkingtreding van die oorgangsgrondwet doen die verweerders aansoek om 'n beroep op artikel 15(1) van die Grondwet (wat vryheid van spraak verskans) tot hulle verweerskrif toe te voeg. Wat die Transvaalse hof by monde van regter Van Dijkhorst moet beslis, is of so 'n wysiging toegelaat moet word op die gevaar af dat dit die verweerskrif eksipieerbaar kan maak. Is 'n beroep op artikel 15(1) met ander woorde 'n geldige verweer in 'n privaatregtelike lasteraksie? Dít bring die moontlike derdewerking van hoofstuk 3 ter sprake.

Sowel gebeure waarop die aksie baseer word as *litis contestatio* het voor inwerkingtreding van die Grondwet plaasgevind. Deur te bevind dat artikel 241(8) die terugwerkende werking van die Grondwet in hierdie geval uitsluit, handel die hof die saak eintlik af (127G). Regter Van Dijkhorst oorweeg nogtans of die aansoek nie tog vanweë die derdewerking van artikel 15(1) kan slaag nie en bevind dat "the fundamental rights set out in chapter 3 of the Constitution are intended to be of vertical application only" (133I–J). 'n Paar interessante en soms aanvegbare redenasies rugsteun hierdie gevolgtrekking. Hierdie bespreking konsentreer slegs op die hof se siening van *historiese interpretasie.*

2 Historiese interpretasie en *travaux préparatoires*

2 1 Die versigtige dog nie-afwysende gebruik van historiese gegewens

By die vertolking van internasionale menseregte-aktes word voorafgaande beraadslagings (*travaux préparatoires*) vryelik gebruik (sien bv Smits *The right to life of the unborn child in international documents, decisions and opinions* (1992) 6–27). Munisipale howe, daarenteen, hanteer hierdie hulpmiddel nie as 'n primêre vertolkingsbron nie maar bloot ter bevestiging van die resultate van

ander uitlegmetodes: diegene wat regstreeks met die opstel van 'n grondwet gemoeid is se siening van wat daarin staan, is té subjektief (en té deur eie voorkeure gekleur) om die "objektiewe" betekenis van die teks onberispelik betroubaar aan te dui (Du Plessis en De Ville "Bill of rights interpretation in the South African context (3): Comparative perspectives and future prospects" 1993 *Stell LR* 374–376; sien ook Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (1989) 49). Boonop reflekteer die eindproduk plek-plek politieke akkoorde "agter die skerms" en "sê" dit nie wat enige van die partye betrokke by die opstelproses "graag sou wou sê" nie.

Die hof in die *De Klerk*-saak sê dat "the drafting history of the Constitution should . . . be regarded as *irrelevant* to its interpretation" (my beklemtoning).Vir hierdie kategoriese verwerping van *travaux préparatoires* word Mureinik ("A bridge to where?: Introducing the interim bill of rights" 1994 *SAJHR* 48) en Marcus ("Interpreting the chapter on fundamental rights" 1994 *SAJHR* 99) as gesag aangehaal.

2 2 Mureinik se argumente

Die sterk taal is dié van Mureinik wat historiese interpretasie in die verbygaan aanraak terwyl hy die moontlike rekwydte van die sinsnede "designs to achieve" in artikel 8(3)(a) van die Grondwet (die "regstellende aksie"-bepaling) oorweeg. In 'n voetnoot sê hy dat 'n "rich literature" redes vir "discounting the drafting history" van 'n handves gee.

Hierdie stelling is verdag. Eerstens is daar 'n (ewe) ryk literatuur wat die gebruik van *travaux préparatoires* in 'n beperkte sin steun (Du Plessis en De Ville 1993 *Stell LR* 374–376). Tweedens verwys Mureinik uitdruklik na slegs twee voorbeelde – albei uit boeke van Ronald Dworkin: hoofstuk 10 van *Law's empire* (1986) en hoofstuk 5 van *Life's dominion* (1993). Hierdie bronne ondersteun nie Mureinik se kategoriese gevolgtrekking nie. Dworkin evalueer die oorspronklike bedoelings- oftewel *original intent*-teorie as benadering tot grondwetlike uitleg en in veral *Life's dominion* reken hy op 'n voortreflike wyse daarmee af. Of die oorspronklike bedoeling (*original intent*) van die opstellers van 'n handves 'n *Leitmotiv* by die vertolking daarvan moet wees *en of* die onmiddellike ontstaansgeskiedenis van 'n handves by die vertolking daarvan hoegenaamd in aanmerking kan kom, is egter verskillende vrae. In hoofstuk 5 van *Life's dominion* onderskei Dworkin tussen wat die opstellers van 'n grondwet bedoel/beoog het om te sê (*meant to say*) en dít waaraan hulle gedink het toe hulle dit gesê het. Die opstellers van die Agste Wysiging van die Grondwet van die VSA het byvoorbeeld beoog om "cruel and unusual punishment" te verbied maar nie gedink dat 'n openbare afranseling wreed en ongewoon is nie. Hierdie tersaaklike onderskeid is nie moontlik as 'n mens die ontstaansgeskiedenis van die Amerikaanse Grondwet ignoreer nie: dit help 'n mens juis sien wát daarin blywend en wát van verbygaande betekenis is.

Dworkin se fokus is nie gebruik van tydgenootlike getuienis by die vertolking van 'n handves nie: hy gee 'n filosofiese kritiek van *original intentionalism* wat neig om die ontstaansgeskiedenis van die teks *met ideologiese bymotiewe* te

misbruik. Self sê hy nie dat die ontstaansgeskiedenis van die teks by die vertolking daarvan *irrelevant* is nie.

Derdens sluit Mureinik se "rich literature" vermoedelik hoofsaaklik Amerikaanse bronne in. In the VSA is die gebruik van "oorspronklike materiaal" problematies omdat meer as tweehonderd jaar sedert die totstandkoming van die oorspronklike teks verloop het. In Kanada en Duitsland daarenteen word historiese gegewens geredeliker gebruik om twee grondwetlike tekste van 'n onlangse oorsprong te vertolk. Die howe se houding is versigtig dog nie volstrek afwysend nie (vgl *Reference Re Section 94(2) of the Motor Vehicle Act* (1988) 24 DLR (4th) 536 554–555 (Kanada) en Katz *Staatsrecht: Grundkurs im öffentlichen Recht* (1992) 49 51 (Duitsland)). Die Deutches Institut für Föderalismusforschung aan die Universiteit van Hannover, Duitsland dokumenteer tans die onmiddellike ontstaansgeskiedenis van die Duitse Grondwet juis omdat daar 'n behoefte aan die gebruik van sulke historiese gegewens by grondwetlike vertolking is.

Ten slotte opper Mureinik (1994 *SAJHR* 48 vn 54) wel een uit (volgens hom) baie moontlike redes vir sy volstrek afwysende houding oor die gebruik van historiese gegewens:

> "[P]eople governed by a text are entitled to order their lives on the strength of what they can see; on the strength, in other words, of the published words and published authoritative commentary, without having to burrow among obscure and inaccessible drafting sources."

Hierdie argument is gebrekkig juis in sy eenvoud. Dit is wensdenkery dat 'n grondwetlike teks duidelik en spesifiek genoeg is vir almal (sélfs regsgeleerdes) om "reg" te verstaan. En as die teks dan met behulp van gesaghebbende kommentare verstaan moet word, waarom moet die kommentare heeltemal van die ontstaansgeskiedenis van die teks wegskram? Moet húlle nie juis vir Jan Alleman sin help maak van "obscure and inaccessible drafting sources" nie?

'n Samelewing en sy mense is "produkte" van 'n wording*geskiedenis*. In 1995 kan 'n mens in the VSA – anders as in 1792, toe die Agste Wysiging aanvaar is – jou lewe orden wetend dat jy nie 'n openbare afranseling op die lyf sal loop nie. Die teks van die Grondwet het egter dieselfde gebly. Waarborge teen openbare afranselings in 1995 lê dus nie in die teks van die Grondwet nie *maar mede* in wat "histories geword" het sedert die aanvaarding van die teks. Maar dan moet 'n mens weet dat die opstellers van die teks, alhoewel hulle presiese gedagtes anders gelyk het as dié van juriste twee eeue later, nogtans 'n verbod op wrede en ongewone straf *beoog* het. Die uitlegger in 1995 hoef nie die opstellers se presiese gedagtes (weer) in praktyk te probeer stel nie maar moet gevolg gee aan wat hulle beoog het.

2 3 Marcus se siening

'n Beroep op Marcus se artikel steun eweneens nie die kategoriese gevolgtrekking dat die ontstaansgeskiedenis van 'n handves *irrelevant* vir die vertolking daarvan is nie. Marcus (1994 *SAJHR* 98–99) bespreek slegs die rol van *vooraf-gaande debatte.* In die geval van Suid-Afrika se oorgangsgrondwet is the posisie in 'n sekere sin eenvoudig: daar bestaan nie betroubare transkripsies van die

voorafgaande debatte nie. In 'n wyer sin is the saak egter ingewikkelder. Die Grondwet en hoofstuk 3 is produkte van 'n grondwetlike debat wat nie tot die onderhandelingslokale van Kemptonpark beperk was nie en trouens lank vóór die onderhandelingsproses self begin het. Omvattender debatspunte was dus ook op die onderhandelingstafel en sommiges het in die eindproduk neerslag gevind (sien bv Du Plessis en Corder *Understanding South Africa's transitional bill of rights* (1994) 23–39). 'n Treffende voorbeeld is die spanning tussen vryheid en gelykheid wat opsigtelik in sleutelbepalings van hoofstuk 3, byvoorbeeld artikel 33(1)(a)(ii) en a 35(1), aanwesig is. Die grondwetlike uitlegger durf hierdie wyer debat en die invloed daarvan op hoofstuk 3 nie ignoreer nie. Regter Van Dijkhorst se uitspraak laat trouens, soos aanstons sal blyk (sien 2 4 hieronder), óók ruimte vir die verdiskontering daarvan.

Marcus baseer sy redes vir die nie-gebruik van voorafgaande debatte (in enger sin) op die oordrewe subjektiwiteit wat deelnemers aan die proses geneig is om aan die dag te lê wanneer hulle sê wat hulle dink 'n grondwetlike bepaling beteken. Soos voorheen opgemerk (sien 2 1 hierbo), sluit hierdie tekortkoming egter nie die *omsigtige en oordeelkundige* gebruik van sodanige gegewens (as sekondêre vertolkingsbron) by voorbaat uit nie.

2 4 Die hof se redenasie

Die hof se uitgangspunt is dat die Grondwet en hoofstuk 3 doeldienend of, liewer, doelsverwesenlikend (*purposive*) uitgelê moet word. Tereg word gesê dat doelsverwesenliking 'n vrygewige of toeskietlike (*generous*) vertolking *kan* noodsaak *maar dit nie noodwendig doen nie*: doelsverwesenliking kwalifiseer toeskietlikheid (128D–I; sien ook die bespreking van die Kanadese regspraak in Davis, Chaskalson en De Waal "*Democracy and constitutionalism: The role of constitutional interpretation*" in Van Wyk, Dugard, De Villiers en Davis (reds) *Rights and constitutionalism: The new South African legal order* (1994) 30). Doelsverwesenliking self is egter ook gekwalifiseer juis deur die doel wat bereik moet word. Dít sê die hof nie in soveel woorde nie, dog by implikasie: die doel van hoofstuk 3 moet bepaal word deur na sowel die geheel as die individuele, daarstellende bepalings daarvan te kyk (128G). Doelsbepaling het dus 'n *strukturele* kant. Daar moet oor hoofstuk 3 egter ook gevra word

> "what problems and aspirations did it seek to address, and what does it have in mind for our society. In short, what are the values and norms our society cherishes and intends to uphold" (128G).

Doelsbepaling het dus ook 'n *historiese* kant: die breëre agtergrondsgeskiedenis van hoofstuk 3 en die omvattender grondwetlike debat (sien 2 3 hierbo) is ter sake – maar dit sluit, na die hof se mening, nie die onmiddellike ontstaansgeskiedenis van hoofstuk 3 in nie.

Die hof hanteer die *strukturele* kant myns insiens grotendeels bevredigend deur sistematies oftewel holisties te interpreteer (Du Plessis en Corder *Transitional bill of rights* 73–7): Artikel 7(1) en artikel 7(2) word saamgelees op so 'n manier dat laasgenoemde eersgenoemde kwalifiseer (133H–I). Artikel 7(1) maak hoofstuk 3 regstreeks bindend op alle wetgewende en uitvoerende staatsorgane op alle regeringsvlakke terwyl artikel 7(2) dit op alle geldende reg van

toepassing maak. Sommiges redeneer dat "alle geldende reg" ook privaatreg insluit (Cachalia, Cheadle, Davis, Haysom, Maduna & Marcus *Fundamental rights in the new Constitution* (1994) 20). Die hof bevind egter tereg dat, omdat artikel 7(1) artikel 7(2) kwalifiseer, "alle geldende reg" slegs (gemene- en gewoonte-) regsnorme met vertikale werking oftewel publiekregsnorme insluit en dus privaatregsnorme (met 'n horisontale werking) uitsluit. (Die hof sê dit nie maar dit volg uit a 7(1), wat wetgewers bind, dat wetgewing, hetsy privaat- of publiekregtelik, altyd regstreeks onderworpe is aan hfst 3.) Die hof redeneer, eweneens tereg, dat die aanwesigheid van artikel 33(4) wat die staat magtig om maatreëls te tref wat "privaatdiskriminasie" verbied, hierdie gevolgtrekking rugsteun: indien hoofstuk 3 regstreekse derdewerking gehad het, sou artikel 33(4) onnodig wees (131H–I). Dit is opvallend dat die hof nie 'n soortgelyke afleiding uit die bestaan van artikel 35(3) maak nie: artikel 35(3) wat die onregstreekse of middellike derdewerking van hoofstuk 3 deur interpretasie moontlik maak, sou eweneens onnodig wees indien regstreekse derdewerking uit artikel 7(2) sou volg. (Die hof oorweeg wel sekere implikasies van a 35(3) maar met 'n ander doel.)

Die hof se hantering van *historiese* kwessies is minder bevredigend. Du Plessis ("A background to drafting the chapter on fundamental rights" in De Villiers (red) *The birth of a constitution* 93) word redelik uitvoerig aangehaal oor hoekom by Kemptonpark bepaal is dat artikel 33(4) en 35(3) moet "vergoed" vir die andersins "swak" derdewerking van hoofstuk 3 (129G–H). Die hof meen egter – met 'n beroep op Mureinik en Marcus (sien 2 2 en 2 3 hierbo) – dat daar (ongelukkig) nie waarde aan hierdie relaas geheg kan word nie en dat dit waarskynlik (*presumably*) slegs slaan op beraadslagings binne die tegniese komitee wat hoofstuk 3 moes opstel. Laasgenoemde is nie korrek nie. Oor 'n beleidskwessie soos derdewerking kon die tegniese komitee die onderhandelingspartye alleen adviseer. Wat in die betrokke artikels staan, weerspieël waarop die onderhandelaars ooreengekom het – nie die tegniese komitee se voorkeure nie.

Du Plessis se weergawe van wat die partye beoog het, klop met wat die hof deur middel van sistematiese uitleg oor die derdewerking van hoofstuk 3 (en die nodigheid van a 33(4)) bevind. Regter Van Dijkhorst sou dus, soos regters elders in die wêreld, die sekondêre inligting oor die ontstaan van hoofstuk 3 (omsigtig en oordeelkundig) kon gebruik om sy eie vertolking te bevestig en te versterk. Hierdie gegewens word egter kategories (en soos in 2 hierbo aangetoon verkeerdelik) uitgesluit. (Sou wat uit die voorafgaande beraadslagings blyk nié klop met wat 'n hof deur sistematiese uitleg bevind nie, kry laasgenoemde natuurlik voorkeur.)

Nogtans huiwer regter Van Dijkhorst nie om ander historiese gegewens wat op die omvattender grondwetlike debat betrekking het (sien 2 3 hierbo), by te haal om sy bevindinge te rugsteun nie, byvoorbeeld:

> "There was a pressing need for a bill of rights, given the suppressive State action of the past. The call for a conventional bill of rights was sharp and clear. But there were no such calls for a bill of rights on a horizontal plane" (131D).

Hierdie *dictum* berus op die aanvegbare veronderstelling dat die meeste Suid-Afrikaners apartheid bloot as 'n verdrukkende stelsel *van staatsweë* ervaar het. Treffend onjuis is ook die aanname dat daar nie 'n behoefte aan 'n menseregte-handves met derdewerking was nie. Op een na maak al die handvesvoorstelle wat in Kemptonpark gedien het, vir vorme van derdewerking sterker as tans in hoofstuk 3 voorsiening. Die uitsondering was die *Regeringsvoorstelle oor 'n handves van fundamentele regte* wat op 'n "vertikaliteitsbeginsel" baseer is soos duidelik uit artikels 1 en 2 daarvan blyk. Daarenteen voorsien beide die ANC en die Demokratiese Party (DP) se voorstelle 'n handves wat nie-staatlike persone en instansies "where appropriate" (a 17 van die ANC-handves) of "where applicable" (a 1 van die DP-handves) bind terwyl artikel 14 van die voorgestelde *Constitution of the State of KwaZulu/Natal* die oppermagtige grondwet ook in "interpersonal relations under the control of the State" afdwingbaar maak. Die Suid-Afrikaanse Regskommissie se handvesvoorstelle van Mei 1993 stel dit die ondubbelsinnigste van almal: fundamentele regte en vryhede geld ook "die onderlinge verkeer van die draers van gemelde regte teenoor mekaar" en fundeer aksies wat sulke regte beskerm en afdwing (a 2(1)). Kortom, regter Van Dijkhorst se verstaan van verskillende betrokkenes se geartikuleerde behoefte aan 'n handves akkommodeer, wat die moontlike derdewerking van so 'n handves betref, die sterk vertikalistiese sentimente van slegs een party, naamlik die vorige Nasionale Party (NP)-regering.

Tydens die onderhandelinge self was die partye geneë om aan hoofstuk 3 'n vorm van derdewerking te gee. Selfs die vorige NP-regering was aanvanklik hiervoor te vinde. Bedenkinge is egter, eienaardig genoeg, deur die Suid-Afrikaanse Kommunistiese Party (SAKP) geopper. 'n Mens verwag dat 'n oorwegend sosialistiese party sal aandring op 'n handves wat maksimum beskerming nie alleen teen die staat nie maar ook teen "private" maghebbers op byvoorbeeld ekonomiese en veral arbeidsgebied gee. Die SAKP se hoofwoordvoerder oor hoofstuk 3, professor Halton Cheadle, het die saak egter andersom beredeneer: 'n handves wat té sterk horisontaal werk, kan private maghebbers 'n hefboom gee om elke denkbare privaatregtelike geskilpunt te probeer konstitusionaliseer – en húlle kan lang en ingewikkelde siviele gedingvoering bekostig. Die handves word dan, in feite en in the persepsie van die breë bevolking, 'n addisionele magsmiddel waarmee die reeds magtiges in the samelewing hulle posisie bestendig. Dít kan die legitimiteit van die handves by the breë bevolking ondermyn (sien Du Plessis en Corder *Transitional bill of rights* 111).

Hoofregter Corbett het ook in 'n *Memorandum submitted on behalf of the judiciary of South Africa on the draft interim bill of rights* (3–5) skerp afwysend gereageer op 'n voorgestelde klousule in 'n vroeëre konsep van hoofstuk 3 wat aan fundamentele regte derdewerking sou gee "where just and equitable". Sy beswaar was dat so 'n bepaling regsprekers sal opsaal met 'n "beleidsbesluit" wat liefs (vooraf) deur die (grond-)wetgewer geneem moet word (Du Plessis en Corder *Transitional bill of rights* 111–112). Hierdie beswaar, komende van die hoofregter namens die regbank, het die NP en vorige regering hulle meer genaakbare posisie oor die derdewerking van hoofstuk 3 laat heroorweeg en hulle belangstellend na die besware van die SAKP laat kyk.

Hoe dit ook al sy, die aangeleentheid is (feitelik-histories) veel ingewikkelder (en die uiteindelike politieke kompromis waaraan die regbank onregstreeks 'n aandeel gehad het minder voor die hand liggend) as wat regter Van Dijkhorst in sy uitspraak te kenne probeer gee. Maar waarom dan steun op karige en ongekontroleerde historiese gegewens terwyl direkte inligting oor die ontstaansgeskiedenis van hoofstuk 3 as "irrelevant" verwerp word? Is so 'n vergissing 'n doodsonde – veral terwyl die hof se sistematiese interpretasie van artikel 7(1) en (2) die Kemptonpark-onderhandelaars se onbevredigende kompromie (en dus "bedoeling") oor die derdewerking van hoofstuk 3 oënskynlik nie onherstelbare geweld aandoen nie?

Wat die hof gedoen het, kan tog ongelukkige gevolge hê – vir 'n geval soos die *De Klerk*-saak maar ook in 'n ruimer konteks.

3 Gevolgtrekkings

In die *De Klerk*-saak het die hof artikel 35(3) nie ernstig genoeg geneem nie – waarskynlik omdat "historiese oogklappe" dit verhinder het om die betrokke bepaling as die Kemptonpark-onderhandelaars se kompromis oor derdewerking te verdiskonteer. Dit is waar dat "whenever there is room for interpretation or development of our virile system of law that *it [a 35(3)]* is to be the point of departure" (133E–F). Maar wat sluit hierdie moontlikheid op die gebied van die lasterreg uit – veral waar 'n openbare figuur in the loop van die "politieke proses" (wat 'n openbare, *staatkundige* proses is) na bewering belaster word? Oor die presiese omstandighede van die beweerde laster in die *De Klerk*-saak sê die gerapporteerde uitspraak niks nie. En die versweë feite sal na regter Van Dijkhorst se insig waarskynlik net so ontersaaklik wees soos gegewens oor die ontstaansgeskiedenis van hoofstuk 3. Hy verwerp immers die uitspraak in *Mandela v Falati* 1994 4 BCLR 1 (W) wat wel, in 'n soortgelyke konteks, waarde heg aan die status van 'n gedingsparty as 'n *openbare, politieke figuur* (132A–H).

Dit was nie in eerste instansie vir die hof in die *De Klerk*-saak nodig om die regstreekse ontstaansgeskiedenis van artikel 35(3) te raadpleeg ten einde volle erkenning aan die bestaansdoel van die betrokke bepaling te gee nie. 'n Sistematiese vergelyking van artikel 7(1) en artikel 7(2) met artikel 35(3) sê wat die besondere funksie van laasgenoemde is: dit moet die ongekwalifiseerd vertikale werking van eersgenoemdes temper. Indien die hof verder sekere van die historiese gegewens waarop dit wel steun – naamlik die onderhandelingspartye se sienings van horisontaliteit vóór die onderhandelings – behoorlik sou kontroleer, sou dit duidelik wees dat daar hoofsaaklik twee sentimente was: een vir gekwalifiseerde horisontaliteit en die vorige regering se uitgesproke voorkeur vir 'n sterk vorm van vertikaliteit. Dit behoort die uitlegger wat die omvattender grondwetlike debat ernstig neem (sien 2 3 hierbo) dadelik te laat vermoed dat daar 'n kompromis êrens in the hoofstuk self moet wees – en wat anders as artikel 35(3) (en natuurlik ook a 33(4)) kan dit wees? Met die daadwerklike ontstaansgeskiedenis van hoofstuk 3 en die politieke debat oor vertikaliteit en horisontaliteit as sekondêre inligting bygereken, word die rol wat artikel 35(3) veronderstel is om te speel bo alle twyfel bevestig. En met artikel 35(3) in die

prentjie ontstaan die vraag: Indien 'n party tot 'n lasteraksie verlang dat die hof "die gees, strekking en oogmerke" van hoofstuk 3 (en veral a 15(1)) by die "toepassing en ontwikkeling" van die lasterreg in aanmerking moet neem, hoe anders as in die pleitstukke bring hy of sy dit te berde? Die hof kan dan steeds die aangeleentheid oorweeg en beslis dat hoofstuk 3 in 'n bepaalde geval nie veel verskil maak nie. Maar om te suggereer dat die blote te berde bring van hoofstuk 3 'n verweerskrif (of dagvaarding) eksipieerbaar kan maak, is om die effek van artikel 35(3) óf te ignoreer óf tot 'n niksseggendheid te relegeer – dit is die ongelukkige gevolg van die uitspraak in die *De Klerk*-saak vir die betrokke saak en vir soortgelyke gevalle. (Vgl hierteenoor die meer bevredigende benadering in *Jurgens v The Editor, The Sunday Times Newspaper* 1995 1 BCLR 97 (W) (1995 2 SA 52 (W)), veral 101–102.)

Wat ongelukkig is in 'n ruimer konteks, is 'n houding wat nie slegs tot die *De Klerk*-uitspraak beperk is nie maar vry algemeen (ook in ander jurisdiksies) na vore kom. Dit is naamlik dat historiese interpretasie beperk is tot 'n beroep op *travaux préparatoires*. Omdat *travaux préparatoires* as hulpmiddel by grondwetlike vertolking sekere tekortkominge het, word dan van historiese interpretasie in 't geheel 'n ondergeskikte vorm van grondwetlike uitleg gemaak. Huidige omstandighede (*present circumstances*), word gesê, dra méér direkte gewig: die handves moet in 'n kontinue tydsraamwerk só vertolk word dat dit óók moontlikhede wat die opstellers daarvan nie voorsien het nie, kan akkommodeer (Du Plessis en De Ville 1993 *Stell LR* 376–377). Met dié stelling kan nouliks getwis word maar dit sal jammer wees as dit veronderstel dat historiese interpretasie met 'n beroep op *travaux préparatoires* eindig. Teleologiese interpretasie wat die wil van 'n "hipoteties-permanente grondwetgewer" postuleer (vgl Katz *Staatsrecht* 49), is nie "minder histories" as 'n vorm van interpretasie wat faktore uit die verlede by die vertolking van die teks in die hede betrek nie.

Die geskiedenis en "historisiteit" is nie slegs attribute van die verlede nie. Dit kry gestalte in 'n kontinue voortgang van gebeure *vanuit* die verlede, *deur* die hede *na* die toekoms toe. Carr (*What is history?* (1986) 24) sê dat geskiedenis "an unending dialogue between the present and the past" is. Heidegger (*Einführung in die Metaphysik* (1953) 34) stel dit nog sterker:

> "Geschichte als Geschehen is das aus der Zukunft bestimmte, das Gewesene übernehmende Hindurchhandeln und Hindurchleiden durch die *Gegenwart*. Diese ist es gerade, die im Geschehen verschwindet."

Op Engels lees hierdie kwalik vertaalbare aanhaling só (Heidegger *An introduction to metaphysics* (1961) 36):

> "History as happening is an acting and being acted upon which pass through the *present*, which are determined from out of the future and which take over the past. It is precisely the present that vanishes in happening."

Volgens Heidegger "verdwyn" die hede in the geskiedenis: geskiedenis *gaan deur* die hede, word vanuit die toekoms *bepaal* en *neem die verlede oor*. Geskiedenis ís dus ewe hede-, toekoms- en verlede-gerig. Die toekoms is egter ongekarteer en onseker. Die verlede, daarenteen, is vasgestel en gekarteer, en is daarom 'n bron of *fokus* van sekerheid, *gegee die onbekendheid van die toekoms*. Die hede (en *present circumstances*) bemiddel tussen die verlede en die toekoms.

Hiervolgens is die inagneem van huidige omstandighede by grondwetlike uitleg (óók toekomsonthalwe) nie minder "histories" as die inagneem van gebeurtenisse uit die verlede nie. Huidige omstandighede vorm trouens 'n ontmoetingspunt tussen historiese interpretasie en teleologiese interpretasie. Met die verlede as fokus van sekerheid kan egter nie weggedoen word nie – ook nie met 'n verlede waarin en van waaruit 'n grondwetlike teks gestalte gekry het nie. 'n Hof wat hoofstuk 3 vertolk, moet rekening hou daarmee dat dit ontstaan het in 'n situasie waar daar 'n duidelike wil was om in die plek van die repressiewe sisteem van apartheid 'n bedeling met optimale beskerming vir menseregte orent te probeer kry. Regter Van Dijkhorst sê dat hy hiermee rekening hou, al is sy aannames oor die onderhandelingspartye se siening omtrent die horisontale trefwydte van menseregte feitelik onjuis (sien 2 4 hierbo). Regters Kroon en Froneman redeneer in 'n soortgelyke trant in *Qozeleni v Minister of Law and Order* 1994 1 BCLR 75 (E) 77–81 (sien ook 1994 3 SA 625 (OK)).

Die historiese konteks van hoofstuk 3 is dus belangrik juis by die doelsverwesenlikende vertolking daarvan. Déél van hierdie konteks is voorafgaande beraadslagings wat, om redes voorheen genoem (sien 2 1 hierbo), omsigtig en oordeelkundig hanteer moet word (en hoogstens sekondêre vertolkingswaarde het) *maar wat nie heeltemal irrelevant is nie.*

'n *Sekondêre* beroep op *travaux préparatoires* by die vertolking van 'n handves, beteken nie dat die *oorspronklike bedoeling* (*original intent*) van die opstellers daarvan 'n interpretatiewe *Leitmotiv* word nie. Laasgenoemde houding is trouens onhistories júís in sy absolutistiese fokus op grondwetgewende denkprosesse *uit die verlede* wat die kontinuïteit van verlede, hede en toekoms nivilleer. Iemand soos Dworkin se kritiek op *original intentionalism* (sien 2 2 hierbo) sluit egter nie 'n begrensde (oordeelkundige en omsigtige) gebruik van *travaux préparatoires* uit nie.

Müller ("Einige Leitsätze zur juristischen Methodik" in Dreier en Schwegmann (reds) *Probleme der Verfassungsinterpretation* (1976) 252–253) onderskei met, toegegee, ander teoretiese oogmerke tussen *historiese* en *genetiese* interpretasie. In 'n ietwat aangepaste vorm kan so 'n onderskeid vir die huidige bespreking van waarde wees. Genetiese interpretasie is, volgens Müller, beperk tot die gebruik van *travaux préparatoires.* Historiese interpretasie daarenteen appelleer op normtekstuele "voorgangers" van die te vertolkte normteks. Sulke voorganger-tekste ontbreek egter in die geval van baie van die bepalings in Suid-Afrika se oorgangsgrondwet, insonderheid dié wat op fundamentele regte en hulle moontlike derdewerking betrekking het. Historiese interpretasie kan egter die aanvul van ontbrekende tekstuele gegewens uit die breëre (in teenstelling met slegs die onmiddellike) ontstaans- en agtergrondsgeskiedenis van hoofstuk 3 magtig. Historiese interpretasie is meer gesaghebbend en "minder sekondêr" as genetiese interpretasie.

Om dus op te som: Historiese interpretasie is 'n inklusiewe proses wat die kontinuïteit van verlede, hede en toekoms moet probeer verdiskonteer. Die inagneem van sowel huidige omstandighede as gebeure uit die verlede wat die uiteindelike grondwetlike teks help vorm gee het, asook die toekomsverwagtings van die gesamentlike outeurs van die teks, is integrerend déél daarvan. Onder

gebeure uit die verlede tel ook die beraadslagings wat die aanname van die teks voorafgegaan het. Omdat die sienings van deelnemers aan die totstandkomingsproses van die Grondwet egter bevooroordeeld en die teks as eindproduk plekplek die resultaat van politieke akkoorde is, moet sulke beraadslagings as getuienis van wat die teks beteken, oordeelkundig en omsigtig gebruik word en het hulle hoogstens die status van sekondêre getuienis wat die resultate van ander uitlegmetodes kan bevestig maar nie kan weerlê nie.

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TERUGWERKENDHEID VAN 'N VERANDERING VAN HUWELIKSGOEDEREBEDELING INGEVOLGE ARTIKEL 21(1) VAN DIE WET OP HUWELIKSGOEDERE

Ex parte Burger 1995 1 SA 140 (D)

In die verlede, voor die inwerkingtreding van die Wet op Huweliksgoedere 88 van 1984, het die sogenaamde onveranderlikheidsreël in ons reg gegeld (sien bv Barnard, Cronjé en Olivier *Die Suid-Afrikaanse persone- en familiereg* (1994) 234). Ingevolge hierdie reël het die huweliksgoederebedeling wat die gades by huwelksluiting gekies het, na huwelksluiting onveranderbaar voortgeduur en kon dit nooit deur die gades tydens die bestaan van die huwelik gewysig word nie. Hierdie reël is egter verslap met die inwerkingtreding van die Wet op Huweliksgoedere in 1984 wat gades in bepaalde omstandighede magtig om hulle huweliksgoederebedeling gedurende die bestaan van die huwelik te wysig.

Artikel 21(1) van die Wet op Huweliksgoedere magtig die hof om op aansoek van beide gades toestemming te verleen dat die gades se huweliksgoederebedeling verander word. Die hof sal

> "indien hy oortuig is dat –
>
> (a) daar gegronde rede vir die voorgenome verandering bestaan;
>
> (b) aan al die skuldeisers van die gades voldoende kennis van die voorgenome verandering gegee is; en
>
> (c) geen ander persoon deur die voorgenome verandering benadeel sal word nie, gelas dat daardie huweliksgoederebedeling nie meer op hul huwelik van toepassing sal wees nie en hulle magtig om 'n notariële kontrak te sluit waardeur hul toekomstige huweliksgoederebedeling gereël word op die voorwaardes wat die Hof goedvind."

Artikel 21(2) van die Wet op Huweliksgoedere het voorsiening gemaak vir 'n wysiging van die gades se huweliksgoederebedeling sonder die nodigheid om die hof te nader. Ingevolge hierdie artikel kon persone wat voor die inwerkingtreding van die Wet op Huweliksgoedere (op 1 November 1984), of voor die inwerkingtreding van die Wysigingswet op Huweliks- en Huweliksgoedereg

3 van 1988 (op 2 Desember 1988), buite gemeenskap van goedere getroud is die aanwasbedeling op hulle huwelik van toepassing maak deur middel van die verlyding en registrasie van 'n notariële kontrak. Hierdie vergunning het egter slegs vir 'n oorgangstydperk gegeld (tot 1 November 1988 vir blanke, kleurling en Asiër gades en tot 2 Desember 1990 vir swart gades). (Ingevolge a 25(2) van die wet kon gades in wie se huwelike (binne of buite gemeenskap van goed) die maritale mag gegeld het, op dieselfde wyse en binne dieselfde tydperke die maritale mag afskaf.) Sedert die verstryking van bogenoemde tydperke moet gades wat 'n verandering aan hulle huweliksgoederebedeling wil bewerkstellig dit doen deur middel van 'n hofaansoek ingevolge artikel 21(1).

Ex parte Burger handel oor 'n aansoek ingevolge artikel 21(1) van die Wet op Huweliksgoedere vir die verandering van die partye se huweliksgoederebedeling. Die applikante is op 30 Mei 1970 buite gemeenskap van goed getroud. Hulle doen nou aansoek om die aanwasbedeling vanaf die datum van huwelksluiting op hul huwelik van toepassing te maak.

Twee vrae ontstaan met betrekking tot die aansoek: Eerstens, voldoen die aansoek aan die drie vereistes wat in artikel 21(1)(a)–(c) van die Wet op Huweliksgoedere gestel word? Tweedens, het die hof die bevoegdheid om die huweliksgoederebedeling terugwerkend tot huwelksluiting te verander?

Met betrekking tot die eerste vraag is veral die eerste vereiste in artikel 21(1)(a) van belang, met ander woorde, of daar "gegronde rede" vir die voorgenome verandering is. Ten aansien daarvan kan die vraag gestel word wat "gegronde rede" beteken. Soos wat regter Hattingh in *Ex parte Le Roux et Uxor; Ex parte Von Berg et Uxor* 1990 2 SA 70 (O) sê, "vereis doelmatigheid dat gegronde rede nie vooruit en uitvoerig omskryf kan word nie omdat dit van geval tot geval sal verskil". In *Ex parte Engelbrecht* 1986 2 SA 158 (NK) kom regter Steenkamp tot die gevolgtrekking dat die woorde "gegronde rede" volgens hulle gewone grammatikale betekenis uitgelê moet word en gevolglik feite is wat oortuigend, geldig en verankerd in die werklikheid is.

Uit die regspraak blyk dat die howe maklik oortuig word dat daar gegronde rede vir 'n wysiging is en dat Hahlo se voorspelling in 1984 (*The South African law of husband and wife* (1984) 283) korrek was dat,

> "provided that the change on which the spouses are agreed is not, on the face of it, unreasonable or unfair to one of the spouses, it should not be difficult to convince the court that there are sound reasons for it".

Voorbeelde van redes wat al as grondig beskou is, is dat partye voor die huwelik ooreengekom het om buite gemeenskap van goed te trou en deurgaans volgens hierdie bedoeling opgetree het (sien *Ex parte Engelbrecht supra*). In *Ex parte Krös* 1986 1 SA 642 (NK) is die feit dat die applikante onkundig was omtrent die regsposisie toe hulle die huwelik aangegaan het en nie regsadvies ingewin het oor die implikasies en gevolge van 'n huwelik binne gemeenskap van goed nie, gekoppel daaraan dat die man beoog het om sy eie sakeonderneming te begin wat die bates van die vrou in gevaar kon stel, as grondig beskou.

In *Burger* se saak word ook bevind dat daar gegronde rede vir die aansoek is – die gegronde rede is in hierdie saak gevind in die feit dat die gades wou hê dat die vrou moes deel in die groeiende boedel van die man, wat nie met hul huidige

huweliksgoederebedeling bewerkstellig kon word nie (141E). Hierdie bevinding stem ooreen met Hahlo se standpunt hierbo en sy mening dat

> "it should also be sufficient that the spouses, after mature consideration, have arrived at the conclusion that the matrimonial system under which they were married does not really suit their circumstances".

Regter Magid bevind verder dat die applikante ook aan die ander twee vereistes van artikel 21(1) voldoen het (141E–F).

Soos hierbo aangedui, was die tweede vraag wat in *Ex parte Burger* ter sprake gekom het, of die hof die bevoegdheid het om te beveel dat die gades se nuwe huweliksgoederebedeling vanaf die datum van die huwelik kan geld. Die probleem hier is dat daar botsende uitsprake oor die aangeleentheid is: In *Ex parte Krös supra* is beslis dat die huweliksgoederebedeling wel terugwerkend verander mag word terwyl die teendeel in *Ex parte Oosthuizen* 1990 4 SA 15 (OK) bevind is.

Die applikante in *Ex parte Krös* het aansoek gedoen dat hulle huweliksgoederebedeling verander moet word van binne gemeenskap van goed na buite gemeenskap van goed vanaf die begin van die huwelik. Die registrateur van aktes het betwis dat die huweliksgoederebedeling ingevolge artikel 21(1) met terugwerkende krag verander mag word. Vir sy argument steun hy hoofsaaklik op die woord "toekomstige" in artikel 21(1) en voer hy aan dat die gebruik van daardie woord beteken dat die huweliksgoederebedeling slegs ten opsigte van die toekoms verander mag word. Regter Basson verwerp hierdie argument en beslis dat daar nie te veel klem op die woord "toekomstige" gelê moet word nie en dat dit nie die afleiding teen terugwerkendheid regverdig nie. Hy sê verder dat die wetgewer net sowel die woord "nuwe" in plaas van "toekomstige" kon gebruik het (645F–G). Regter Basson voer nog verdere redes aan vir sy beslissing dat die huweliksgoederebedeling wel met terugwerkende krag verander mag word. Onses insiens is die belangrikste rede dat die hele doel van die Wet op Huweliksgoedere is

> "om weg te doen met die onbuigsaamheid wat voorheen bestaan het. As die hof nie by magte is om die huweliksgoederebedeling met terugwerkende krag te verander nie, is ons weer terug by 'n onbuigsame stelsel" (646C–D).

Hierdie rede is oortuigend (sien ook Cronjé en Heaton *Vonnisbundel oor die Suid-Afrikaanse persone- en familiereg* (1994) 406).

In *Ex parte Oosthuizen* het die applikante toestemming gevra om hulle huwelik van binne gemeenskap van goed na 'n huwelik buite gemeenskap van goed te verander, ook met terugwerkende krag. In die saak word sterk klem gelê op die woorde in artikel 21(1) wat op die toekoms dui (nl "sal wees" en "toekomstige"). Regter Erasmus beslis dat wanneer die hof 'n verandering van 'n huweliksgoederebedeling ingevolge artikel 21(1) magtig, die hof gelas dat die bestaande bedeling nie meer van toepassing "sal wees" nie, dit is *ex nunc* (vanaf die datum waarop die bevel gegee word) en nie *ex tunc* (vanaf die huweliksdatum) nie. Verder magtig die hof 'n "toekomstige" huweliksgoederebedeling. Hierdie woorde dui volgens regter Erasmus duidelik daarop dat die wysiging nie terugwerkend kan wees nie. Die regter sê ook verder dat benewens die duidelike bepaling van die artikel baie probleme kan ontstaan indien die artikel wel

terugwerkende krag sou hê. Derdes sou daardeur benadeel kon word en regsonsekerheid sou kon ontstaan.

Alhoewel die interpretasie in die *Oosthuizen*-saak in ooreenstemming is met die letter van die wet, is die buigsame benadering in *Krös* waarskynlik meer in ooreenstemming met die bedoeling van die wetgewer en is dit te verkies. (Sien Cronjé en Heaton 406; sien egter ook Van Schalkwyk *Huweliksregbronnebundel* (1992) 249; Visser en Potgieter *Inleiding tot die familiereg* (1994) 75; Sonnekus "Terugwerkende wysiging van huweliksgoederebedeling" 1991 *THRHR* 133 wat die uitspraak in *Oosthuizen* steun op grond van die uitdruklike bewoording van a 21(1). Van Schalkwyk "Nahuwelikskontrakte" 1991 *De Jure* 345 argumenteer dat dit gevaarlik is om oor die boeg van 'n algemene en vae doelstelling soos die "buigsaamheid" van 'n wet, 'n betekenis strydig met die uitdruklike betekenis te wil invoer.)

In *Ex parte Burger* spreek regter Magid geen mening uit oor welke van die *Krös*- en *Oosthuizen*-saak korrek is nie en probeer hy ook glad nie om die botsing tussen die twee sake te versoen nie. Die rede hiervoor is dat hy tot die gevolgtrekking kom dat dit wat die gades *in casu* versoek glad niks met terugwerkendheid te make het nie! Regter Magid beslis dat wanneer gades hul huweliksgoederebedeling wil wysig ten einde die aanwasbedeling ingevolge artikel 21(1) op hul huwelik van toepassing te maak, hulle verplig is om die "normal basis of the accrual system" te gebruik. Hierdie "normal basis" word in hoofstuk 1 van die wet vervat en bepaal dat wanneer gades die aanwasbedeling op hulle huwelik van toepassing maak, die aanwasbedeling gebaseer is op die groei van elke gade se boedel vanaf die datum van huweliksluiting tot by die ontbinding van die huwelik. Regter Magid redeneer dat die gades ook in die geval van 'n wysiging ingevolge artikel 21(1) die aanwasbedeling *moet* invoer vir die *hele duur van hul huwelik* en dat die nuwe bedeling dus nie kan geld vanaf die datum van die artikel 21(1)-bevel nie.

Ter ondersteuning van sy argument, sê regter Magid, moet gelet word op die bewoording van artikel 21(2) van die wet. Artikel 21(2) het (soos hierbo verduidelik) gades wat buite gemeenskap van goed getroud was gemagtig om die aanwasbedeling in te voer deur middel van die verlyding en registrasie van 'n notariële kontrak. Die artikel het die partye uitdruklik 'n keuse gegee of die aanwasbedeling vanaf die datum van huweliksluiting of vanaf die datum van die kontrak moes geld. Regter Magid redeneer dat as die wetgewer bedoel het om die gades ook ingevolge artikel 21(1) so 'n keuse te gee, die wetgewer dit uitdruklik in die artikel sou vermeld het. Aangesien die wetgewer dit nie gedoen het nie mag gades wat ingevolge artikel 21(1) om wysiging van hul huweliksgoederebedeling aansoek doen die aanwasbedeling net van die begin van die huwelik af invoer.

Die regter gaan egter verder en beslis dat sy gevolgtrekking dat die aanwasbedeling vanaf die begin van die huwelik ingevoer moet word nie beteken dat die gades se huweliksgoederebedeling terugwerkend verander word nie. Hierdie aspek van die beslissing is onses insiens moeilik om te verstaan aangesien dit immers vanselfsprekend is dat as 'n wysiging (in hierdie geval die invoer van die aanwasbedeling) vanaf die begin van die huwelik geld, dit noodwendig beteken

dat die huweliksgoederebedeling terugwerkend moet wees. 'n Mens kan kwalik anders as om af te lei dat die regter eenvoudig net nie die botsing tussen *Ex parte Krös* en *Ex parte Oosthuizen* wou aanspreek nie.

'n Verdere beswaar teen die uitspraak in *Ex parte Burger* is dat regter Magid in effek beslis dat 'n wysiging ingevolge artikel 21(1) – minstens vir sover die aanwasbedeling ingevoer word – terugwerkend *moet* wees. Die gevolg hiervan is dat die rigiditeit waarteen in *Ex parte Krös* gewaarsku is weer kop uitsteek. Ingevolge *Krös* se uitspraak *mag* die verandering terugwerkend plaasvind; ingevolge *Ex parte Burger* se uitspraak *moet* die verandering terugwerkend plaasvind.

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ARTIKEL 2(3) EN 2A VAN DIE WET OP TESTAMENTE – KONDONASIEBEVOEGDHEID VAN DIE HOF – VERLYDING EN HERROEPING VAN TESTAMENTE

Logue v The Master 1995 1 SA 199 (N);
Horn v Horn 1995 1 SA 48 (W)

1 Inleiding

Met die toevoeging van artikel 2(3) en 2A tot die Wet op Testamente 7 van 1953 (sien a 3(g) en 4 van die Wet tot Wysiging van die Erfreg 43 van 1992) was die oogmerk van die wetgewer (of die noodwendige gevolg) dat in geval van onduidelikheid by die verlyding of herroeping van testamente, litigasie sou volg. Deur aan die hof 'n kondonasiebevoegdheid te verleen, beteken dat wanneer onsekerhede ontstaan oor die geldigheid of die aanvaarding van 'n testament die hof (en nie die meester nie) uitsluitsel oor vraagstukke moet gee.

Die huidige posisie ten opsigte van die verlyding en herroeping van testamente kan soos volg saamgevat word:

(a) Ten einde 'n geldige testament te verly, moet voldoen word aan die vormvereistes gestel in artikel 2(1)(a) van die Wet op Testamente. Indien enige van die gestelde vereistes nie nagekom is nie kan daar soos volg aansoek gedoen word ingevolge artikel 2(3):

> "Indien 'n hof oortuig is dat 'n dokument of die wysiging van 'n dokument wat opgestel of verly is deur 'n persoon wat sedert die opstel of verlyding daarvan oorlede is, bedoel was om sy testament of 'n wysiging van sy testament te wees, gelas die hof die Meester om daardie dokument, of die dokument soos gewysig, vir die doeleindes van die Boedelwet, 1965 (Wet No 66 van 1965), as testament te aanvaar ofskoon dit nie aan al die vormvereistes vir die verlyding of wysiging van testamente bedoel in subartikel (1) voldoen nie." (Vir 'n bespreking van die

omvang van die bevoegdheid van die hof, sien Schoeman "Testamente – regterlike diskresie" 1992 *De Jure* 423 ev.)

(b) Ten einde 'n geldige testament te herroep, moet daar aan die gemeenregtelike vereistes vir herroeping voldoen word (sien De Waal, Schoeman en Wiechers *Erfreg studentehandboek* (1992) 62–75). Indien dit onseker is of 'n herroepingshandeling 'n gemeenregtelik erkende herroepingswyse is, kan daar ingevolge artikel 2A soos volg by die hof aansoek gedoen word:

> "Indien 'n hof oortuig is dat 'n erflater–
>
> (a) 'n geskrewe aanduiding op sy testament aangebring het of voor sy dood sodanige aanduiding laat aanbring het;
>
> (b) 'n ander handeling met betrekking tot sy testament verrig het of voor sy dood sodanige handeling laat verrig het wat uit die voorkoms van die testament waarneembaar is; of
>
> (c) 'n ander dokument opgestel of voor sy dood sodanige dokument laat opstel het, waardeur hy bedoel het om sy testament of 'n gedeelte van sy testament te herroep, verklaar die hof die testament of die betrokke gedeelte van sy testament, na gelang van die geval, herroepe te wees." (Sien Schoeman 1992 *De Jure* 423 427.)

Die ideaal is dus steeds dat 'n testament behoorlik verly word en dat die formaliteitsvereistes nagekom word. Indien die erflater 'n bestaande testament wil herroep, is dit verder gewens dat hy dit op een van die erkende gemeenregtelike wyses doen. Gevolglik sou daar geargumenteer kon word dat artikel 2(3) en 2A slegs daar is vir gevalle waar die bedoeling van die testateur as gevolg van die statutêre en gemeenregtelike vereistes wat vir die verlyding en herroeping van testamente gestel word, verydel sou word. Die agterdeur word dus oopgelaat om uitvoering te gee aan die ware bedoeling van die testateur.

Wanneer artikel 2(3) en 2A naas mekaar gestel word, is dit opvallend dat in artikel 2(3) slegs verwys word na 'n dokument of wysiging van 'n dokument wat verly is deur *'n persoon wat sedert die opstel of verlyding daarvan oorlede is* terwyl artikel 2A verwys na handelinge wat verrig is met betrekking tot herroeping deur *die erflater of iemand anders*. Hieruit sou afgelei kon word dat dit 'n vereiste vir die werking van artikel 2(3) is dat daar getuienis moet wees dat die erflater self ('n persoon) die dokument wat vir kondonasie voorgelê word, moet opgestel het (die handeling verrig het) terwyl by herroeping die handeling deur die erflater of iemand anders verrig kon word. Of dit die bedoeling van die wetgewer was, word betwyfel. Volgens die skrywers sal 'n dokument wat deur die erflater opgestel is, maar ook 'n dokument wat op versoek van die erflater deur iemand anders (soos 'n prokureur) opgestel is maar nog nie verly is nie of foutiewelik verly is (deurdat die formaliteite nie behoorlik nagekom is nie), gekondoneer kan word. Die woorde "opstel of verly" is dus bepalend en nie die woord "persoon" nie.

In die sake onder bespreking het die toepassing van artikel 2(3) en 2A ter sprake gekom. In beide gevalle was die betrokke dokument wel deur die erflater self opgestel. Dit blyk dat daar by die applikante en die hof onduidelikheid is oor (a) in welke volgorde aansoeke gebring moet word: moet artikel 2(3) eers toegepas word en daarna artikel 2A of andersom (sien 200D en I van die *Logue-*

saak)?; (b) of een of beide die artikels hoegenaamd toepassing behoort te vind; en (c) hoe die hof sy regterlike diskresie moet uitoefen.

2 *Logue v The Master*

In die *Logue*-saak het die oorledene 'n geldige testament op 7 April 1986 verly. (Later word na dié testament verwys asof dit op 18 Junie verly is: sien 202B.) Uit dié testament (hierna genoem die "eerste testament") blyk dat die oorledene doelbewus die applikant, sy seun, onterf het na 'n familietwis. Gedurende 1987 het die oorledene 'n ligte beroerte-aanval gehad en is gehospitaliseer. Hy word deur die applikant en dié se kinders besoek en die verhouding tussen die oorledene en die applikant word herstel. Die goeie verhouding het daarna voortgeduur tot en met die afsterwe van die oorledene op 27 Januarie 1993.

Applikant meld dat gedurende die tydperk van versoening hy deur die oorledene meegedeel is dat hy sy sake in orde gekry het en dat sy dokumente in 'n liasseerkabinet tuis was. Volgens die applikant het hy die indruk gekry dat die oorledene die nodige stappe gedoen het om hom weer as erfgenaam te herstel. By die oorledene se dood word 'n dokument in die kabinet gevind wat netjies in sy eie handskrif geskryf was en waarvan die handtekening en datering met 'n ander pen gedoen is as waarmee die dokument oorspronklik geskryf is. Die dokument is op 24 Desember 1988 deur slegs die oorledene op die laaste bladsy daarvan onderteken. Die vormvereistes vir die behoorlike verlyding van 'n testament ooreenkomstig artikel 2(1)(a)(i–v) is dus nie nagekom nie. Die oorledene het nie die dokument in teenwoordigheid van getuies geteken nie, geen getuies het geteken nie en die oorledene het nie die eerste bladsy van die dokument geteken nie (202C).

Sekere aspekte in die *Logue*-saak was gemeensaak. Daar bestaan 'n geldige, behoorlik verlyde eerste testament (200H). Daar is na die dood van die erflater 'n dokument gevind (201G – hierna die "latere testament" genoem) wat oënskynlik ongeldig is omdat daar nie aan die formaliteitsvereistes voldoen word nie (202C). Dit blyk dat oor twee aspekte uitsluitsel gegee moet word:

(a) Die applikant doen by die hof aansoek om die dokument geldig te verklaar en die meester te gelas om dit as testament te aanvaar. Presies hoe die aansoek geformuleer was, is nie duidelik nie (sien 199I).

(b) Die meester was onseker oor "certain practical difficulties arising from the provisions of s 2(3) and 2A of the Wills Act 7 of 1953, which were introduced into the Act by the Law of Succession Amendment Act 43 of 1992" (200D).

Geen uitsluitsel word gegee oor die praktiese probleme wat die meester voorsien het nie. Die probleem was waarskynlik gesentreer om die belangrike vraag in welke volgorde die aansoeke gebring moet word. Die meester word egter gelas om met die dokument te handel soos bepaal in artikel 8(4) van die Boedelwet (204E). Artikel 8(4) bepaal dat

> "indien dit aan die Meester blyk dat so 'n dokument wat 'n testament is of heet te wees, om die een of ander rede ongeldig is, kan hy, ondanks registrasie daarvan ingevolge subartikel (3), weier om dit vir doeleindes van hierdie Wet te aanvaar totdat die Hof oor die geldigheid daarvan besluit het".

Die meester het getwyfel oor die geldigheid van die dokument aangesien die formaliteitsvereistes nie nagekom is nie en wag dus vir 'n hofbevel oor bedoelde geldigheid. Die meester se probleem was ongetwyfeld egter nie die bepalings van artikel 8(4) nie; hy was van mening dat sekere praktiese probleme bestaan oor die toepassing van artikels 2(3) en 2A. Die bepalings van artikel 8(4A) is ook belangrik in dié verband:

> "[B]y die neem van 'n besluit aangaande die aanvaarding van 'n testament vir die doeleindes van hierdie Wet neem die Meester die herroeping van 'n testament deur 'n latere testament in ag, maar nie die gemeenregtelike vermoedens aangaande die herroeping van 'n testament nie."

('n Bespreking van die uitwerking van artikel 8(4A) volg hieronder. Sien ook Schoeman 1992 *De Jure* 428.)

Ten opsigte van die aansoek deur die applikante om die dokument geldig te verklaar, beklemtoon die hof in eerste instansie die belangrikheid van die formaliteitsvereistes (202D–F 203F) maar bevind tereg dat die bedoeling van die erflater nie onderdruk of verydel moet word as gevolg van "tegnikaliteite" nie (203F). Die hof was wel op die feite voor hom oortuig (203G) dat die erflater bedoel het dat die dokument sy testament moet wees en verleen ingevolge artikel 2(3) 'n bevel dat die meester die dokument as testament moet aanvaar. Die hof bevind dat die bepalings van artikel 2(3) gebiedend eerder as aanwysend is (202G). Indien die hof daarmee bedoel dat hy die bevel *moet* verleen indien hy oortuig is dat dit die bedoeling van die oorledene was dat die dokument sy testament moet wees, is dit onses insiens korrek; en indien die verloop van die uitspraak was soos hierbo uiteengesit, sou dit na ons mening korrek gewees het. Die hof het egter reeds voor die toepassing van artikel 2(3) die eerste testament herroepe verklaar (200A 203D). Soos uit die bespreking hieronder sal blyk, was dit prosessueel verkeerd.

Die gevolg van 'n aanvanklike artikel 2(3)-bevel sou wees dat daar aan die latere testament ("dokument" – hierna a 2(3)-testament genoem) uitvoering gegee kan word. Ingestelde erfgename sal kan erf volgens die bepalings van dié testament, en die eksekuteur kan sy benoeming aanvaar. Belangrik is ook dat, omdat daar 'n geldige testament is, 'n herroepingsklousule in die latere artikel 2(3)-testament 'n vroeëre testament sal herroep. Soos hierbo aangehaal, magtig artikel 8(4A) van die Boedelwet die meester om by die herroeping van testamente die herroeping deur 'n latere testament in ag te neem. Indien die latere testament strydig met die vroeëre testament is, behoort dit die vroeëre testament stilswyend te herroep by gebrek aan 'n uitdruklike herroepingsklousule en in die mate wat dit onversoenbaar is, behoort die latere testament voorkeur te geniet. Hierdie is albei gemeenregtelike erkende herroepingswyses.

Dit wil lyk of die aansoek hier verkeerd geformuleer is "for an order declaring a will of a testator to have been revoked and directing the master to accept a certain document to be the will of such testator" (199I). Ons is van mening dat 'n artikel 2(3)-bevel herroeping tot gevolg sou hê en dat die aanwending van artikel 2A onnodig was.

Artikel 2A (soos hierbo aangehaal) sal ter sprake kom waar dit onduidelik is of 'n spesifieke herroepingswyse 'n erkende gemeenregtelike herroepingswyse

is. In die *Logue*-saak het die artikel 2(3)-bevel die aanwending van artikel 2A onnodig gemaak. Die aanwendingsmoontlikhede van artikel 2A word hieronder bespreek.

3 *Horn v Horn*

In die *Horn*-saak blyk dit uit die beperkte beskikbare feite dat die oorledene 'n selfmoordbrief gedateer 30 November 1993 nagelaat het wat skynbaar strydig met 'n vroeëre testament was asook 'n ander vel papier met onbekende inhoud. Die brief was nie 'n geldige testament nie. Dit is wel deur die oorledene onderteken (48I–J 49A) maar geen getuies was teenwoordig (48H) of het die brief geteken nie. 'n Vroeëre gesamentlike testament is in 1986 deur die oorledene en sy vrou verly (48H).

Die gerapporteerde saak is wel slegs 'n bevel *nisi* (48F) maar die kommentaar wat volg, is volgens die skrywers tog geregverdig. 'n Aansoek dien voor die hof om die selfmoordbrief as testament te kondoneer (48F) en verder dat die brief die vroeëre testament herroep (48H).

Die hof was van mening dat hy geen diskresie het om die bevel te verleen nie (49I). As daar feite soos in die onderhawige geval voor die hof is, is die bepalings volgens die hof gebiedend. Die bevindinge word gegrond op die bewoording in die Engelse teks: "[T]he Court shall order the Master to accept that document" (50B). Die hof kan onses insiens egter slegs artikel 2(3) en 2A toepas indien die hof telkens *oortuig is* dat die erflater bedoel het om te testeer of bedoel het om te herroep. Die hof het wel 'n diskresie om die bevel te verleen al dan nie maar die diskresie van die hof berus dan op die feit dat getuienis hom daarvan moet oortuig dat hy die regte bevel verleen. Dit blyk uit die hof se bevindinge dat die hof na aanvanklike twyfel tog oortuig was dat die oorledene bedoel het dat die dokument as sy testament moet dien. Daar word soos volg bevind (49I):

> "Nadat die uitspraak voorbehou is, het dit egter vir my al meer begin blyk dat die Hof ingevolge art 2(3) geen diskresie het nie. Die erflater het geteken; die dokument noem homself 'n 'testament' en is dit ook in strekking en toon in al die omstandighede die bedoeling dat dit as testament moes funksioneer."

Hier word eers 'n artikel 2(3)-bevel verleen (50F–G – die selfmoordbrief word gekondoneer as synde 'n testament) en daarna word artikel 2A toegepas (50G). Ook dié resultaat bring verwarring mee aangesien geen feite beskikbaar is oor die inhoud van die selfmoordbrief en die moontlikheid van stilswyende of uitdruklike herroeping nie. Soos in die *Logue*-saak is hier net een dokument (alhoewel daar na nog 'n dokument verwys word, is daar geen inligting oor die inhoud daarvan nie: 49C).

Indien aanvaar word dat die hof hier korrek te werk gegaan het deur eers artikel 2(3) toe te pas, is die volgende belangrike vraag of artikel 2A korrek aangewend is. Aangesien geen besonderhede oor die inhoud van die selfmoordbrief bekend is nie, kan die vraag na uitdruklike of stilswyende herroeping nie spesifiek beantwoord word nie. Daar kan egter geredeneer word dat die inhoud van die selfmoordbrief vanselfsprekend strydig was met die bepalings van die gesamentlike testament, anders sou daar geen rede wees om die selfmoordbrief

as testament te kondoneer nie. Soos reeds hierbo genoem, is artikel 2A op die wetboek geplaas om voorsiening te maak vir herroepingswyses waaroor daar nie sekerheid is nie omdat dit nie as een van die erkende gemeenregtelike herroepingswyses kwalifiseer nie. Die hof kan slegs van artikel 2A gebruik maak indien hy oortuig is dat die bedoeling om te herroep uit die selfmoordbrief blyk (sien 50D). Die moontlike toepaslike artikels is óf 2A(a) óf 2A(c). In die eerste geval sou dit moes blyk uit 'n geskrewe aanduiding op 'n testament dat die erflater bedoel het om sy testament of 'n gedeelte van die testament te herroep (die aanduiding sal iets anders moet wees as die inhoud van die testament); en in die tweede geval sou dit uit 'n ander dokument wat opgestel is of laat opstel is, moes blyk dat die erflater sy testament wil herroep. Indien die hof eers artikel 2(3) toepas en bevind dat die selfmoordbrief 'n testament is, sal artikel 2A(a) slegs toepassing vind indien daar 'n geskrewe aanduiding op "dieselfde testament" is. Artikel 2A(c) sal toepassing vind indien daar 'n herroepingsbedoeling blyk, aangesien die artikel 2(3)-testament nie langer as 'n dokument beskou kan word nie. Die hof beskou egter wel die selfmoordbrief (artikel 2(3)-testament) as dokument: "Dit wil my voorkom dat die 1993 dokument die 1986 testament kon herroep al is die 1993 dokument self nie 'n testament nie" (50D); die hof verwys dan na a 2A(c). Die stelling is as sodanig korrek maar in dié stadium was die selfmoordbrief reeds gekondoneer.

Daar moet toegegee word dat die volgorde waarin die artikels aangewend sal word, van die omstandighede sal afhang. Indien 'n dokument nie 'n testament is nie (daar word nie met die bemaking van bates, die omvang daarvan, of aanwys van bevoordeeldes gehandel nie) maar slegs die bedoeling bevat om 'n vroeëre testament te herroep, sal slegs artikel 2A(c) aanwending vind sonder 'n verdere bevel. Indien 'n testament self egter 'n aanduiding bevat om 'n vroeëre testament te herroep – iets anders as 'n herroepingsklousule – soos strepe of woorde voor of agter op die testament – sal artikel 2A(a) toepassing vind.

4 Samevatting

Die wenslikheid van die verlening van 'n kondonasiebevoegdheid is reeds bevraagteken. Daar is vroeër opgemerk dat die howe waarskynlik weer riglyne sal moet soek vir gevalle waar kondonasie wel verleen kan word (Schoeman "Enkele opmerkings oor die regskommissie se verslag insake die wysiging en herroeping van testamente" 1988 *De Jure* 141 ev). Probleme manifesteer nou reeds in die eerste twee gerapporteerde uitsprake. As die uitsprake geëvalueer word, blyk dit dat die hof dit as 'n leemte sien dat daar geen maatstawwe is waarvolgens geoordeel moet word nie (*Horn*-saak 50A). In die *Horn*-saak word die bewoording van artikel 2(3) soos volg gekritiseer (49F–G):

> "'n Ander vraag wat ontstaan, is waarom die woord 'al' in art 2(3) verskyn. Dit kan 'n poging wees om aan te dui dat, normaalweg altans, substansiële nakoming van die vormvereiste nodig sou wees of so nie 'n herkenbare poging om aan die Wet te voldoen. Anders sou ook die Engelse teks net kon sê: 'although it does not comply with the formalities'. As dit so sou wees dat 'n testament erken moet word as testament ondanks die grofheid van verontagsaming . . ., sou art 2(1) weglaatbaar wees want, weens art 2(3) word enige testamentêre beskikking wat die bewese handtekening van 'n kompetente erflater dra, as testament erken. Artikel 2(1) sou nie eers hoef te verwys na 'n handtekening nie want 'n 'konsep' wat

> opgestel is en wat (op die een of ander stadium?) bedoel was om as 'n testament te funksioneer moet erken word."

Welke substansiële vereistes volgens die hof nagekom moet word, is nie duidelik nie. Die wet vereis slegs 'n dokument. Skrif word dus as die enigste drempelvereiste gestel (Suid-Afrikaanse Regskommissie *Hersiening van die erfreg* (1991) par 2 29). Die hof hoef nie na verdere maatstawwe te soek nie. Wat wel deur die hof as belangrik geag word, is dat die erflater self die dokument geskryf het en dat dit ook die handtekening van die erflater dra (*Horn* 49I). Wat weer uit die *Logue*-saak blyk, is dat die handtekeninge van getuies skynbaar nie so belangrik is nie (202E–J) terwyl in die *Horn*-saak die hof tog van mening was dat die getuies moontlik 'n belangrike rol vervul (49E).

Daar word aanbeveel dat die bepalings van artikels 2(3) en 2A duidelik onderskei moet word. Dit kan wees dat beide in gegewe omstandighede aanwending vind, maar dit is nie noodwendig so nie. Gewoonlik sal kondonasie ingevolge artikel 2(3) tot gevolg hê dat die vroeëre testament deur die werking van die gekondoneerde testament ook herroep word. Die omstandighede en hoeveelheid dokumente ter sprake sal bepaal in welke volgorde die aansoeke gebring moet word.

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STEEDS 'N PAAR TEKSTUELE IKONE TEEN DIE REGSTAATLIKE MUUR

Kalla v The Master 1995 1 SA 261 (T)

Heelparty wanopvattings oor die aard van die konstitusionele grondverskuiwing wat sedert April verlede jaar plaasgevind het, kom deesdae na vore: 'n taxibestuurder verklaar prontuit tydens 'n televisieonderhoud dat daar mos nou 'n handves van menseregte is en dat almal nou mag doen wat hulle wil; 'n arbeidskenner pleit in 'n radioprogram dat die regering moet ingryp om die probleme rondom die nuwe arbeidswetsontwerp op te los, want daar is darem iets soos die "soewereiniteit van die parlement"; sommige wetstoepassers en staatsaanklaers is van mening dat hoofstuk 3 van die 1993-Grondwet veroorsaak het dat die handhawing van wet en orde heeltemal lamgelê is; 'n eertydse sekurokraat is egter glad nie bekommerd nie, want deur middel van die slim en gereelde toepassing van die beperkingsklousule (a 33(1)) sal niks regtig verander nie! Hierdie ekstreme persepsies beklemtoon die gebrek aan 'n *rights culture* in die Suid-Afrikaanse samelewing, wat (hopelik) met verloop van tyd sal verander.

Bogenoemde wanopvattings oor die wesenskenmerke van die 1993-Grondwet as die *lex fundamentalis* in die Suid-Afrikaanse regsorde is egter nie net tot die man in die straat beperk nie. Voor die inwerkingtreding van die 1993-Grondwet is daar reeds twyfel uitgespreek oor die moontlike onvermoë van die regbank in Suid-Afrika om die eise van 'n nuwe wets- en grondwetuitlegmetodiek die hoof te kan bied. Talle voorbeelde uit die stortvloed van grondwetlike regspraak sedert die begin van die nuwe grondwetlike bedeling het hierdie skeptisisme egter besweer (sien oa *Gardener v Whitaker* 1994 5 BCLR 19 (E), asook regter Cloete se indrukwekkende hantering van hierdie nuwe sistematiek in *Shabalala v Attorney-General, Transvaal*; *Gumede v Attorney-General, Transvaal* 1995 1 SA 608 (T)). Die aanmerkings van regter Van Dijkhorst in *Kalla v The Master* 1995 1 SA 261 (T) (asook sy uitspraak in *Du Plessis v De Klerk* 1994 6 BCLR 124 (T)), is egter 'n aanduiding dat die hele regbank nog nie ten volle vertroud is met die aard van die nuwe Suid-Afrikaanse regstaatlikheid nie.

Vir doeleindes van hierdie bespreking sal die feite van die saak bloot kortliks opgesom word. Die geskil het te make met die erflating van 'n sekere Mohamed Abdool Kalla. Kalla is gedurende 1922 in Suid-Afrika gebore en het permanent in die Republiek gewoon. Gedurende 1948 het hy volgens Islamitiese reg in Indië met die tweede respondent in die huwelik getree en gedurende 1950 na Suid-Afrika teruggekeer. Hy sterf op 1 April 1992 en op 14 Januarie 1994 het die Meester van die Hooggeregshof beslis dat die huwelik geldig is in Suid-Afrika. Op 10 Februarie 1994 rig die applikante (Kalla se enigste twee testate erfgename) 'n aansoek om die hersiening van die Meester se beslissing, en die geding was nog hangende met die inwerkingtreding van die 1993-Grondwet op 27 April 1994. Op grond van die appèlhofbeslissing in *Ismail v Ismail* 1983 1 SA 1006 (A), asook die feite van die onderhawige saak, wys regter Van Dijkhorst dan ook uit dat die poligame huwelik tussen wyle Kanna en die tweede respondent ongeldig was voordat die 1993-Grondwet in werking getree het. Die tweede respondent opper egter die argument dat aangesien die *mores* van die Suid-Afrikaanse samelewing verander het, die hof in die lig van artikel 14(1) van die Grondwet (wat godsdiensvryheid waarborg) moet beslis dat die *Ismail*-beslissing nie meer geld nie.

Soos die regter tereg opmerk, kom die terugwerkende toepassing van die 1993-Grondwet (en meer spesifiek a 241(8)) dus nou ter sprake. Sagkens gestel, is hierdie bepaling nie 'n toonbeeld van helderheid nie (sien oa *S v Shuma* 1994 4 SA 583 (OK) 589E). Die talle botsende hofbeslissings oor artikel 241(8) is seker die grootste nagmerrie vir diegene wat probeer byhou met die grondwetlike regspraak wat feitlik daagliks verskyn. In *S v Makwanyane* 1994 3 SA 868 (A) het die appèlhof beslis dat hierdie bepaling meer as een betekenis het, maar aangesien die appèlhof ingevolge artikel 101(5) van die Grondwet nie jurisdiksie oor grondwetlike aangeleenthede het nie, is die hele vraag aan die konstitusionele hof oorgelaat vir 'n beslissing. Artikel 241(8) (onder die opskrif **Oorgangsreëlings: Regsprekende gesag**) is deel van **Hoofstuk 15: Algemene en Oorgangsbepalings** en bepaal soos volg:

> "Alle verrigtinge wat onmiddellik voor die inwerkingtreding van hierdie Grondwet hangende was voor 'n geregshof, met inbegrip van 'n tribunaal of hersieningsgesag wat by of kragtens 'n wet ingestel is, wat jurisdiksie uitoefen ooreenkomstig die

> reg wat toe van krag was, word mee gehandel asof hierdie Grondwet nie aangeneem is nie. Met dien verstande dat indien 'n appèl in sodanige verrigtinge aangeteken word of hersieningsverrigtinge met betrekking daartoe ingestel word na genoemde inwerkingtreding, die verrigtinge voor die hof gebring moet word wat kragtens hierdie Grondwet jurisdiksie het."

Regter Van Dijkhorst kom tot die gevolgtrekking dat artikel 241(8) die terugwerkende toepassing van die Grondwet op hangende sake uitsluit. Met dié beslissing sluit hy hom aan by die groep beslissings (*S v Lombard* 1994 3 SA 776 (T); *S v Saib* 1994 4 SA 554 (D); *S v Ndima* 1994 4 SA 626 (D); *S v Vermaas* 1994 4 BCLR 18 (T); *S v Coetzee* 1994 4 BCLR 58 (W); *Mulaudzi v Chairman, Implementation Committee* 1995 1 SA 513 (V); *De Klerk v Du Plessis supra*) wat artikel 241(8) interpreteer as 'n arbitrêre afsnypunt: die Grondwet, insluitende die fundamentele regte in hoofstuk 3, is nie van toepassing op enige regsverrigtinge wat voor 27 April 1994 ontstaan het nie. Al die verskillende punte van kritiek teen die "afsnypunt"-benadering kan nie hier behandel word nie (sien veral Breitenbach "Raising constitutional issues in existing proceedings" *Juta's seminar on constitutional litigation: Procedure and practice* (Maart 1995) vir 'n breedvoerige bespreking van al die beslissings en standpunte oor a 241(8)). Daar moet egter toegegee word dat artikel 241(8) wel tot verskillende interpretasies aanleiding kon gegee het. Wat egter pla in die *Kalla*-beslissing, is nie soseer die hof se uiteindelike standpunt oor artikel 241(8) nie, maar wel die wets- en grondwetuitlegmetodiek waarmee die beslissing gestut word, asook die hof se gebrek aan begrip oor die aard en rol van die fundamentele regte in hoofstuk 3.

Die regter verklaar (266I) dat artikel 241(8) die enigste bepaling is wat van toepassing is op die kwessie van terugwerkendheid van die Grondwet. Hiermee kan nie saamgestem word nie. Afgesien van die res van artikel 241, moet artikels 101–103 noodwendig daarmee saamgelees word. Verder verplig artikel 35(3) enige hof om by die uitleg van alle wetgewing (insluitend die res van die Grondwet) die gees, strekking en oogmerk van hoofstuk 3 behoorlik in ag te neem. Die voorrede, artikel 4, die sogenaamde *postamble* en die grondwetlike beginsels speel in hierdie verband 'n belangrike rol, terwyl artikel 33(1) moontlik 'n beperkende invloed kan hê. Dat wetsbepalings nie in isolasie gelees en verstaan moet word nie, is tog 'n aanvaarde beginsel van wets- en grondwetuitleg (*Nasionale Vervoerkommissie v Salz Gossow* 1983 4 SA 344 (A); *Nyamakazi v President of Bophuthatswana* 1992 4 SA 540 (BGD) 556C; *Qozeleni v Minister of Law and Order* 1994 5 BCLR 75 (OK) 78G–79E; *Matiso v The Commanding Officer, Port Elizabeth Prison* 1994 3 BCLR 80 (SOK) 88H).

Regter Van Dijkhorst volg (269C–G) die ortodokse *plain meaning*-reël van wetsuitleg: Volgens hom is die belangrikste beginsel van wetsuitleg steeds om die bedoeling van die wetgewer te vind; gevolglik moet die uitlegger met die woorde begin en indien die teks dubbelsinnig blyk te wees, moet die reëls van wetsuitleg toegepas word; die gewone reëls van wetsuitleg vorm deel van die *law of the land* en is nie deur die Grondwet opgehef nie. Met hierdie formulering kan ongelukkig nie saamgestem word nie (sien ook *S v Shabalala supra* 618I):

(a) Die sogenaamde "bedoeling van die wetgewer" is sedert 27 April 1994 nie meer die belangrikste beginsel van uitleg nie. Die bedoelingsteorie is binne die raamwerk van parlementêre soewereiniteit vir jare al gekritiseer (Devenish *Interpretation of statutes* (1992) 25–35; CJ Botha "Interpreting the Constitution" 1994 *SAPR/PL* 259–261; Du Plessis *The interpretation of statutes* (1986) 31–39), en het nie enige bestaansreg onder 'n oppermagtige grondwet nie. Nou is dit die belangrikste beginsel om die doel en oogmerk van die wetgewing (of die "bedoeling van die wetgewer", as dit dan moet) vas te stel in die lig van die Grondwet in die algemeen en hoofstuk 3 in die besonder. Artikel 35(3) van die Grondwet, wat handel oor die interpretasie van wetgewing in die algemeen, bepaal soos volg:

> "By die uitleg van enige wet en die toepassing en ontwikkeling van die gemene reg en gewoontereg, neem 'n hof die gees, strekking en oogmerke van hierdie Hoofstuk behoorlik in ag."

Dit beteken dat alle howe tydens die interpretasie van alle wetgewing die doel en oogmerk daarvan moet beoordeel in die lig van hoofstuk 3 wat die fundamentele regte uiteensit: met ander woorde, *plain meanings* en sogenaamde duidelike tekste is nou nie meer voldoende nie. Onmiddellik word die relevante faktore en omstandighede *rondom die blote teks van die wetgewing* by die uitlegproses betrek. Met ander woorde, artikel 35(3) het die effek dat nog voordat die betrokke teks bestudeer word, die uitlegger reeds buite daardie teks met een voet binne hoofstuk 3 staan. Artikel 35(1) van die Grondwet bepaal egter dan die volgende ten opsigte van hoofstuk 3:

> "By die uitleg van die bepalings van hierdie Hoofstuk moet 'n geregshof die waardes wat 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid ten grondslag lê, bevorder en, waar van toepassing, die volkereg wat van toepassing is op die beskerming van die regte wat in hierdie Hoofstuk verskans is, in ag neem, en kan die hof vergelykbare buitelandse hofbeslissings in ag neem."

Kortliks gestel, moet die regbank tydens die uitleg van alle wetgewing die doel, gees en strekking van die hoofstuk oor fundamentele regte in ag neem (a 35(3)), maar om dit te kan doen, moet artikel 35(1) in ag geneem word (sien veral Kruger "Value judgments and section 35" 1995 *CILSA* 1–20). Die hof moet dus die relevante reëls van volkereg (veral die *international human rights law*) ondersoek, en indien wenslik, buitelandse hofsake wat oor soortgelyke bepalings handel. NJ Botha ("International law and the South African interim Constitution" 1994 *SAPR/PL* 249) wys egter daarop dat beslissings oor handveste van menseregte deur munisipale howe een van die bronne van *international human rights law* is. Streng gesproke het die Suid-Afrikaanse howe ingevolge artikel 35(1) nie 'n keuse nie: ook vergelykbare buitelandse hofbeslissings *moet* in ag geneem word tydens die uitleg van hoofstuk 3. Artikel 35(3) skep egter nog 'n interessante anomalie. Ingevolge artikel 101(4) en (5), saamgelees met artikel 98(2), is die appèlhof nie by magte om die Grondwet uit te lê nie. Artikel 35(1) en (3) het egter die noodwendige gevolg dat enige hof 'n mate van grondwetuitleg sal moet doen terwyl wetgewing in die lig van die gees, doel en strekking van hoofstuk 3 uitgelê word. Indien die appèlhof geensins enige grondwetuitleg mag doen nie, sou dit beteken dat die appèlhof vir alle praktiese doeleindes nooit sal mag sit nie, aangesien artikel 35 ook die ontwikkeling van die gemenereg en die

gewoontereg betrek. Afgesien van al die ander kritiek teen die uitsluiting van die appèlhof se konstitusionele jurisdiksie, is dit teoreties gesproke ook ongrondwetlik, omdat dit bots met artikel 35.

(b) Twee bepalings in die 1993-Grondwet skep 'n "vermoede van grondwetlikheid": artikel 35(2) bepaal dat waar wetgewing op die oog af ongrondwetlik is omdat dit op die oog af bots met die bepalings van *Hoofstuk 3*, en die betrokke bepaling(s) redelikerwys vatbaar is vir 'n meer beperkte interpretasie wat wel grondwetlik en dus geldig sal wees, sodanige beperkte betekenis gevolg behoort te word. Artikel 232(3) weer bepaal dat waar wetgewing op die oog af ongrondwetlik is omdat dit op die oog af bots met die bepalings van die *Grondwet in die algemeen* en die betrokke bepaling(s) redelikerwys vatbaar is vir 'n meer beperkte interpretasie wat wel grondwetlik en dus geldig sal wees, sodanige beperkte betekenis gevolg behoort te word. Saamgelees met artikel 4(1) en 35(3), kan bogenoemde bepalings dalk die gevaar van 'n "dubbelsinnigheid" en 'n sogenaamde "niksseggende" resultaat (*S v Lombard supra* 783A) vermy of uit die weg ruim.

(c) Myns insiens is dit te betwyfel of die lukrake stel epistomologiese stelreëls waarop die Suid-Afrikaanse reëls van wetsuitleg berus, die status van *law of the land* verdien (CJ Botha *Statutory interpretation* (1991) 1). Hoe dit ook al sy, die 1993-Grondwet as *lex fundamentalis* (en veral artikel 35(1) en (3)) het dit onherroeplik verander, indien nie afgeskaf nie. Regter Van Dijkhorst (269D) baseer die voortbestaan van die tradisionele reëls van wetsuitleg op artikel 33(3). Artikel 33(3) kan egter nouliks beskou word as gesag vir die handhawing van 'n besondere wetsuitlegmetodiek, aangesien dit die voortbestaan van bestaande regte en vryhede waarborg insoverre dit nie bots met hoofstuk 3 nie.

(d) Hierdie tradisionele wetsuitlegmetodiek het die regspositivisme en parlementêre soewereininteit as grondslag, en is dus nie versoenbaar met 'n menseregtebedeling, oppermagtige grondwet en die normatiewe basis van die 1993-Grondwet nie (sien Henk Botha "The values and principles underlying the 1993 Constitution" 1994 *SAPR/PL* 233).

(e) Alhoewel die howe steeds onseker is oor die verskille tussen 'n *generous*, *liberal* en *purposive* grondwetuitleg (sien oa *Government of the Republic of Namibia v Cultura 2000* 1994 1 SA 407 (NmSC); *S v Shabalala supra* 623H–J; *Phato v Attorney-General, Eastern Cape* 1994 5 BCLR 99 (OK) 107J–110F; *Qozeleni v Minister of Law and Order supra* 633G–I), moet die klem eerder val op die waardes en norme onderliggend aan die Grondwet. Labuschagne ("Regsnormvorming: riglyn vir 'n nuwe benadering tot die tradisionele reëls van wetsuitleg" 1989 *SAPR/PL* 211) bepleit tereg 'n normdoeldienende uitleg, wat nou binne die raamwerk van die 1993-Grondwet *grondwetlike* normdoeldienende uitleg moet wees. Aangesien die Grondwet se normatiewe basis waarde-oordele van die regbank sal verg, word 'n teleologiese uitlegbenadering vereis. Dit is dan veral 'n begrip vir die *telos* van die 1993-Grondwet wat in die onderhawige saak ontbreek.

(f) Die gemeenregtelike vermoede teen terugwerkendheid word gebruik om die "afsnypunt"-benadering ten opsigte van artikel 241(8) te ondersteun (269H–J). Met alle respek, ook hierdie argument toon 'n tekstuele onderbou. Die vermoede

teen terugwerkendheid het juis ten doel om te verhoed dat die individu se gevestigde regte aangetas of weggeneem word (Devenish 190–191). Die fundamentele regte sal egter bestaande regte versterk, sekere prosessuele en bewysregtelike remedies verbreed en selfs nuwe regte skep. Indien bestaande regte dalk deur die inwerkingtreding van die 1993-Grondwet aangetas kan word, sal dié steeds beskerming geniet deur veral die toepassing van die beperkingsklousule in artikel 33(1) (sien veral *Gardener v Whitaker supra* 25I–26E). Die rol van die gemeenregtelike uitlegvermoedens het ook sedert 27 April 1994 'n verandering ondergaan. Waar die vermoedens in die verlede in 'n groot mate deur die howe misken is en bloot 'n derderangse funksie tydens die uitlegproses vervul het, is Du Plessis (54) se standpunt dat die vermoedens die materiële *grundnorm* van die regsorde moet vervul het, nou verwesenlik. Die onderliggende beginsels van meeste van die vermoedens vind weerklank in die fundamentele regte. Daardie vermoedens (of gedeeltes daarvan) wat nie in hoofstuk 3 "weerspieël" word nie, is egter steeds weerlegbaar en moet in elk geval volgens artikel 35(3) in die lig van die gees en strekking van die fundamentele regte ontwikkel en toegepas word.

Regter Van Dijkhorst verklaar onomwonde (269G): "The meaning is plain." Die uitspraak is versier met talle tekstuele ikone: bedoeling van die wetgewer, *plain meanings*, dubbelsinnigheid, *Venter v R* 1907 TS 910, *Union Government v Mack* 1917 AD 731 en, helaas, Steyn.

Die konstitusionele hof het op 8 Junie 1995 in *Mhlungu v State* (CCT 25/94 ongerapporteer) beslis dat artikel 241(8) nie die terugwerkende toepassing van die Grondwet op hangende verrigtinge uitsluit nie. Gevolglik is die feit dat regter Van Dijkhorst die afsnypunt-benadering ten opsigte van artikel 241(8) gevolg het, van minder belang. Dit is egter die tekstueel-gebaseerde redes daarvoor wat pla. In politieke geledere heers 'n heftige debat oor die behoud al dan nie van simbole uit die vorige politieke era. Daar is myns insiens egter geen twyfel dat *Kalla v The Master* se tekstuele ikone nie teen die regstaatlike muur van die nuwe Suid-Afrika hoort nie, en so gou as moontlik verwyder moet word.

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DELIKTUELE ONREGMATIGHEID BY DIE NIE-NAKOMING VAN 'N STATUTÊRE VOORSKRIF

Knop v Johannesburg City Council 1995 2 SA 1 (A)

Die eiser het skadevergoeding van die verweerder geëis op grond daarvan dat laasgenoemde eersgenoemde se aansoek om onderverdeling van 'n erf goedgekeur het terwyl die onderverdeling in botsing was met die verweerder se dorpsbeplanningskema. Die eiser het sekere onkoste in verband met die ontwikkeling van die

erf aangegaan nadat die aansoek om onderverdeling goedgekeur is en poog nou om sy gevolglike ekonomiese verlies van die verweerder te verhaal. Die appèlhof bevestig die hof *a quo* se bevinding dat die eis van die hand gewys moet word, onder andere omdat die verweerder se goedkeuring van die gebrekkige aansoek nie op die verbreking van enige regsplig teenoor die eiser neergekom het nie – die verweerder het volgens die hof dus nie onregmatig opgetree nie.

Die beslissing handel oor die vraag na deliktuele onregmatigheid weens die nie-nakoming van 'n statutêre voorskrif (sien in die algemeen Neethling, Potgieter en Visser *Law of delict* (1994) 64–66). Soos bekend, word onregmatigheid in die Suid-Afrikaanse deliktereg basies aan die hand van die skending van 'n subjektiewe reg of die nie-nakoming van 'n regsplig bepaal. In beide hierdie gevalle is die algemene norm of maatstaf waarvolgens vasgestel word of die feitelike benadeling van 'n persoon regtens ongeoorloof is al dan nie, die *boni mores* of regsopvattings van die gemeenskap (*idem* 31 ev). Dit het nou reeds algemene praktyk geword om onregmatigheid by aanspreeklikheid weens 'n late, die veroorsaking van suiwer ekonomiese verlies (nalatige wanvoorstelling inbegrepe) en die nie-nakoming van 'n statutêre voorskrif met verwysing na die regsplig-benadering vas te stel. Die rede is waarskynlik, anders as wat normaalweg die geval is, dat die feitelike benadeling van 'n persoon in hierdie gevalle nie *prima facie* onregmatig is nie (sien egter die bespreking hieronder par 4) aangesien daar volgens die *boni mores* nóg 'n algemene regsplig is om benadeling van andere deur positiewe optrede te voorkom (Neethling, Potgieter en Visser 50 ev), nóg 'n algemene plig om suiwer ekonomiese verlies te vermy (*idem* 280 ev), nóg 'n algemene plig om deur nakoming van 'n statutêre voorskrif benadeling te verhinder. So 'n algemene plig sou waarskynlik 'n te swaar las op die gemeenskap plaas. Daarom moet in elke besondere geval bepaal word of daar 'n regsplig was om positief op te tree, suiwer ekonomiese verlies te vermy of 'n statutêre plig na te kom (*idem* 49).

In die lig hiervan verdien die volgende aspekte van die onderhawige saak vermelding of bespreking:

1 Appèlregter Botha (sien in die algemeen 19–25) maak dit duidelik dat dit in die huidige verband geen sin het om tussen *kwasie-judisiële* en suiwer *administratiewe* beslissings te onderskei nie; trouens, dit is volgens hoofregter Rumpff in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 834 nie moontlik om vaste reëls in verband met die bepaling van 'n regsplig neer te lê nie: "When in the past Judges have attempted to lay down rigid rules or classifications or categories they have later had to be abandoned" (aanhaling uit *Mutual Life & Citizens' Assurance Co Ltd v Evatt* [1971] 1 All ER 150 (PC) 162). Met betrekking tot die onregmatigheidsvraag val die klem daarom deurgaans op die omstandighede van die besondere geval, en, moet 'n mens byvoeg, op die algemene toepaslike deliksbeginsels. Dit is onnodig om verder hierop in te gaan en ons volstaan met die volgende *dictum* van regter Botha (24G–I):

> "In the present case, if it is assumed that the Council was negligent in exercising its statutory functions, the question whether it is liable in damages to the plaintiff must depend on the answer to the question whether its conduct was wrongful. In considering this question the nature of the Council's functions will certainly

> require close scrutiny. But in view of what has been said above, two observations must immediately be added. The first is that the nature of the functions is but one of the circumstances calling for consideration in this case; as always, to determine the issue of wrongfulness, all the circumstances of the case fall to be considered. The second is that, to determine the issue of wrongfulness, there is no point in straining to categorise the functions as either quasi-judicial or purely administrative."

2 Vir doeleindes van die onderhawige tipe geval maak appèlregter Botha tereg 'n duidelike onderskeid tussen onregmatigheid en nalatigheid. In hierdie verband verwys hy na die Engelsregtelike "duty of care"-leerstuk (26I ev). Hierdie leerstuk verg volgens die Engelse reg 'n tweeledige benadering om nalatigheid te bepaal. Eerstens word gevra of die verweerder teenoor die eiser 'n "duty of care" verskuldig was (die sogenaamde "duty issue" wat "policy based" is); en tweedens of daar 'n nie-nakoming ("breach") van daardie "duty" was (die sogenaamde "negligence issue"). Nou spreek dit eintlik vanself dat deur die gebruik van die "duty of care"-leerstuk in ons reg verwarring kan ontstaan tussen die toets vir onregmatigheid as die verbreking van 'n regsplig en dié vir nalatigheid. Om verwarring te voorkom, is dit dus beter om "regsplig" by onregmatigheid met "legal duty" te vertaal (sien ook Neethling, Potgieter en Visser 139–140). Net soos hoofregter Rumpff in die *Trust Bank*-saak *supra* 833–834, sluit appèlregter Botha (27D–I) soos volg hierby aan:

> "In the phraseology of our law the 'policy based or notional duty of care' is more appropriately expressed as a 'legal duty', in consonance with the requirement of wrongfulness as an element of delictual liability and the underlying concept of legal reprehensibility in respect of the causing of pure economic loss . . . [T]he enquiry into the existence of a legal duty is discrete from the enquiry into negligence . . . The existence of the legal duty to prevent loss is a conclusion of law depending on a consideration of all the circumstances of the case . . . The enquiry encompasses the application of the general criterion of reasonableness, having regard to the legal convictions of the community as assessed by the Court."

3 In verband met die onregmatigheidsvraag by die verbreking van 'n statutêre plig word soms gesê dat die verweerder aanspreeklik is indien hy sy statutêre bevoegdheid op 'n "nalatige" wyse uitgeoefen het en die eiser daardeur skade gely het. Soos reeds voorheen beklemtoon is (Neethling en Potgieter "Deliktuele aanspreeklikheid by die lasgewer-lashebber-verhouding" 1992 *THRHR* 311), gaan dit hier natuurlik (nog) nie om nalatigheid nie aangesien die oorskryding van die perke van statutêre bevoegdheid onregmatigheid betrek. In hierdie stadium is die vraag met ander woorde nie of die verweerder nalatig (skuldig) opgetree het nie, maar wel of hy deur onredelike optrede sy bevoegdhede oorskry en dus onregmatig gehandel het (vgl *Knop* 25B–26D; sien ook *Simon's Town Municipality v Dews* 1993 1 SA 191 (A) 196).

4 Appèlregter Botha maak vir doeleindes van 'n afleiding van onregmatigheid, 'n onderskeid tussen gevalle van saakbeskadiging en gevalle van suiwer ekonomiese verlies. Hy bevestig, soos reeds hierbo aangedui, dat die veroorsaking van suiwer ekonomiese verlies in teenstelling met saakbeskadiging nie *prima facie* onregmatig is nie. Hy stel dit soos volg (26E–I):

> "The point of distinction between the situation dealt with in that case [*Dews supra*] and the issue in the present one is this. In that case the negligent causing of a fire to spread to and damage the respondents' properties would undoubtedly have been found to have been wrongful, but for the possibility of a defence under s 87 of the Forestry Act being successfully invoked. *Prima facie* wrongfulness was manifest in the physical impact the appellant's conduct had on the corporeal property of the respondents . . . In the present case there is no such feature. The plaintiff is suing for the recovery of pure economic loss. He is in no position to rely on an inference of wrongfulness flowing from an allegation of physical damage to property (or injury to person)."

Hierdie standpunt verdien in die algemeen instemming omdat in die geval van suiwer ekonomiese verlies, soos reeds gesê, 'n *prima facie* afleiding van onregmatigheid 'n te swaar las op die gemeenskap sou plaas. Hierbenewens verskaf by saakbeskadiging die feitelike inwerking op die saak as beskermde regsgoed as 't ware 'n opsigtelike haak waaraan 'n onregmatigheidsoordeel geknoop kan word. 'n Klaarblyklike uitsondering op hierdie algemene beginsel is dat die feitelike inwerking op die werfkrag van 'n mededinger weens die nie-nakoming van 'n statutêre voorskrif *prima facie* onregmatig is (vgl Van Heerden en Neethling *Unlawful competition* (1995) 267 ev). Die rede hiervoor is dat 'n mens hier, net soos in die geval van saakbeskadiging, met die inwerking op 'n afgebakende regsobjek te make het op grond waarvan onregmatigheid afgelei kan word. (Sien in die algemeen Van Aswegen *Die sameloop van eise om skadevergoeding uit kontrakbreuk en delik* (LLD-proefskrif Unisa 1991) 146 117 ev.)

5 Aangesien die verbreking van 'n statutêre plig wat tot nadeel lei, hoogstens *prima facie* onregmatig kan wees, moet steeds uit die spesifieke bewoording van die betrokke statutêre bepaling vasgestel word of die nie-nakoming daarvan inderdaad as deliktuele onregmatigheid gebrandmerk kan word. Dit verg volgens regter Botha 'n ondersoek na die bedoeling van of oogmerk met die betrokke bepaling (31D):

> "The fundamental question, therefore, is this: did the legislator intend that the applicant should have a claim for damages in respect of loss caused by the negligence of the local authority?"

Vir doeleindes hiervan ondersoek die regter dan die betrokke statutêre voorskrifte en kom tot die volgende slotsom:

> "In my opinion the reasoning reflected in the above passages can be applied to the legislation under consideration in the present case, in conformity with the criteria in our law for determining whether or not the local authority owes a legal duty to an applicant for subdivision in respect of pure economic loss. As to the intention of the legislature, the fact that it has prescribed a particular form of procedure by which an aggrieved applicant can obtain relief against the refusal of his application shows by necessary implication that it did not intend a negligently incorrect refusal to give rise to an action for damages. As to the broader considerations of policy, on the one hand an aggrieved applicant does not need an action for damages to protect his interests; he has readily at hand the appeal procedure provided within the legislative framework. On the other hand, considerations of convenience militate strongly against allowing an action for damages; the threat of such an action would unduly hamper the expeditious consideration and disposal of applications by the local authority in the first instance. That is not to say that the local authority need not exercise due care in dealing with applications; of course it must, but the point is that it would be contrary to the objective criterion of reasonableness to hold the

> local authority liable for damages if it should turn out that it acted negligently in refusing an application, when the applicant has a convenient remedy at hand to obtain the approval he is seeking. To allow an action for damages in these circumstances would, I am convinced, offend the legal convictions of the community. (Compare *Minister of Law and Order v Kadir* [1995 1 SA 303 (A).]"

Alhoewel hierdie beredenering en slotsom volle instemming verdien, vind ons dit tog jammer dat die appèlhof nie direk na die tradisionele benadering tot die nie-nakoming van 'n statutêre voorskrif, soos uiteengesit in *Da Silva v Coutinho* 1971 3 SA 123 (A) 140, verwys nie. In laasgenoemde saak bevestig appèlregter Jansen McKerron (*The law of delict* (1971) 257 ev) se vereistes wat 'n persoon moet bewys ten einde met 'n deliktuele aksie gegrond op verbreking van 'n statutêre regsplig te slaag, te wete:

> "(1) the statute was intended to give a cause of action;
> (2) he was one of the persons for whose benefit the duty was imposed;
> (3) the damage was of the kind contemplated by the statute;
> (4) the defendant's conduct constituted a breach of the duty; and
> (5) the breach caused or materially contributed to the damage."

(Sien ook Van Heerden en Neethling 267–268; Van der Walt *Delict: principles and cases* (1979) 37 ev; Burchell *Principles of delict* (1993) 46; Neethling, Potgieter en Visser 65–66.)

Interessant genoeg pas appèlregter Botha in sy ondersoek in elk geval die primêre vereiste – naamlik of die statutêre bepaling beoog het om aan die eiser 'n privaatregtelike remedie te verskaf – toe. Ofskoon hy die eis tereg bloot om hierdie rede van die hand wys, moet in gedagte gehou word dat die ander vereistes wat McKerron noem in gepaste omstandighede steeds 'n nuttige rol by die onregmatigheidsvraag kan speel (sien *ibid*).

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REDELIKE DOKTER VERSUS REDELIKE PASIËNT

Castell v De Greef 1994 4 SA 408 (K)

1 Inleiding

Die tradisionele "redelike man-toets" vir nalatigheid is onvoldoende in gevalle waar die dader oor 'n eienskap van bedrewenheid of deskundigheid ten aansien van die beweerde nalatige optrede beskik. In sulke gevalle word gewoonlik gewerk met die toets van die "redelike deskundige" en waar die deskundige 'n dokter is, met die sogenaamde "redelike dokter". Hierdie "redelike dokter" is in alle opsigte soos die redelike man, maar dan aangevul deur 'n redelike mate van

die toepaslike deskundigheid. Die standaard van deskundigheid word as *redelik* beskryf omdat daar nie gewerk word met die hoogste mate van deskundigheid in die betrokke professie of beroep nie, maar met die algemene en gemiddelde vlak van deskundigheid wat daar heers (Neethling, Potgieter en Visser *Deliktereg* (1992) 129; *Castell v De Greef* 1993 3 SA 501 (K) 509G–H).

In die saak onder bespreking is die toetssteen van die "redelike dokter" aangewend met verwysing na twee verskillende vrae. Eerstens die vraag of die verweerder (respondent) die eiser (appellant) na behore ingelig of gewaarsku het rakende die wesenlike risiko's en komplikasies verbonde aan die operasie wat hy op haar uitgevoer het (419A). Hierdie vraag hou verband met the stelreël *volenti non fit iniuria* en bepaal of die toestemming deur die pasiënt (eiser) aan die dokter (verweerder) gegee, regsgeldige toestemming was wat *onregmatigheid*, en derhalwe ook aanspreeklikheid, aan die kant van die dokter uitgesluit het. Tweedens word die "redelike dokter-toets" aangewend om te bepaal of die dokter se optrede as *nalatig* aangemerk kan word. Dit is vir doeleindes van interpretasie van hierdie beslissing van uiterste belang dat hierdie twee toepassingsgebiede van die "redelike dokter" uitmekaar gehou sal word (425E–F).

2 Feite

Die verweerder (respondent), 'n plastiese chirurg, is deur die eiser (appellant) gedagvaar weens die nalatige wyse waarop hy 'n operasie op haar uitgevoer het. Die eiser het 'n familiegeskiedenis van borskanker gehad en nadat sy gewasse in haar borste begin kry het, is besluit om 'n mastektomie op haar uit te voer. Dit is belangrik om te weet dat daar twee metodes is waarop hierdie operasie uitgevoer kan word, elk met sy eie risiko's. Alhoewel die operasie 'n sukses was, het daar later infeksie in die wonde gekom en dit het bykomende pyn en ongemak veroorsaak. Omdat die infeksie in 'n laat stadium eers behandel is, het dit 'n verdere operasie genoodsaak. Die eiser dagvaar die geneesheer, Castell, vir R94 000 vir hierdie ekstra uitgawes, asook weens pyn en lyding. (Sien *Castell v De Greef* 1993 3 SA 501 (K) 502I–505D vir 'n opsomming van die feite.)

Regter Scott (hof *a quo*) wys die eis van die hand. Sy beslissing is hoofsaaklik gebaseer op afleidings van die mediese getuienis wat hy aangehoor het, asook op 'n gedeeltelike verwerping van die eiser se getuienis teenoor die aanvaarding van die verweerder se weergawe van die feite. Die eiser appelleer nou na 'n volbank van dieselfde hof.

Geriefshalwe sal deurlopend na beide die hof *a quo* (Scott R) en die volbank van die Kaapse Provinsiale Afdeling (Ackermann R) verwys word. Regter Ackermann baseer sy uitspraak op drie (feitelike) gronde vir nalatigheid (414F–416H) soos dit in die pleitstukke geformuleer is, naamlik:

(a) Verweerder se versuim om eiser te waarsku teen die wesenlike risiko's en komplikasies van die operasie;

(b) verweerder se versuim om die intrede van nekrose te voorkom of die omvang daarvan te beperk; en

(c) verweerder se versuim om die post-operatiewe infeksie behoorlik of betyds te behandel.

By die eerste grond vir nalatigheid moet die vraag of die eiser se toestemming tot die operasie regsgeldig was, beantwoord word vóór die moontlike nalatigheid aan die kant van die dokter ter sprake kan kom en gaan in paragrawe 3 en 4 bespreek word. Die ander twee gronde vir nalatigheid sal kortliks in paragraaf 5 behandel word.

3 *Volenti non fit iniuria*

Wanneer 'n wilsbevoegde persoon regsgeldig toestemming gee dat hy benadeel mag word, geskied die benadeling regmatig. Die toestemming kan dus deur die dader as regverdigingsgrond aangebied word indien die benadeelde hom aanspreeklik wil hou vir die skade wat uit sy optrede voortvloei (Neethling, Potgieter en Visser 90). Toestemming, soos uitgedruk in die stelreël *volenti non fit iniuria,* kan twee verskyningsvorme aanneem: *toestemming tot benadeling* en *toestemming tot die risiko van benadeling.* Waar eersgenoemde toestemming tot 'n spesifieke benadeling inhou, word in laasgenoemde geval eerder toegestem tot die *risiko* dat die optrede van die dader *moontlik* benadeling kan inhou (*idem* 91). In die saak onder bespreking het laasgenoemde verskyningsvorm van *volenti* ter sprake gekom.

Die vereistes vir regsgeldige toestemming word soos volg deur regter Ackermann (met verwysing na Van Oosten *The doctrine of informed consent in medical law* (1989) 13–25) opgesom (425H–I):

(a) Die toestemmende persoon moet kennis gedra en bewus gewees het van die aard en omvang van die benadeling of risiko;

(b) die toestemmende persoon moet waardeer en verstaan het wat die aard en omvang van die benadeling of risiko is;

(c) die toestemmende persoon moet toegestem het tot die benadeling of die risiko aanvaar het; en

(d) die toestemming moet volledig gewees het, met ander woorde van toepassing wees op die geheel van die ooreenkoms, met insluiting van al sy gevolge.

4 "Redelike dokter" en toestemming

Daar word algemeen aanvaar dat daar in *sekere omstandighede* 'n plig op 'n dokter rus om sy pasiënt in te lig of te waarsku aangaande die risiko's betrokke by 'n operasie of ander mediese behandeling. Die probleem is egter om te bepaal (a) *wanneer hierdie plig tot waarskuwing ontstaan* en (b) *wat die aard en omvang van die waarskuwing moet wees* (416J–417A).

Met verwysing na (a) haal regter Ackermann uit *Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T) 721B en 721C–E aan:

> "I do not pretend to lay down any such general rule; but it seems to me, and this is as far as I need go for purposes of a decision in the present case, that a therapist, not called upon to act in an emergency involving a matter of life or death . . . must explain the situation and resultant dangers to the patient . . ." (417E–F).

En:

> "In such cases where it is frequently a matter of life and death I do not intend to express any opinion as to whether it is the surgeon's duty to point out to the patient

> all the possible injuries which might result from the operation, but in a case of this nature . . . in order to effect a possible cure for a neurotic condition, I have no doubt that a patient should be informed of the serious risks he does run" (417G–H).

Uit hierdie aanhalings kan 'n mens aflei dat daar in 'n *noodgeval* heel waarskynlik nie 'n streng plig op die dokter sal rus om die pasiënt vooraf in te lig nie. In ander gevalle rus daar egter wel 'n plig op 'n dokter om sy pasiënt in te lig of te waarsku aangaande die risiko's verbonde aan die operasie of mediese behandeling. Daar bestaan nietemin nie duidelikheid oor wat die aard en omvang van hierdie waarskuwing (b) moet wees nie (419A). Regter Ackermann verwys hier na die toepassing van die sogenaamde terapeutiese of geneeskundige privilegie ("therapeutic privilege") van die geneesheer. Hierdie privilegie het ten doel om gesondheidswerkers te magtig om inligting van pasiënte te weerhou wat hulle as teen-terapeuties en dus nadelig vir die spesifieke pasiënt beskou (418D–E).

Regter Ackermann ag dit nie nodig om hom verder hieroor uit te laat nie aangesien die dokter in hierdie saak nie op die privilegie gesteun het nie (418G). Hy meen egter dat dit wel verband hou met die wyer debat aangaande toestemming tot mediese behandeling en die vraag of die klem geplaas moet word op die *outonomie* en *reg op selfbeskikking* van die pasiënt in die lig van al die feite, en of die klem eerder geplaas moet word op die *reg van die mediese professie* om te bepaal wat die betekenis van redelike bekendmaking van inligting is (418G–H). Die vraag is dus of die aard en omvang van die waarskuwing wat gegee moet word, uit die oogpunt van 'n *redelike dokter* bepaal moet word of uit die oogpunt van 'n *redelike pasiënt*.

Regter Scott in die hof *a quo* (517H–I) aanvaar die redelike dokter-toets soos dit deur regter Watermeyer in *Richter v Estate Hammann* 1976 3 SA 226 (K) 232H aangewend is:

> "[I]t seems to me in principle that his conduct should be tested by the standard of the reasonable doctor faced with the particular problem. In reaching a conclusion a Court should be guided by medical opinion as to what a reasonable doctor, having regard to all the circumstances of the particular case, should or should not do."

Regter Scott beslis dat die redelike dokter-toets goed ingeburger is in ons reg en soepel genoeg is dat dit, indien na behore aangewend, nie die gevolg sal hê dat die bepaling van 'n regsplig slegs by die dokter berus nie. Hy verwerp die leerstuk van ingeligte kennis ("informed consent") in navolging van die uitspraak van die House of Lords in *Sidaway v Bethlem Royal Hospital Governers* [1985] 1 All ER 643. Volgens die *leerstuk van ingeligte kennis* sal 'n pasiënt se toestemming tot mediese behandeling ongeldig wees indien hy nie genoegsame inligting aangaande die voorgestelde behandeling ontvang het nie. Onderworpe aan 'n aantal uitsonderings word die mate van inligting wat hy moet ontvang, bepaal nie met verwysing na die inligting wat 'n redelike dokter bekend sou gemaak het nie, maar met verwysing na die waarde wat 'n verstandige ("prudent") pasiënt waarskynlik aan die inligting sou heg in sy besluitneming of hy die behandeling moet ondergaan of nie (518C–E). Regter Scott aanvaar dat enige redelike dokter sy pasiënt na behore sal inlig aangaande alle risiko's en dat daar in elk geval nie van 'n dokter verwag kan word om sy pasiënt op dieselfde vlak van kennis te bring as wat hyself het nie (518E–I). Regter Ackermann verskil egter met regter Scott op hierdie punt (418J).

Regter Ackermann maak 'n duidelike onderskeid tussen die "redelike dokter" met verwysing na die standaard van bekendmaking (419A) en die "redelike dokter" met verwysing na die bepaling van nalatigheid (425E–F 423B–C). Regter Scott pas dieselfde redelike dokter-toets in beide gevalle toe. Wat eersgenoemde geval betref, het die toets volgens regter Ackermann nog nie veel aandag in ons reg geniet nie. Regter Ackermann is egter nie oortuig dat die tradisionele redelike dokter-toets in hierdie gevalle nie daartoe sal lei dat die bepaling van die regsplig aan die oordeel van die dokter alleen oorgelaat word nie (419C). Hy meen dat daar nie alleen regverdiging vir 'n ander benadering is nie maar dat dit inderdaad 'n noodsaaklikheid geword het om 'n pasiënt-georiënteerde benadering in hierdie gevalle te volg (420G–H). Hy baseer hierdie mening op veral drie gronde, naamlik (i) dat regsgeldige toestemming in die Suid-Afrikaanse reg (anders as in die Engelse reg) 'n andersins deliktueel onregmatige optrede kan regverdig (420H–I); (ii) die belang van die fundamentele reg op selfbeskikking (420J–422E); en (iii) die ontwikkeling in ander lande op dieselfde gebied (422E–425F).

Wat (i) betref, is reeds daarop gewys dat die toepassing van die "redelike dokter" by *volenti non fit iniuria* anders hanteer moet word as by gevalle waar getoets word vir nalatigheid. Indien die toestemming van die pasiënt as regsgeldig aanvaar word, word die andersins onregmatige optrede van die dokter geregverdig en kan hy nie aanspreeklik gehou word vir die nadelige gevolge wat daaruit kan voortspruit nie.

Wat (ii) betref, beslis regter Ackermann dat dit duidelik die pasiënt se keuse in die uitvoering van sy reg op selfbeskikking is om te besluit of hy/sy die operasie wil ondergaan (420J). Regter Ackermann kritiseer ook die terapeutiese privilegie in hierdie konteks. Hy gaan sover as om te sê dat indien 'n dokter sou weet dat sy vroulike pasiënt nooit sal toestem tot 'n mastektomie nie, en hy en die hele mediese professie oortuig is dat dit die enigste wyse is waarop haar lewe gered kan word, dit die dokter nog steeds nie 'n reg gee om die risiko hieraan verbonde van sy pasiënt te weerhou nie (421A–D):

> "I cannot conceive how the 'best interests of the patient' (as seen through the eyes of her physician or the entire medical profession, for that matter) could justify a mastectomy or any other life-saving procedure which entailed a high risk of the patient losing a breast. Even if the risk of breast-loss were insignificant, a life-saving operation which entailed such risk would be wrongful if the surgeon refrains from drawing the risk to his patient's attention, well knowing that she would refuse consent if informed of the risk. It is, in principle, wholly irrelevant that her attitude is, in the eyes of the entire medical profession, grossly unreasonable, because her rights of bodily integrity and autonomous moral agency entitle her to refuse medical treatment" (421B–D).

Regter Ackermann haal op hierdie punt met goedkeuring aan uit Giesen *International medical malpractice law* (1988). Giesen 297 verwys na twee pasiënt-georiënteerde benaderings wat toegepas kan word:

(a) Die "objektiewe" of "redelike" pasiënt-benadering, gebaseer op die behoefte aan inligting van die hipotetiese "redelike" pasiënt en dit wat die dokter van sy pasiënt se omstandighede weet of behoort te weet; of

(b) die individuele of "subjektiewe" pasiënt-benadering, waar die dokter daardie inligting moet bekend maak wat hy weet of behoort te weet deur sy spesifieke pasiënt in daardie besondere omstandighede vereis sal word (421E–G).

Giesen 303–305 stel voor dat 'n kombinasie van bogenoemde twee benaderings gevolg word. Die redelike pasiënt se *minimum behoeftes* kan as uitgangspunt gebruik word, aangevul deur die individuele pasiënt se *addisionele behoeftes.* Volgens hom moet die reg van die pasiënt om sy eie besluite met betrekking tot sy liggaam te neem, gewaarborg word selfs waar die individuele pasiënt verskil van wat die mediese professie of enige iemand anders meen 'n "redelike" pasiënt moet doen. Die pasiënt het 'n reg om anders te wil wees; hy het 'n reg om verkeerd te wees (421G–J).

Wat (iii) betref, verwys regter Ackermann onder andere na navorsing wat deur Giesen en Van Oosten gedoen is, asook na die belangrike uitspraak *Rogers v Whitaker* (1993) 67 ALJR 47 in die High Court van Australië. Volgens Giesen 295 word in beide Duitsland en Switserland die pasiënt se mensereg om self te besluit wat met sy liggaam gedoen moet word, as uitgangspunt geneem, en hierdie beginsel word in geen opsig beperk deur die paternalistiese toepassing van die terapeutiese privilegie van die dokter nie. Die plig van die dokter om die pasiënt in te lig, verseker dat die pasiënt 'n ingeligte besluit kan neem (422E–G). Van Oosten 414 kom tot die volgende slotsom na die bestudering van die "leerstuk van ingeligte kennis" in die Suid-Afrikaanse, Engelse en Wes-Duitse reg (423H–I):

> "When it comes to a straight choice between patient autonomy and medical paternalism, there can be little doubt that the former is decidedly more in conformity with contemporary notions of and emphasis on human rights and individual freedoms . . . The fundamental principle of self-determination puts the decision to undergo or refuse a medical intervention squarely where it belongs, namely with the patient."

Regter Ackermann steun in sy beslissing sterk op die volgende uitspraak wat deur die hof in *Rogers v Whitaker supra* 52 gemaak is (426C):

> "The law should recognise that a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it. This duty is subject to the therapeutic privilege."

Volgens regter Ackermann behoort die Suid-Afrikaanse reg die uitspraak in *Rogers v Whitaker* te volg, soos aangepas vir die besondere behoeftes van die Suid-Afrikaanse regsleer. Hierdie uitspraak is volgens hom in ooreenstemming met die fundamentele reg op individuele outonomie en selfbeskikking waarheen die Suid-Afrikaanse reg besig is om te beweeg. Hierdie omskrywing staan ook lynreg teenoor paternalisme waarvan ons reg besig is om weg te beweeg. Dit is in ooreenstemming met sowel die ontwikkelings in die *common law*-lande soos Kanada, die Verenigde State van Amerika en Australië, as regspraak in Europa (426D–F).

Regter Ackermann kom dan tot die volgende gevolgtrekking (426F–H) wat betref die *nuwe benadering of standaard ten opsigte van die plig van die dokter om sy pasiënt in te lig*: Voordat 'n pasiënt se toestemming tot mediese behandeling as regverdigingsgrond wat onregmatigheid uitsluit deur die dokter geopper kan word, moet die dokter die toestemmende pasiënt ingelig het oor enige wesenlike ("material") risiko's verbonde aan die voorgestelde behandeling; 'n risiko is wesenlik indien, in die omstandighede van die besondere geval –

(a) 'n redelike persoon in die pasiënt se posisie, as hy/sy aangaande die risiko ingelig sou word, waarskynlik waarde daaraan sal heg; of

(b) die dokter bewus is of redelikerwys bewus behoort te wees daarvan dat die spesifieke pasiënt, as hy/sy aangaande die risiko ingelig sou word, waarskynlik waarde daaraan sal heg.

Hierdie nuwe benadering moet volgens regter Ackermann onderworpe aan die terapeutiese privilegie toegepas word, "whatever the ambit of the so-called 'privilege' may today still be" (426H). Indien regter Ackermann se uitspraak en opmerkings oor die terapeutiese privilegie in die geheel gelees word, wil dit voorkom of hy in die lig van die huidige ontwikkelings in ons reg nie positief oor die toepassing van hierdie privilegie voel nie. Dit is egter duidelik dat hy hom nie finaal *teen* die toepassing van die privilegie in ons reg wil uitspreek nie.

Verder sal deskundige mediese getuienis, soos geïnterpreteer deur die howe, relevant wees om te bepaal watter risiko's met spesifieke mediese behandeling verband hou (426H–I). Regter Ackermann identifiseer vervolgens op grond van die mediese getuienis vyf wesenlike risiko's waarvan die eiser ingelig moes gewees het om haar toestemming regsgeldig te maak (427B–G). Hy bevind dat al vyf hierdie wesenlike risiko's wel deur die verweerder aan haar bekend gemaak is en dat haar toestemming derhalwe regsgeldig was (427H–430I). Hieruit kan dus afgelei word dat die eerste grond vir nalatigheid (aanspreeklikheid) nie slaag nie, aangesien die toestemming van die eiser regsgeldig was en die dokter derhalwe nie onregmatig gehandel het nie toe hy die operasie op haar uitgevoer het.

5 "Redelike dokter" en nalatigheid

By die bepaling of die verweerder se optrede as nalatig aangemerk kan word op grond van die tweede en derde gronde, maak regter Ackermann gebruik van die tradisionele benadering met betrekking tot die "redelike dokter" (soos bespreek in par 1 hierbo). Hy baseer sy beslissing hoofsaaklik op die deskundige mediese getuienis en kom dan tot die slotsom dat die dokter se optrede nie as nalatig aangemerk kan word wat die nekroses betref nie (430J–434I), maar wel wat sy behandeling van die infeksie betref (434J–440G). Hy bevind egter dat daar nie 'n nou genoeg (kousale) verband op grond van die getuienis bewys is tussen die verweerder se nalatige optrede en die latere operasie wat sy moes ondergaan nie (440I–J). Die hof staan egter wel vergoeding toe vir haar pyn en lyding gedurende daardie tydperk wat die dokter nalatig was met sy behandeling van die infeksie (441A–D).

6 Slotsom

Die belang van hierdie beslissing lê veral daarin dat regter Ackermann (i) 'n duidelike onderskeid maak tussen die toepassing van die "redelike dokter" in die bepaling van nalatigheid *en* die vraag of daar regsgeldige toestemming was; (ii) die klem nou plaas op die reg op selfbeskikking van die pasiënt in teenstelling met die sogenaamde terapeutiese privilegie van die dokter; en, (iii) in die lig hiervan, 'n duidelike omskrywing gee van die benadering wat gevolg moet word ten opsigte van die plig van 'n geneesheer om sy pasiënt in te lig. Die benadering in (ii) kan veral van belang wees in die debat rakende aborsie en die vraag of daar enige beperkinge geplaas mag word op die pasiënt (moeder) se reg op selfbeskikking.

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The bond between husband and wife may be equally as strong as that between mother and child. Marriages are almost invariably entered into by parties who have deep affection for one another and who intend to devote the remainder of their lives together. Although the condition of matrimony does not, as a concept of law, make the spouses one flesh – una caro – *it nonetheless embodies the obligations to found a home, to cohabit, to have children and to live together as a family unit. It is the most fundamental institution known to mankind – 'the first step from barbarism' and 'the true basis of human progress'* (per Gubbay CJ in *Rattigan v Chief Immigration Officer, Zimbabwe* 1995 2 SA 182 (ZS) 189).

BOEKE

BUTTERWORTHS LAW REPORTS: LABOUR LAW
by AT MYBURGH, J GOLDBERG, CM DE VILLIERS
and RB WADE (managing editors)
Butterworths Durban
Price R456,00 (12 month subscription)

People active in the rapidly growing field of labour law in this country are somewhat set in their ways. They talk a language all of their own, refer to decisions and legislation other academics and practising lawyers avoid like the plague and they read certain journals. Being creatures of habit they have also grown used to citing decisions of certain courts in a certain way.

The following citation may serve as an example: *National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd* 1994 15 *ILJ* 1005 (LAC). The abbreviation *ILJ* stands for the *Industrial Law Journal*, a publication of Juta & Co that turns sixteen in 1995. The relatively new *Butterworths Law Reports* labour law series (which, for the sake of brevity, will also be referred to as the *Butterworths Labour Law Reports*) finds itself in direct competition with this sturdy sixteen-year-old.

There is, at this point, something wistful about reviewing a publication devoted to the reporting largely of judgments handed down in the industrial court. The new Draft Labour Relations Bill foresees the demise of the industrial court as we know it. What, one cannot help but ask, will be reported in the *Butterworths Labour Law Reports* once the industrial court, now in its death-throes, painful to watch, finally gives up the ghost and is buried in the sands of time?

The reporting of industrial court decisions started in 1980 (in Juta & Co's *Industrial Law Journal*). The Wiehahn Commission's vision of the role of the revamped industrial court made the extensive reporting of decisions necessary. In accepting the proposals of the Wiehahn Commission, the government of the time agreed with the commission that the industrial court would "develop a body of case laws [*sic*] which would by judicial precedent contribute to the formulation of fair employment guidelines". This the industrial court would do in terms of a definition of the unfair labour practice (in terms of amendments to the predecessor of the Labour Relations Act in 1979) as being any labour practice that in the opinion of the industrial court is unfair. This extremely wide definition meant that the industrial court would not only determine unfair labour

practices (dispute resolution), but would also be performing what some commentators at the time called a "legislative" function (Reichman and Mureinik "Unfair labour practices" 1980 *ILJ* 22). The court would be performing this legislative function by defining unfair labour practices – this process in turn leading to the establishment of a code of fair labour practices through judicial precedent. The Industrial Conciliation Amendment Act 95 of 1980 introduced a definition of the unfair labour practice not dissimilar to the one still tenaciously clinging to life in the not-yet-quite-dead Labour Relations Act 28 of 1956 as amended. The definition contained a more extensive statutory definition of the unfair labour practice, essentially as any labour practice or change in labour practice which unfairly affects the employment opportunities, work security or welfare of employees, which unfairly affects the business of any employer, which promotes labour unrest or which detrimentally affects the relationship between employees and employers. The introduction of this statutory definition led the commentators to state that the legislative function of the industrial court had fallen away (Mureinik "Unfair labour practices: update" 1980 *ILJ* 117).

But the industrial court used the 1980 definition as the foundation for an extensive, technical, complex, and sometimes contradictory jurisprudence covering aspects of South African labour law. Perhaps the most significant in this regard is the development of the unfair dismissal jurisprudence, originally based almost exclusively on international labour standards. (It is, to an extent, surprising that the industrial court chose to adopt the conceptual structures of conventions and recommendations of the International Labour Organisation (ILO) even though South Africa was at the time not a member of the ILO, and at a time when the relationship between the South African government and the ILO was distinctly troubled.)

Through a large number of cases, the industrial court has virtually single handedly, *made* law in several respects, assisted here and there by the commentaries and suggestions of leading academic labour lawyers. In this law-making process, the role of the reporting of decisions should not be underestimated. Decisions were reported, commented upon, further decisions made, which either followed earlier principles or re-wrote the contours of our law. The piece-meal development of labour law has several disadvantages, the lack of coherence being the most often cited.

Throughout this creative process, the *Industrial Law Journal* was where it all happened: cases were reported, academic commentaries and articles appeared, cases were analysed and discussed and some issues debated. Even as early as 1984, it had become clear that Juta & Co's *Industrial Law Journal* had become *the* labour law journal in South Africa.

In this context, the *Butterworths Labour Law Reports* have their work cut out, because they are competing with a journal that has an established reputation and a set place in South African labour law.

For the purposes of review, we were supplied with Issue No 7 of 1994 (July). Apparently, these reports are to appear on a monthly basis. If the size of the July issue is anything to go by (in total 129 pages), this would mean a total of about 1500 odd pages per year, a figure similar to the annual size of the *Industrial Law*

Journal. These being reports of court decisions, the traditional volume number of a journal has been done away with.

Generally, the *Butterworths Labour Law Reports* make a good impression: the reports of decisions are presented as they are. The editors state clearly that judgments are not edited (this saves time), but are printed in the form in which they are released for publication. This focus on speed of publication is commendable, even though it has the (inadvertent) effect of subjecting readers to the poor style of the judgments (this is, of course, outside the sphere of responsibility of the editors!).

A table of contents and an index also help the reader find what he or she is looking for. An additional (and very helpful) feature is an editorial which contains a summary of both the facts of a case and the decision of the court. In this editorial, cases are organised in terms of the topic covered, such as dismissal for misconduct, retrenchment, constructive dismissal, strikes and collective bargaining. Additional (and detailed) summaries appear at the beginning of each case report – these summaries being more detailed than those appearing in the *Industrial Law Journal*.

These helpful features enhance the usefulness of the reports, making this a publication with easy, effective and speedy access to the information contained between the covers. No academic articles or commentaries appear in this publication, however. Should one therefore be interested in reading comments and ideas of academic lawyers and others involved in labour law, one would still need to peruse the familiar pages of the *Industrial Law Journal*.

A brief comparison indicates that the cases reported in the July 1994 *Butterworths Labour Law Reports* do not appear in those 1994 issues of the *Industrial Law Journal* that are available at this stage. The review copy did not disclose any principles of editorial policy – it is therefore not clear whether the aim of the *Butterworths Labour Law Reports* is to report only those cases that do not make it onto the pages of the *Industrial Law Journal*, or in fact to duplicate the reports of the *Industrial Law Journal*. While the first approach entails the potential danger of reporting only relatively marginal cases (those deemed not important enough to be taken up in the *ILJ*), the second approach implies a wasteful duplication.

The cases reported in the July 1994 issue of the *Butterworths Labour Law Reports* date from the end of January to May 1994. In other words, the greatest difference between the date of judgment and publication in the July 1994 issue was 6 months, which, considering the sometimes haphazard manner in which copies of decisions are distributed, is relatively efficient. This impression of efficiency is enhanced by the fact that by far the majority of the judgments reported in the July 1994 issue were in fact handed down in May 1994 (a difference of about one and a half months between date of judgment and date of publication).

The success of the *Butterworths Labour Law Reports* depends on the niche it will be able to carve for itself on the already cramped bookshelves of labour practitioners and academics. As an alternative source of reports of judgments,

this speedy reporting will no doubt gladden the hearts of all those who have reached a stage beyond exasperation at the familiar frustrating delays in the publication of the *Industrial Law Journal*. If the *Butterworths Labour Law Reports* succeed in providing quick and easy access to judgments handed down, and if the judgments reported are not merely those not reported in the *Industrial Law Journal*, this young publication may indeed succeed in giving the sixteen year old journal some stiff competition.

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BASIC PRINCIPLES OF CONSUMER CREDIT LAW
deur NJ GROVÉ en L JACOBS
Juta Kaapstad Wetton Johannesburg 1993; xvi en 112 bl
Prys R60,00 (sagteband)

Die skrywers beoog met hierdie werk om 'n oorsig van die basiese beginsels van verbruikerskredietreg te gee aan regsgeleerdes en studente wat onbekend met hierdie deel van die reg is. Voorwaar geen maklike taak nie! Die reg insake verbruikerskrediet is sekerlik een van die ingewikkeldste regsgebiede. Soos die skrywers dit stel (2): "Consumer-credit legislation is complicated. It is extremely technical in nature, difficult to comprehend and difficult to apply in practice." Daar is nie net drie wette betrokke nie maar ook regulasies wat ingevolge hierdie wette uitgevaardig is. Die wetgewing wat ter sprake is, is die Woekerwet 73 van 1968, die Wet op Kredietooreenkomste 75 van 1980 en die Wet op die Vervreemding van Grond 68 van 1981. Hierdie wetgewing moet verder teen die agtergrond van die algemene beginsels van die kontraktereg en die reëling van sekere spesifieke kontrakte (koop-, huur-, diens- en geldleningskontrak) gelees word.

Ten spyte van die ingewikkeldheid van die regsgebied, slaag die skrywers inderdaad daarin om 'n oorsig van die verbruikerskredietreg op so 'n wyse te gee dat dit verstaanbaar vir die oningewyde leser is. Dit gaan vir die skrywers nie net om die oordra van inligting nie maar ook om 'n begrip van hierdie moeilike regsgebied by die leser te kweek. Die skrywers huiwer verder nie om kritiek uit te spreek waar die wette gebreke toon nie. Die jarelange ervaring wat die skrywers opgedoen het by die dosering van die verbruikerskredietreg aan studente blyk duidelik uit die skrywers se werkswyse. Die teks is duidelik en sover moontlik vry van onnodige detail. Vele van die verdere verduidelikings en opmerkings om diepere insig te bewerkstellig, word in die voetnotas geakkommodeer. Dikwels gaan 'n vraag die verduidelikings in die teks vooraf – 'n styl wat algemeen by klasgee gebruik word. Verskeie voorbeelde word waar nodig gebruik om die regsposisie en rekeningkundige berekeningsmetodes te

verduidelik. Ook die privaatregtelike agtergrond van die wetgewende bepalings word bespreek waar dit nodig is om hulle in perspektief te plaas. Die skrywers maak ten laaste vryelik gebruik van opskrifte. Uiteindelik dra al hierdie metodes daartoe by dat die skrywers in hulle doel slaag.

Hoofstuk 1, wat 'n inleiding is, handel oor die funksie van krediet, verbruikerskrediet en -beskerming en 'n historiese oorsig van die verskillende wette waardeur verbruikers beskerm word. Hierdeur skets die skrywers die sosiale en ekonomiese agtergrond van krediet en die beskerming van kredietverbruikers.

In hoofstuk 2 verduidelik die skrywers eers dat elkeen van die vier spesifieke kontrakte waarop die Woekerwet en die Wet op Kredietooreenkomste van toepassing is, bedinge het wat van regsweë ingelees word (*naturalia*). Daarna bespreek hulle die verskillende soorte koop- en huurkontrakte wat in die handel gebruik word. Die verskille is geleë in die bedinge van die kontrakte. Hulle bespreek verder die oorwegings wat daartoe lei dat 'n bepaalde soort kontrak in die handel gebruik word. Die skrywers slaag daarin om op 'n heldere wyse die verskillende kontrakte waarop die Woekerwet en die Wet op Kredietooreenkomste onderskeidelik toepassing vind, uit te lig. Hulle toon aan dat die toepassingsgebied van hierdie twee wette slegs ten dele oorvleuel. Die verskille tussen die toepassingsgebiede van die wette vorm die gevolgtrekking van hierdie hoofstuk.

Die bepalings van die Wet op Kredietooreenkomste word in hoofstuk 3 bespreek. Hierdie wet reël die kontraktuele aspekte van kredietverlening. Die skrywers behandel die wet se reëlings oor die voorkontraktuele fase, die sluiting van die kontrak, die bedinge van die kontrak en aspekte van die prosesreg, strafreg en administratiewe aangeleenthede. Die bespreking dek al die belangrikste bepalings van hierdie wet waarvan 'n oningewyde kennis behoort te neem.

Hoofstuk 4 handel oor die algemene beginsels van die openbaarmaking van finansieringskoste. Die skrywers bespreek in hierdie kort hoofstuk die regspolitieke oogmerk met die openbaarmaking van finansieringskoste, die terugbetaling van die hoofsom, die delging van finansieringskoste en die berekening van finansieringskoste in geval van lopende krediet. Die verskillende rekeningkundige berekenings word geïllustreer aan die hand van voorbeelde. Hierdie hoofstuk vorm die agtergrond van die volgende hoofstuk wat handel oor die bepalings van die Woekerwet.

Hoofstuk 5 is die langste hoofstuk en bestaan uit nie minder nie as elf onderafdelings. Die Woekerwet het twee hoofoogmerke, naamlik die beperking en bekendmaking van finansieringskoste. Na die inleiding word die definisies van hoofskuld en finansieringskoste bespreek. Die wetgewer se beperking van finansieringskoste kom dan aan die beurt. Finansieringskoste word beperk deur ten eerste die bedrae te omskryf wat as deel van die hoofskuld gereken kan word en ten tweede deur die maksimumbedrae voor te skryf. Daar is bepalings oor die openbaarmaking van finansieringskoste tydens die voorkontraktuele fase, kontraksluiting en die duur van die kontrak. Die skrywers behandel voorts die prestasie deur die kredietnemer. Die kwessie van vervroegde betaling en die hef van finansieringskoste en ander bedrae wat die voorgeskrewe maksimumbedrae oorskry, is hier van belang. Die skrywers bespreek ook die afrekening na afloop van 'n huurtransaksie asook strafregtelike en administratiewe aangeleenthede.

Hierdie hoofstuk is ook voorsien van berekeningsvoorbeelde en rekenkundige tabelle.

Die Wet op die Vervreemding van Grond kom in die laaste hoofstuk onder bespreking. Die skrywers begin deur duidelik die probleemareas te skets wat bestaan by die verkoop van grond op krediet. Daarna word die agtergrond en toepassingsgebied van hoofstuk 2 van die Wet op Vervreemding van Grond geskets. Hierdie wet se voorskrifte oor formaliteitsvereistes en inhoud waaraan die koopkontrak moet voldoen, word vervolgens uiteengesit. In hierdie verband word die beperking van die bedrag wat die verkoper van die koper mag verhaal onder 'n afsonderlike opskrif behandel. Die skrywers bespreek ten slotte die verskillende oplossings wat die wet bied vir die probleme wat aanvanklik geskets is, die vereiste kennisgewing aan die koper wat die gebruik van buitengewone remedies van die verkoper moet voorafgaan en enkele losstaande aangeleenthede.

Die skrywers gebruik gewoonlik kruisverwysings na 'n bespreking van 'n artikel van 'n wet of 'n verduideliking in 'n voetnoot om die inhoud van 'n artikel kortliks te verduidelik waar daar in die teks bloot verwys word na 'n bepaalde statutêre bepaling sonder enige verdere bespreking. Daar is egter enkele gevalle waar hulle dit nie gedoen het nie. Dit kan by die oningewyde leser tot verwarring lei. Daar is geen verdere verduideliking in die teks of 'n voetnoot welke adres wel gekies mag word as *domicilium citandi et executandi* nie, maar net 'n verwysing na die adres waarna artikel 5(4) van die Wet op Kredietooreenkomste (25) verwys. Die skrywers verwys slegs na artikels 4 en 13 van die Wet op Kredietooreenkomste ter verduideliking waarom 'n beding, waarin die kredietopnemer erken dat die kredietooreenkoms op die besigheidsperseel van die verkoper geteken is, verbode is (26). 'n Kruisverwysing in 'n voetnoot na die bladsye (21–22) waarop hierdie artikels wel bespreek word, sou van pas gewees het. Die skrywers verwys verskeie kere na die optekening van die kontrak in artikel 20 van die Wet op die Vervreemding van Grond (94 99). 'n Kruisverwysing na die bespreking van die optekening (101) sou beslis vir die oningewyde leser van nut gewees het. So word daar ook na artikel 28(1) van die dieselfde wet verwys (100–101) sonder 'n kruisverwysing na die toepaslike bespreking (92).

Ten spyte van die voorafgaande voorstelle ter verbetering, is hierdie werk 'n uitstekende inleiding tot die reg insake verbruikerskrediet en slaag dit ongetwyfeld in die oogmerk wat die skrywers hulle in hulle voorwoord ten doel gestel het.

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ARBITRATION AT WORK

by CASPER LÖTTER and KENNY MOSIME

Juta Cape Town Wetton Johannesburg 1993; xvi and 124 pp

Price R75,00 (VAT included)

This book aims to provide "a guide to the intricacies of labour arbitration", a goal it reaches in a way that can hardly be commended too highly. Apart from its use as a self-contained guide to dismissal arbitration, it contains many basic wisdoms which many a person will do well to heed. How refreshing, for instance, to find authors taking time off to address the time honoured legal tradition of "fighting technical warfare" (5–6). Given this and other instances of a more universal application (eg the discussion on leading evidence), one can only lament in advance that this book's readership will be confined to labour practitioners.

Its universal merits aside, this publication provides a clear, chronological, and very logical structure for, and text on, dismissal arbitration. After introductory remarks placing dismissal and labour disputes within the broad arbitration framework, the discussion proceeds to the negotiation of an arbitration agreement, the substantive law of dismissal, the law of evidence, how to prepare for arbitration, how to go about presenting one's case and, finally, the arbitration award. Throughout, the text focuses on practice, and the reader will find much by way of practical examples and hints which make the book eminently usable. In this regard the theoretical outline which appears at 65–66 and is meant to serve as basis for preparation of a case, as well as the discussion concerning leading of evidence in chapter 6, deserve special mention. The text is furthermore enhanced by a number of appendices (examples of arbitration agreements, a checklist for representatives, the Arbitration Act, IMMSA details and a list of arbitrators by province). The authors' refusal to employ legalese provides the finishing touch to a text accessible to everyone interested.

Those steeped in the legal tradition might feel that a publication such as the present one is, at best, superficial. Do not be fooled. In the interest of self-preservation we lawyers like to stress our brilliance, and not the more tedious task of presenting the facts properly, as the determining factor in the outcome of a case. Given this reality, and if one takes the liberty of placing a premium on the peace of mind of arbitrators, one can only hope this book is read and its contents applied.

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LEADING CASES ON INSOLVENCY
by LEONARD GERING
Butterworths Durban 1994; xxi and 323 pp
Price R125,00

A casebook on the law of insolvency has long been over due. Professor Gering's book is therefore very welcome.

This is a well-organised book which any student of the law of insolvency should find valuable. The author's style of giving an introductory note to each case is very helpful. In each introductory note the author indicates what each case is all about and then highlights the pertinent points in the judgment. Introductory notes in this book are, however, not the equivalent of summaries which are characteristic of most law reports.

The use of additional notes to indicate other cases which have dealt with a similar matter is also a very useful study and research aid. The only major drawback in this book is the absence of sufficient reference to legal principles and rules in the author's notes. As casebooks are essentially designed for the use of students of law, they are invariably more helpful when an author introduces each topic with a few notes on its scope and principles. Users are then referred to principal case discussions and decisions on the same. The author's decision to adopt his present style may, on the other hand, have been prompted by the fact that this book is purely a casebook and not a book on cases and materials. But to the extent that it does not contain guiding materials, at least for those who are new to the study of the law of insolvency, this criticism is valid.

All in all, the author must be commended for taking the initiative to produce this useful study tool to the law of insolvency.

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THE LAW OF ACCESS TO CHILDREN
by ID SCHÄFER
Butterworths Durban 1993; viii and 142 pp
Price R66,12 (soft cover)

In the preface to this publication the author points out that because of the significance assumed by access in recent years, the need has arisen to consider afresh the manner in which the courts are involved in access disputes and the scope of their powers in this regard. The book supplies this longfelt want to a great extent.

Accordingly, the aim of the publication is to highlight the practical difficulties faced by South African courts when dealing with questions of access to the children of divorced and separated parents and to suggest some methods by which they can be resolved.

In the first few chapters of the book the author gives a brief outline of the sociological perception of access, analyses practical problems of access from the perspective of parents and children, and considers the advantages and disadvantages of access against the backdrop of practical dilemmas confronting the court. The author then sets about defining access and giving guidelines for the determination of what constitutes reasonable access. He distinguishes between undefined and defined or structured access, and discusses the various kinds of defined access. He further highlights some of the more common conditions of reasonable access which may be imposed by the custodian parent and examines the general powers of the custodian parent with reference to the effect of access on these powers. The denial, variation and enforcement of access are also discussed. In the last chapter, the author focuses on the extent to which the law should concern itself with the private arrangements of parents regarding the custody of their children in general and access to their children in particular.

Comparative developments in English law as well as the law elsewhere have also been noted in order to facilitate meaningful research.

The content of the book is well structured and reproduced in a short and concise manner. *The law of access to children* is a unique and almost up-to-date exposition which will prove invaluable to legal practitioners, divorce mediators and students alike.

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*The role of the press in a democratic society cannot be understated. The press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed (*per Joffe J in *Government of the Republic of SA v 'Sunday Times' Newspaper* 1995 2 SA 221 (T) 227–228).

The force of agreements: valid, void, voidable, unenforceable?*

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OPSOMMING

Die regskrag van ooreenkomste: geldig, nietig, vernietigbaar, onafdwingbaar?
Soos alle reg streef die kontraktereg na geregtigheid. Hierby is die sentrale vraag in welke mate die reg die gewilde gevolge van 'n ooreenkoms moet erken en in geheel of gedeeltelik moet afdwing. In die besonder handel dit oor sogenaamde aanvegtingsgronde en gevalle van ongeoorloofdheid. Met verwysing na voorbeelde uit die Duitse, Nederlandse en Belgiese reg word die grondslag vir die heg van gedifferensieerde gevolge aan regshandelinge in hierdie verband ondersoek. Die voorbeelde wat gebruik word, hou veral verband met handelinge teen die goeie sedes of die goeie trou en met misbruik van omstandighede, geïllustreer onder meer aan die hand van borg- en leenkontrakte. Daar word aan die hand gedoen dat die Suid-Afrikaanse reg die gestelde probleem kan hanteer deur middel van 'n afweging van sosiale en individuele belange soos dit deur die sogenaamde openbare belang en beleid in ag geneem word. Die toepassing van so 'n benadering word getoets aan die hand van die regspraak.

1

Justice and fairness are universally accepted to be the purpose – or at least a vital part of the purpose – of any system of law. Essential as the commitment to such an ideal may be, the legitimacy of a legal system depends finally on the extent to which it is experienced as just and fair in its particular applications. This would clearly apply to public law. It would apply no less to private law, and accordingly also to the law of contract. The immediately obvious role in contract of the actual or construed intentions of the contractants tends to place these intentions, and thus the autonomy of the parties, at centre stage. However, this must not obscure the fact that the principles and rules of contract law remain concerned with justice and fairness. This concern is expressed in the search for a reasonable

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balance between the interests of the parties to the contract, including – as the law has developed – the interests of the public, as the invisible but ever-present "third party" observing from the wings. Depending on the circumstances, the interests of one party may be given preference over the interests of the others. In a system of law within a constitutional state, the process of balancing interests must take place within the framework of the Constitution and with regard for the principles and values of the broader society which are reflected in the Constitution. In the sphere of contract these principles and values may receive effect mainly in so far as they are subsumed in rules and principles of private law, and particularly contract law,[1] such as the concepts of "public policy and public interest" and "reasonableness and good faith".

For many decades the emphasis in South African jurisprudence has been on an analytical and historical approach to private law and especially to the law of contract. None the less, and perhaps for that very reason, the need for social justice in matters of contract has become ever more apparent – especially in borderline cases where a rigid reliance on analysis and history often effects the opposite of individual fairness. Small wonder that in recent years it has been argued, contrary to a typically analytical approach, that the law *is* morals and that private law is private morality in the sense of mutual expectations and entitlements ("aansprake") between individual legal subjects.[2] The debate about the exact relationship, if any, between law and morals, need not be reopened here. Suffice it to say that, whether for reasons of principle or practicality, effective law requires some moral content.[3]

For the law of contract the central question in this context concerns the extent to which the law will and should recognise, in part or entirely, or regard as enforceable, in part or entirely, consequences which were indeed intended or may reasonably be assumed to have been intended by the acting party or parties. In particular, the question bears on agreements based on consent improperly obtained (instances of so-called rescission) and agreements which are based on properly obtained consent but are in conflict with the interests of society as contained in the norms or mores of a particular society (instances of so-called "illegality" or "ongeoorloofdheid").

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1 So-called horizontal seepage. See ch 3 of the Constitution of the Republic of South Africa Act 200 of 1993. Cf *Waltons Stationery Co (Edms) Bpk v Fourie* 1994 4 SA 507 (O); *Gardener v Whitaker* 1994 5 BCLR 19 (E); *Mandela v Falati* 1995 1 SA 251 (W); *Kalla v The Master* 1995 1 SA 261 (T); *De Klerk v Du Plessis* 1995 2 SA 40 (T).

2 See Nieuwenhuis *Confrontatie en compromis recht, retoriek en burgerlijke moraal* (1992) 5. Cf on the other hand Friedmann *Legal theory* (1967) 256 ff for a discussion of the approach of analytical positivism to the relationship between law and morals.

3 The following words from the Wolfenden Report of 1957 illustrate the vacillation between moral conviction and pragmatism in relation to a subject which has long evoked strong moral indignity: "We are not attempting to abolish prostitution or to make prostitution itself illegal. We do not think that the law ought to try to do so . . . What the law can and should do is to ensure that the streets of London and our big provincial cities should be free from what is offensive and injurious." See also Paton *A textbook of jurisprudence* (1972) 155, and for a comparable current development in South Africa cf *Report of the task group: film and publication control* (1994).

A consideration of this issue introduces concepts like validity and invalidity, voidness and voidability, enforceability and unenforceability, and indeed calls into question the tenability of such distinctions.

In South African law obligationary agreements based on improperly obtained consent have traditionally been regarded as valid contracts rescindable at the choice of the aggrieved party. The policy consideration underlying this approach seems to be that the manner in which the contractant's consent is obtained, does not allow a sufficiently unfettered exercise of private autonomy and as such leads to a defect in that contractant's will.[4] This construction would seem to be compatible with the recent extension by the Appellate Division of the so-called grounds for rescission.[5] Legality, on the other hand, is generally accepted to be a constitutive requirement for a contract. In principle, therefore, an illegal agreement creates no obligations or, as is usually said, is an invalid contract.[6] Some exceptions to this rule have been recognised. Gambling agreements and wagers, for example, are regarded as tainted with illegality but nevertheless give rise to legally relevant obligations, although these are not directly enforceable before a court of law.[7] More recently, the law on contractual restraints of trade has been interpreted to mean that if such a restraint is contrary to public policy (and thus, in traditional terms, illegal)[8] it will be unenforceable but not completely invalid.[9]

In the final analysis it must be considered whether the above matters are decided in accordance with a variety of specific norms, or whether what may seem to be different norms are but applications of one general basic norm.

2

In considering these matters it is instructive to take note of the approach adopted by some Continental legal systems to related questions. Particularly apposite is the development in respect of the enforceability of certain terms in agreements of suretyship and assignment of debt and also of agreement induced by conduct which amounts to an abuse of a co-contractant's circumstances.

The questions relating to suretyship and assignment of debt often relate at once to most if not all the concepts and considerations referred to above. A central consideration, for example, is the ability of the surety or new debtor to meet his obligation. In this respect, the further circumstance that the surety or

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4 See Van der Merwe, Van Huyssteen, Reinecke, Lubbe and Lotz *Contract: general principles* (1993) 71.

5 See *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk* 1986 1 SA 819 (A).

6 See Van der Merwe *et al supra* fn 4 145 ff.

7 These obligations are often said to be "natural obligations" – cf *Gibson v Van der Walt* 1952 1 SA 262 (A); Van der Merwe *et al supra* fn 4 154 ff.

8 See eg De Wet and Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* vol 1 (1992) 89–90; Joubert (ed) "Contract" 5 (1978) *LAWSA* par 149 ff; Christie *The law of contract in South Africa* (1991) 432 ff; cf also the words of the court in *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 18G in respect of an extremely harsh set of contractual terms: "contrary to public policy, and therefore illegal".

9 See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 894–898, specifically 895D.

debtor is in effect economically or financially fettered for a long or indeterminate time can be taken into account when the ability to perform is judged. Another consideration is whether the particular circumstances may have affected the conclusion or execution of the agreement in so far as they may actually have influenced the decision of the surety or debtor to accept liability. Furthermore, the creditor's conduct may be of such a nature as to be especially objectionable in the eyes of the law.

In German law, these matters have received particular attention in the context of suretyship, co-debtorship or the taking over of debt by persons in close relation (by blood or marriage) to the main debtor; persons often young and relatively impecunious, who nevertheless find themselves in what has been called "ein moderner Schuldturm".[10] German courts seem to accept that entering into transactions which are inherently fraught with risk does not necessarily conflict with private autonomy, even where the performance undertaken by the debtor will be possible only under the most favourable conditions.[11] However, according to the courts, the individual's freedom to assume risk in matters of credit and suretyship is not without limitation.[12]

In 1992, the 11th Zivilsenat of the Bundesgerichtshof[13] had to deal with the question whether a suretyship by the wife of the principal debtor was contrary to good morals ("sittenwidrig") in terms of 138.1 *BGB* and accordingly invalid ("nichtig"). The debt related to credit for a business in which the principal debtor was the main shareholder and chief executive. The wife had no significant income or assets. According to the Bundesgerichtshof the mere fact that the surety was married to the principal debtor and was impecunious, was not sufficient to render the suretyship contrary to good morals.[14]

In 1991, the 9th Zivilsenat[15] had already accepted that a suretyship was not contrary to 138.1 *BGB* simply because the surety was a relative of the principal debtor, that the surety had no significant patrimony and that, to boot, the surety's future patrimonial situation could not be estimated.

Some time earlier, the 11th Zivilsenat[16] also considered the case where a wife without significant income or other patrimony had entered into a suretyship agreement in respect of a principal debt of her husband. The court not only considered the question whether such an agreement was contrary to 138.1 *BGB*. It also took into account that a bank representative who had arranged to negotiate

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10 See eg Westermann "Die Bedeutung der Privatautonomie im Recht des Konsumentenkredits" in *Festschrift für Hermann Lange* (1992) 995.

11 See the decision of the Zivilsenat IX *ZR* 130/88; Westermann *supra* fn 10 995 1009 ff.

12 See Westermann *idem* 995 who refers to intervention in order to correct expressions of private autonomy.

13 XI *ZR* 98/92.

14 Cf the position in English law where such circumstances may lead to a presumption of undue influence which may justify rescission of the contract. See eg Treitel *The law of contract* (1991) 366 ff.

15 IX *ZR* 245/90.

16 XI *ZR* 111/90.

with a loan applicant at the latter's home and had then persuaded the applicant's wife to agree to co-debtorship had, by not making a previous appointment with the wife herself, acted contrary to 56.1.6 of the Gewerbeordnung.[17] In addition, it was held that a standard contractual clause in which applicants for joint credit authorised one another in advance to enter singly into further obligations debited to their joint bank account, ran contrary to 3 and 9.1 of the AGBG.[18]

In 1989, the 9th Zivilsenat[19] held that a bank which did not investigate the creditworthiness ("Bonität") of a prospective surety – even though he was a close relative of the principal debtor – did not, in principle, act contrary to good morals in terms of 138.1 *BGB*. A similar approach appears from an earlier decision of the 3rd Zivilsenat[20] in respect of a loan contract, where the court also held that a loan agreement may well be contrary to 138.1 *BGB* if the repayments are so high that the debtor's ability to maintain his minimum requirements for existence ("Existenzminimum") is endangered. The court also found that in the case of suretyship the creditor did not have special duties to disclose and to warn ("Aufklärungs- und Warnpflichten") as against the surety. In similar vein, the same court has held[21] that in principle a bank which required the live-in companion of an applicant for a loan to agree to co-debtorship, did not have a duty to bring to her attention the typical risks accompanying a change in the personal situation of the principal debtor, such as breaking off the relationship of co-habitation, death of one of the partners, illness and loss of income.

These decisions, and a great many similar ones, were primarily concerned with determining whether a particular juristic act was contrary to a specific statutory provision, and especially 138 *BGB*. In a codified system of law one would not expect otherwise. At least as far as 138 *BGB* is concerned, the decisions are at once indicative of a wide range of circumstances which go beyond the wording of a particular statutory provision, namely the factors which determine whether or not a particular juristic act is contrary to the norm or norms contained in the statutory provision.

Commentary on the case law indicates the relevance of a spectrum of factors which is much wider than that which was considered in the decisions referred to above. These factors range from the personal characteristics and circumstances of the surety or debtor on the one hand, and of the creditor on the other, in the context of securing the interests of society and of the individual.

There would seem to be general agreement that circumstances such as age, financial position, degree of (business) experience or inexperience[22] and close

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17 Version of 1978-01-01.

18 Gezets zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen of 1976-12-09.

19 IX *ZR* 124/88.

20 III *ZR* 132/87.

21 III *ZR* 236/88.

22 See also Tiedtke "Mitverpflichtung der mittellosen Ehefrau für Verbindlichkeiten des Ehemannes bei Mitarbeit in Gewerbebetreiben, angemeldet teils auf den Namen des Mannes, teils auf den Namen der Frau" 1992 *Entscheidungen zum Wirtschaftsrecht (EWiR)* 1167.

personal ties which appear directly from the case law, are indeed factors to be considered. But so are other factors. Thus an agreement with a relative of a debtor to bind himself for the debtor could not only bring to bear the pressure of close family ties, but may also in the circumstances amount to an *exploitation of family relations* for the creditor's own purposes.[23] In the case of a marriage relationship it has even been argued that suretyship or taking over a debt by a wife can be "sittenwidrig" because its effect is to limit the freedom of the wife to leave the marriage relationship if it should break down.[24]

The validity of the obligation is drawn into question even further where the creditor stands to gain no special advantage from binding the relative, whereas the latter is plunged into permanent misery.[25]

In more general vein, it has been said that the courts would do well to take into account the mental and emotional predicament or state of necessity ("seelische Zwangslage") in which the surety or debtor may find himself.[26] With reference to this consideration, the German courts have apparently not been eager to extend the liability for duress in terms of 123 *BGB* to such instances.[27] At the same time it is notable that assistance to sureties and debtors has been based on the most general of values. So, for example, it has been said that a debtor who has overtaxed his earning power excessively is entitled to require that the court, in the spirit of a doctrine of human rights, should protect his ability to attain personal good fortune.[28] It has also been argued that to bind a loan debtor who has over-extended himself would be contrary to the principle of the social state.[29] With reference to the earlier decisions of the Bundesgerichtshof, it has in fact been said that the court bears a measure of moral responsibility in respect of the onerous consequences which a rigorously analytical judgment may hold for a debtor over an extended period of time.[30]

Objective factors have played a definite role in the process of deciding whether a surety or accessory debtor should be bound to an onerous contract.

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23 See Großfeld and Lühn "Die Bürgschaft junger Bürger für ihre Eltern" 1991 *Zeitschrift für Wirtschafts- und Bankrecht (WM)* 2013.

24 See the decision of the LG Münster 1990 *WM* 1662; Bender "Zur Sittenwidrigkeit eines Schuldbeitritts zu einem Geschäftsdarlehen des Ehemannes" 1990 *EWiR* 1049; Westermann *supra* fn 10 998.

25 "Lebenslang ins Unglück". See BGH XI *ZR* 111/90; Grün "Zur Unwirksamkeit der Mitverpflichtung vermögensloser Angehöriger bei Bankkrediten" 1991 *Neue Juristische Wochenschrift (NJW)* 925.

26 See Reinicke and Tiedtke "Zur Sittenwidrigkeit hoher Verpflichtungen vermögens- und einkommensloser oder einkommensswacher Bürgen" 1989 *Zietschrift für Wirtschaftsrecht* 613.

27 See eg BGH IX *ZR* 245/86; Emmerich "Rechtsprechungsübersicht: Sittenwidrigkeit der Ausnutzung einer seelischen Zwangslage" 1988 *Juristische Schulung* 986.

28 "Ihm den Weg in ein persönliches Glück [sichern]" – cf OLG Stuttgart 1988 *WM* 450; Westermann *supra* fn 10 997.

29 "Verstoß gegen das Sozialstaatsprinzip" – LG Lübeck 1987 *WM* 785.

30 See Wochner "Die neue Schuldknechtschaft" 1989 *Betriebs-Berater* 1354, who raises the question whether judges whose onerous finding drives a surety or debtor to suicide could be criminally liable!

The requirement of transparency ("Transparenzgebot") in the interpretation of standard contract terms under the AGBG has, for example, come to be regarded as a general norm for controlling standard terms.[31] The determination of "Sittenwidrigkeit" in terms of 138 *BGB* in instances of allegedly excessive interest rates has also been objectified with reference to a maximum level of interest.[32] Furthermore, the fact that, objectively viewed, there is a marked discrepancy between performance and counter-performance has been accepted as a factor which influences the question of "Sittenwidrigkeit" in matters of consumer credit.[33] However, some courts and commentators seem loath to base a decision to alleviate the position of a surety or an accessory debtor on an objective discrepancy between performance and counter-performance alone, and they apparently do not regard the statutory limitation on the extent to which a person may encumber his patrimony ("Pfändungsfreie Grenze")[34] as a sufficient qualification of the simple test of objective equivalence or discrepancy. The argument is that such an approach would be too formalistic to effect a just balance of the interests involved. For this reason it is required that an imbalance between performance and counter-performance should be evaluated in the context of *additional factors* which influence the situation of the parties.[35]

A consideration often raised by grantors of credit illustrates the tension between factors which relate to creditors and debtors respectively: drawing spouses and close relatives into the "Schuldturm", the argument goes, is necessary in order to protect the bank or other credit institution from the very real risk that the principal debtor may feel constrained to transfer assets to persons within his immediate proximity and sphere of influence, thereby withdrawing those assets from the creditor's grasp. The Bundesgerichtshof has expressed the opinion that the possibility of bringing a claim for damages resulting from an intentional act which is contrary to good morals ("gegen die guten Sitten") in terms of 826 *BGB* should provide sufficient protection to the creditor.[36] Comments elsewhere in the case law and literature indicate, however, that the latter possibility would (or should) not bring a final solution to the problem, but that a more encompassing consideration of relevant factors is necessary.[37]

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31 See Westermann *supra* fn 10 1000.

32 Cf *idem* 1000–1001.

33 See eg Bülow "Kriterien für die Sittenwidrigkeit der Mithaftung einers Ehegatten für einen Kredit" *Entscheidungssammlung zum Wirtschafts- und Bankrecht (WuB)* (loose leaf series 1985) I E 2 b Verbraucher-/Ratenkredit 2.92.

34 850c ZPO.

35 See eg the decision of the LG Münster 1990 *NJW* 1669; Westermann *supra* fn 10 997–998. It is not uncommon in the case law and literature for the legal effect or acceptability of financial transactions to be measured with reference to a combination of objective and subjective factors. Cf eg the viewpoint that the financial overstretching of a loan debtor may be sufficient to deny the loan contract its legal effect when it is considered in conjunction with other circumstances which relate to the juristic act – see BGH IX *ZR* 245/90. Cf also the discussion below.

36 1991 *NJW* 925.

37 See the comments made by Westermann *supra* fn 10 1007 and the sources cited there.

German jurisprudence is clearly not against employing a variety of legal instruments to deal with the type of transaction discussed above – the assumption being that multi-faceted economic and social situations often require diverse solutions, such as evaluation in terms of misrepresentation, duress, good morals or other specific statutory measures or in terms of *culpa in contrahendo*.[38] The question of the legal effect of such a transaction or term in a contract receives no single answer: the simple choice between complete invalidity and complete validity (with a concomitant duty to perform completely) may often not be satisfactory. Thus an evaluation in terms of 138 *BGB* to determine "Sittenwidrigkeit" refers to the moment of conclusion of the contract and would not allow for a consideration of a subsequent deterioration in the position of the surety or debtor, such as divorce or loss of employment. To this end one would have to resort to legal instruments such as the failure of the basis of the contract ("Wegfall der Geschäftsgrundlage") or the breach of specific duties imposed on the creditor by law, failing which the surety or debtor would be bound by the contract.[39]

The manner in which these Continental legal systems have attempted to accommodate abuse of circumstances as a potential ground for granting relief to a contractant is a further illustration of the problem under discussion. It has long been universally accepted that abuse of circumstances in itself – such as exploitation of dire personal or economic circumstances and lack of experience or judgment – cannot readily be "classified" amongst the classic grounds for rescission like fraud and duress.[40]

In German law, for instance, abuse of circumstances has been treated in terms of "Sittenwidrigkeit" and the primary emphasis has been placed on 138(2) *BGB*. In terms of this provision, a contractant acts contrary to good morals ("gegen die guten Sitten") if he exploits his co-contractant's state of necessity ("Zwangslage"),[41] inexperience, lack of judgment or excessive weakness of mind ("Willensschwäche"), by persuading him to agree to a performance which is noticeably disproportionate to the counter-performance. Instances of abuse of circumstances which cannot be brought under this subsection have mostly been accommodated under the more general provision contained in 138(1) *BGB*.[42] The effect of a contravention of 138 is "Nichtigkeit", generally in the sense of total invalidity (although there is some recognition of the inadequacy of the concept of total invalidity in German jurisprudence).[43]

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38 See eg Westermann *supra* fn 10 1016.

39 See *idem* 1008.

40 See in general Van Huyssteen *Onbehoorlike beïnvloeding en misbruik van omstandighede in die Suid-Afrikaanse verbintenisreg* (1980) *passim*.

41 Including economic and even political circumstances and state of health – see Jauernig *BGB* (1991) 138 Anm 4.cc.

42 826 *BGB* further provides for a delictual claim for damages against someone who has caused damage by intentional conduct which is against good morals.

43 See eg Hijma *Nietigheid en vernietigbaarheid van rechtshandelingen* (1988) *passim*, esp 69 ff 247 ff, and also the discussion below. It is not necessary to discuss here the possibility that, in terms of 242 *BGB*, conduct which would otherwise render an agreement invalid under 138 *BGB* may nevertheless be in accordance with "Treu and Glauben" and thus override the invalidity ("'Treu und Lauben' verdrängt 'Sittenwidrigkeit'?!" – Jauernig *BGB* (1991) 138 Anm 5.c).

The background to the development of 138 *BGB* provides a useful perspective on the problem in hand. The paragraph replaced earlier provisions governing usury which were originally formulated with reference to the objective norm of a discernible discrepancy between performance and counter-performance. In the course of time, however, subjective factors were taken into account to provide for a more nuanced application of the provisions. The wording of 138 *BGB* is the result of this combination of objective and subjective factors in dealing with "usury" in the wider sense of abuse of circumstances as well.[44]

Belgian law developed the concept of qualified detriment ("gekwalificeerde benadeling")[45] to deal with instances of abuse of a contractant's circumstances. A contractant may avoid contractual liability if he can prove a marked disproportion between performance and counter-performance to his serious detriment as well as abuse by the other contractant of the first contractant's circumstances, which caused the contract to be concluded.[46]

There is a divergence of opinion about the theoretical basis of qualified detriment in Belgian law. The doctrine of *culpa in contrahendo* and the requirement of lawful cause,[47] as well as the doctrine of abuse of rights[48] have been advanced as explanations. According to Van Gerven[49] qualified detriment is the result of an improper use ("een verkeerd gebruik") of contractual freedom in circumstances where there is too great an inequality between the contractants[50] or the basic rights and freedoms of the other contractant have been grossly disregarded. The author advances the argument that exercising contractual freedom in such circumstances amounts to negligence ("fout") in terms of section 1382 of the Belgian civil code. The resultant agreement has an unlawful cause and as such may be voided entirely or in part. Where there has been abuse of circumstances, but no detriment, Van Gerven[51] suggests that the principles regarding defects of consent ("wilsgebreken") as reflected in fraud or duress may be extended to include instances of abuse of circumstances in the absence of detriment.

In Dutch law the nature and effect of abuse of circumstances are – or at least have been – construed in terms of just cause ("geoorloofd oorzaak") or in terms of defects or weakness of will ("wilsgebreken" or "zwakheid"). To some extent the fluctuation between these two constructions is symptomatic of the relative impact of objective and subjective factors on the phenomenon of abuse of

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44 *Inter alia*, this was probably due to the absence from the *BGB* of a specific ruling like *laesio enormis*; cf Van Huyssteen *supra* fn 40 89.

45 A propos of the concept of "benadeling" in terms of the Belgian civil code.

46 See Van Gerven *Verbintenissenrecht* vol 1 (1992–1993) 63; Herbots "Belgium" in Blanpain (gen ed) *The international encyclopaedia of contract law* (1993) 220.

47 See Herbots *loc cit*.

48 See De Ly "Het gelijkheidsbeginsel in het contractenrecht" 1991–1992 *Rechtskundig Weekblad* 1154.

49 *Supra* fn 46 62.

50 On the principle of equality in the Belgian law of contract, in general see De Ly *supra* fn 48 1141 ff. The manner in which the right to equality before the law in terms of s 8 of the Constitution, Act 200 of 1993, may bear upon the matter must still be decided.

51 *Supra* fn 46 63–64.

circumstances. This is evident, *inter alia*, from the influence of the concepts of *iustum pretium* and *laesio enormis* in the development of abuse of circumstances as a ground for legal redress: the "objective" discrepancy between performances which typified these concepts eventually gave rise to the conviction that the relative inequality between the subjective positions of the contractants similarly justifies legal redress.[52]

An intermediate stage in this development in Dutch law was the characterisation of abuse of circumstances as being an unjust cause which rendered the contract void.[53] This conclusion has been called into question mainly on the basis that the act of abusing the circumstances of a co-contractant in essence does not run contrary to good morals. Rather, the argument goes, the Hoge Raad held it to be contrary to good morals for the simple reason that the court could not directly classify it under the grounds for rescission then provided for in the *Burgerlijk Wetboek* (*BW*).[54] Moreover, the argument has been raised that at most the "abuser", and not the abused contractant, could be seen to act against the good morals, in which case it would be difficult to accept that the *bilateral* act of concluding the contract was itself against good morals.[55]

The *Burgerlijk Wetboek*[56] now provides that abuse of circumstances results in a defect of will and therefore falls under the grounds for rescission recognised in the code. This provision makes it possible to take into account directly the interests of the abused party by allowing him the election to impugn the contract. Accordingly, it is not necessary to regard the contract as completely void even where voidness may be contrary to the interests and wishes of the abused contractant. In certain circumstances the court has the power to change the consequences of the contract.[57]

Significant in the context of the development surrounding abuse of circumstances in relation to the conclusion of a contract according to Dutch law, is the extent to which the concept of good faith[58] has been raised. Thus it has been argued[59] that the emphasis on the will theory and the resultant dominant role of the consensus has obscured the role which good faith has always had to play in the relationship between the creation of contracts, just cause and the execution of a contract. A claim for specific performance of a contract which was created as a

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52 See Van Zeben *De leer van het iustum pretium en misbruik van omstandigheden* (1960) *passim*.

53 See eg 1959 *NJ* 37 (HR 11.1.1957); 1965 *NJ* 104 (HR 29.5.1964).

54 See Hijma *supra* fn 43 88.

55 Hijma *loc cit*.

56 3:44.1.

57 See the discussion below.

58 Expressed in the new version of the Dutch civil code as "redelijkheid en billijkheid" – see *BW* 3:12, 6:2. The result of an extended debate now seems to be that there is finally no material difference between good faith and "redelijkheid en billijkheid" – see eg Van Schilfgaarde "Over de verhouding tussen de goede trouw van het handelen en de goede trouw van het niet weten" in *Opstellen aangeboden aan Prof Mr WCL van der Grinten* (1984) 70.

59 See Abas *Beperkende werking van de goede trouw* (1972) 76.

result of fraud or duress can be said to have been against good faith even before the concept of consensus was developed into the will theory.[60] In fact, abuse of circumstances has, on the one hand, been said not to result in a true defect of will, but as it were stands adjacent to defects such as misrepresentation and duress and is determined, *inter alia*, with reference to good faith.[61] On the other hand, there is support for the view that in terms of the original *BW* the construction of defects of will, and abuse of circumstances in particular, derived from the norm of good faith.[62]

3

From the South African case law and literature it is apparent that while the concepts of illegality and improperly obtained consensus both concern circumstances which exist during the conclusion of a contract, they respectively bear on the question whether obligations are created at all, and on the subsequent continuation and thus operation of the contract.

In so far as legality is construed as a requirement for the very coming into existence of a contract and contractual obligations, the maxim *ex turpi causa non oritur actio* has come to mean that an illegal agreement which purports to be a contract is no contract at all. As long as one is able to determine the content of the concept "illegal" such a construction seems unproblematic. However, the position in the law regarding some agreements which have generally been said to be illegal but are treated as valid but unenforceable – particularly wagering, gambling and restraints of trade – raise the question whether such agreements are indeed illegal or rather legal but unenforceable for some other reason of policy. *Ex turpi causa non oritur actio* then means that (at least in some cases) no claim is made available to a party to an otherwise valid contract.

Logically, and especially in accordance with the ideal of economy of concepts, it is not unthinkable to adopt a single concept of illegality which manifests itself in two aspects, each of which results in different juristic consequences. Such an extended concept of illegality could serve to accommodate the dictates of public policy to a large extent.[63] It is, however, questionable whether, in the final analysis, such an approach would be jurisprudentially the soundest and whether it would really bring greater clarity and certainty to an area of contract inherently concerned with values and concepts which are by their very nature difficult to determine. Perhaps a better approach would be to determine the broad basis and at once the confines of illegality as an operative requirement for

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60 Cf eg the early development of the *exceptio doli generalis*.

61 See Calen *Misbruik van omstandigheden* (1983) 2–3.

62 See eg Hartkamp "Open normen (in het bijzonder de redelijkheid en billijkheid) in het Nieuw BW" 1981 *Weekblad voor Privaatrecht, Notariaat en Registratie* 230; Abas *supra* fn 59 76 ff; *contra* Lebens-de Mug *Het wilsgebrek misbruik van omstandigheden* (1981) 132 ff.

63 Cf the remarks by Van der Merwe and Lubbe "Bona fides and public policy in contract" 1991 *Stell LR* 97.

a contract,[64] and to remove entirely from its ambit those objectionable circumstances (traditionally also interpreted as instances of "illegality") which in terms of legal policy should result in contracts which may be unenforceable but should not be invalid.

The importance of a minimum moral content in the law of contract does not mean that law and morals can be equated. The materialism and positivism which also form part of modern South African jurisprudence dictate, especially when coupled with an analytical approach to legal concepts, that the concept of illegality cannot fulfil its proper function if it is construed as having an exclusively moral basis. Illegality should, in other words, not be regarded as the equivalent of *turpitudo* alone, but must have a wider content.

A broader basis for illegality may be found in the interests which the legal system strives to protect and balance.[65] These can be divided into interests concerning individuals *per se*, on the one hand, and interests concerning the collection of individuals as a society, on the other, and may be called individual interests and social interests respectively. The latter category could also be called public interests and is occasionally even further distinguished into public interests and social interests.[66] When the interests of society are simply called "public interests", the expression may be confused with the term "public interest" (in the singular). "Public interest" is often used at a higher level of abstraction than the (subordinate) categories of particular interests. In this sense "public interest" can be said to be a normative concept functioning at the same level as so-called "public policy", which itself expresses a broad value-based criterion in terms of which a legal system is focused. In this sense public policy may, *inter alia*, be a determinant, and more probably the principal guideline, in the process of the recognition of agreements and the determination of their juristic force. The categories of interests to be balanced in a system of law are then subject to public policy inasmuch as it determines the balancing process by weighting the various interests.[67] For present purposes the exact relationship between public

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64 Legality as a constitutive requirement for a contract could in fact be extended so far (*inter alia* by imposing wide-ranging duties of disclosure on a prospective contractant) that it effectively results in a prohibition on concluding the contract at all – cf Westermann *supra* fn 10 1009.

65 Without thereby necessarily professing to a process of "social engineering" or for that matter "Interessenjurisprudenz" (often in contrast with the more modern concept of "Wertungsjurisprudenz") in German legal science. Whatever the methodological basis may be, a balancing of potentially conflicting interests is accepted in many decisions of the courts as being part of the method by which the goals of the South African legal system are attained; cf eg the decisions referred to below in regard to contractual restraints of trade; cf also *Standard Bank of SA Ltd v Wilkinson* 1993 3 SA 822 (C); *First National Bank of Southern Africa Ltd v Bophuthatswana Consumer Affairs Council* 1995 2 SA 853 (BGD).

66 Cf eg the teachings of the *Interessenjurisprudenz* and Pound's catalogue of interests – for a brief overview of which see Friedmann *Legal theory* (1967) 336 ff. Cf also the essay "Recht en belang" by Nieuwenhuis *supra* fn 2 29 ff, in particular 43.

67 Cf eg the manner in which Nienaber JA in *Basson v Chilwan* 1993 3 SA 742 (A) 767 described the process of balancing the interests which have to be considered in the process of determining whether a contractual restraint of trade is enforceable.

policy and public interest is not crucial.[68] For the sake of clarity, however, the particular interests which concern society as against the interests of the individual are here called "social" interests, the term "public" being reserved to indicate values at a more general level. The essential distinction which must be made is between interests which concern individuals in their personal capacity and interests which concern society as a whole or at least sectors of society.

These distinctions are not absolute; nor are the particular contents of each category. For present purposes, however, one point is clear: the particular individual interests which relate to personal freedom are generally also reflected in the spectrum of social interests. Particular social interests concerning public order and social stability and welfare, in their turn, are usually included in the collection of individual interests. The underlying consideration is obviously that for both individual and society reciprocally the protection of social and individual interests, respectively, is of fundamental importance.[69]

If it is accepted that, fundamentally, illegality should be determined with reference to the process of balancing the different interests which are distinguished in a legal system, it becomes possible to achieve a differentiation in the juristic force of legally objectionable acts which *de facto* lead to agreements purporting to create obligations.[70]

Such acts could be contrary to the different interests in a variety of ways – some in such a manner that they are branded "illegal" in the strict sense, and others only to the extent that they are objectionable but not quite illegal. The consequences of such acts could also be differentiated: some acts may bring about no juristic consequences at all (so-called complete invalidity); others may have consequences, but only to a limited extent (partial invalidity or unenforceability). These consequences may not even have been intended by the parties.[71]

In terms of the above analysis, an act which relates to the conclusion of an obligationary agreement will be illegal to the extent that the agreement does not

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68 In the case law, the terms "public policy" and "public interest" (and the Afrikaans equivalents "openbare beleid" and "openbare belang") as they appear in the context of contract have not been given a precise content. Although the terms have been used in a manner which implies some distinction in their meaning (see eg Nienaber JA in *Basson v Chilwan* 1993 3 SA 742 (A) 767C: "as dit die openbare belang skaad en aldus teen die openbare beleid indruis") they are often used interchangeably – see eg *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 891–893; *Humphrys v Laser Transport Holdings Ltd* 1994 4 SA 388 (C) 400–401 406H.

69 See Van der Merwe *et al supra* fn 4 139 ff.

70 Cf eg the distinction made in the German commercial code – 74.a *HGB* – between absence of liability (*Unverbindlichkeit*) and nullity (*Nichtigkeit*) in connection with contractual restraints of trade placed on a commercial employee.

71 These constructions would be affected by the nature and content of the concept of a juristic act which prevails in a legal system, *inter alia* in respect of the question whether the existence and juristic effectiveness of the act depends simply on the factual occurrence of the act or on the intention of the actor. Cf eg Hijma *supra* fn 43 53 ff (and the references made there to the construction placed on the juristic act by other commentators); Lubbe "Estoppel, vertrouensbeskerming en die struktuur van die Suid-Afrikaanse privaatreg" 1991 *TSAR* 19–20.

create obligations at all, if the act is primarily contrary to some social interest. This would apply, for example, to agreements to commit a serious crime, to subvert the state or to obstruct or defeat the administration of justice. Such agreements may at once affect individual interests, but then on a secondary level; for example, the *pactum de quota litis* and particularly agreements in restraint of trade as interpreted in English law and previously also by South African courts.

Certain objectionable agreements primarily affect individual interests rather than social interests, such as agreements in restraint of trade as interpreted by the South African courts since the decision in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*.[72] Agreements which primarily affect the interests of the individual contractants may, of course, simultaneously affect the interests of society; the subordinate role played by the social interests in the particular circumstances would, however, not justify a conclusion of illegality. Thus, it is generally accepted in connection with contractual restraints of trade that both the freedom to conclude contracts and the freedom to be economically active form part of social interests.[73] Nevertheless, where a contractual restraint of trade is treated as valid and enforceable in principle, but unenforceable (and not invalid) when contrary to public policy, the individual interests which are taken into account in terms of public policy are obviously placed in the foreground and given greater weight than the social interests involved. The values of "freedom of contract" and "sanctity of contract" are used to justify the position that, in principle, a restraint is valid.[74] These values are, first and foremost, an expression of principal individual interests regarding contracts. In the final analysis, the elevation of public policy to the criterion for the enforceability of a restraint in the *Magna Alloys* case, to the exclusion of the fact of unreasonableness between the parties themselves, does not militate against the recognition of the primary importance of individual interests in this context. Indeed, the statement by Rabie CJ[75] that a restraint which is unreasonable between the contractants will probably be against public policy, is indicative of the primary importance of individual interests in the process of balancing interests as weighted in terms of public policy.

The above conclusion is supported by decisions of the South African courts following the *Magna Alloys* case. This applies particularly to the decision of the Appellate Division in *Basson v Chilwan*,[76] where it was held that an "unreasonable" restraint will conflict with public policy.[77] "Unreasonableness" in this sense is not equated in every respect with "unreasonableness between the

72 1984 4 SA 874 (A).

73 To some extent this is underscored by the value which is attached to the "competition principle" in such circumstances, although the importance of free competition obviously also relates to individual interests as such. See eg LJ van der Merwe *Die beskerming van handelsvryheid in die Suid-Afrikaanse kontraktereg* (LLD thesis PU for CHE 1988) 180 ff.

74 Apart from the *Magna Alloys* decision, see *Roffey v Catterall, Edwards & Goudré (Pty) Ltd* 1977 4 SA 494 (N) 505.

75 894B 898A.

76 1993 3 SA 742 (A).

77 767 777; see also *Humphrys v Laser Transport Holdings Ltd* 1994 4 SA 388 (C) 406H.

parties" which the courts previously regarded as the principal criterion. In dealing with the facts, however, the court focuses on individual interests in general as well as the particular protectable interests of the contractants themselves.[78]

A similar pattern can be discerned in respect of agreements of gambling and wagering. The conduct involved may be evaluated in a particular society primarily in terms of either social or individual interests. As the law stands in South Africa[79] and especially in the light of the present consideration of the entire issue of the acceptability of such agreements of chance,[80] it would seem as if acts of gambling and wagering are not regarded as completely immoral or unethical. Rather, they seem to be regarded as objectionable primarily from the perspective of individual interests and of the parties themselves. This would explain why such agreements have been held to be not invalid but only unenforceable.[81]

In *Sasfin (Pty) Ltd v Beukes*[82] the Appellate Division was called upon to decide whether a set of contractual terms to which a borrower had agreed and which subjected him "to the most stringent burdens and restrictions"[83] was in accordance with "simple justice between man and man".[84] The court accepted that this norm was part of public policy. In the particular instance the norm was applied in the context of legality as a constitutive requirement for a contract. The terms were found to be illegal and accordingly invalid. To determine the illegality in terms of public policy the court concentrated almost exclusively on the effect which the terms would have on the borrower. Such an approach recognises that individual interests, as much as social interests, are taken into account when the dictates of public policy are considered.

The court attached the consequence of invalidity in the sense of being void *ab initio* to the illegality of the terms.[85] In so far as individual interests were the decisive consideration, the court may well have concluded that the contractual terms, although contrary to public policy, were nevertheless not illegal.[86] The

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78 See eg 767 772–773 778–779. Cf also the sequence in which Nienaber JA 676 considered the various interests, as well as the fact that facets of public policy which stand apart from the interests of the contractants themselves did not come up for consideration. For the purpose of deciding whether a restraint is contrary to public policy, English courts often take into consideration the reasonableness of the restraint between the parties themselves; see eg *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1967] 1 All ER 699 712 ff; *Greig v Insole; World Series Cricket Pty Ltd v Insole* [1978] 3 All ER 449 495 502–503.

79 See eg *Gibson v Van der Walt* 1952 1 SA 262 (A); *Christie v Mudaliar* 1962 2 SA 40 (N); *Rademeyer v Evenwel* 1971 3 SA 339 (T).

80 See Lotteries and Gambling Board *Main report on gambling in the Republic of South Africa* (RP 85/1995).

81 Including the possibility that such agreements may give rise to natural obligations.

82 1989 1 SA 1 (A).

83 10B.

84 And cf *Jajbhay v Cassim* 1939 AD 537.

85 See 18G–19C and cf the interpretation of the majority judgment by Van Heerden JA 19H.

86 Such a conclusion would of course mean that, contrary to what the court seemed to imply (18G – see fn 8 *supra*), conflict with public policy does not necessarily render a contract or a contractual term illegal in the strict sense.

terms could then have been regarded as unenforceable rather than completely void. In this regard it is noteworthy that in a number of decisions about contractual terms which were potentially objectionable for being unfair in the sense that individual interests were primarily affected, the courts have emphasised the unenforceability of such terms rather than their complete invalidity.[87]

The decision in *Ex parte Minister of Justice: In re Nedbank Ltd v Abstein Distributors (Pty) Ltd; Donelly v Barclays National Bank Ltd*[88] illustrates the point. The Appellate Division was in effect called upon to interpret its own decision in the *Sasfin* case as regards the validity or not of a "conclusive proof clause" relating to a certificate of balance of indebtedness. The court concluded that where such a clause was in favour of a creditor who would also be the author of the certificate of balance, it would be *contra bonos mores* to the extent of being void. This finding is compatible with the construction that the conclusion of illegality and concomitant voidness is justified where a term in an agreement is primarily offensive to social interests – in the instant case because the jurisdiction of the courts is ousted and the decision in respect of the very extent of a debt rests solely with the creditor, who becomes a judge in his own cause.[89] The approach of the court is also compatible with the possibility that a conclusive proof clause may not run contrary to the social interests and may indeed reflect an acceptable balance between the interests of the individual parties. In such a case the clause should not be *contra bonos mores* and therefore completely valid (or perhaps have partial effect?). The court gave the example of a clause which leaves the issuing of the certificate of balance to "an independent third person, such as, for example, an engineer, architect or auditor".[90]

The test for determining legality or illegality in terms of public policy by way of a balancing of interests need not be expressed only in terms of standards like simple justice between man and man, the *boni mores* or good morals. Extreme unfairness or unconscionability, or absence of good faith or reasonableness[91] may also justify a conclusion of illegality where conflict with social interests is paramount.[92] The matter does not end there, however. The above-mentioned standards may be equally relevant where, as indicated earlier, individual interests are paramount for the purposes of executing public policy. One would then not be constrained to conclude that the agreement is illegal and completely invalid. Much rather, the agreement may be treated as valid, but having consequences in

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87 See Van der Merwe and Lubbe *supra* fn 63 97.

88 1995 3 SA 1 (A).

89 21B.

90 21G–H.

91 Cf the concept of "redelijkheid en billijkheid" in the new *BW* 6:2 and esp 3:12: "Bij de vaststelling van wat redelijkheid en billijkheid eisen, moet rekening worden gehouden met algemeen erkende rechtsbeginselen, met de in Nederland levende rechtsovertuigingen en met de maatschappelijke en persoonlijke belangen, die bij het gegeven geval zijn betrokken."

92 Cf the view expressed by Smalberger JA in *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 8 that in the context of public policy these concepts overlap and are interchangeable. See also Van der Merwe and Lubbe *supra* fn 63 97 ff.

various degrees. This would include partial invalidity as well as complete or partial unenforceability. The greater the extent to which an agreement or a term is in conflict with social interests – even though it may at once conflict with individual interests – the harsher would be the judgment of the law: agreements or terms which are first and foremost directly in conflict with social interests would accordingly be treated as having no consequences at all rather than as having limited consequences or effect.

Distinguishing between social and individual interests in the above manner need not be an indication that the greater general value is placed on social interests. Private autonomy, which forms part of the individual interests recognised by public policy, implies that the individual contractants should remain in control of the destiny and force of their contracts as far as possible. Where individual interests are paramount in terms of public policy, it would therefore be justifiable to afford a contractant who stands to be protected the degree of protection which is reasonably necessary to ensure his private autonomy and freedom of choice. He should accordingly be entitled to have the consequences of the juristic act limited to such a degree. His co-contractant, on the other hand, may expect that the normal consequences of the act should not be limited further than this extent. Hence, in such circumstances partial invalidity or partial enforceability may be the proper consequence.[93] In other instances, however, the manner in which conduct in relation to an agreement conflicts with individual interests, and private autonomy in particular, as well as the extent of the conflict, may call for a different evaluation of the proper juristic consequences. Thus, for example, the circumstances may be such that the contractant who is worthy of protection should be given a choice between allowing the contract to have its full consequences or denying it any consequences at all.[94]

The latter possibility was recognised in effect in South African law relating to contracts for which consensus was obtained in an improper manner. At common law, fraud and duress were accepted as grounds justifying such a choice. The development in the case law towards allowing rescission in instances of undue influence[95] and even "improperly obtained consent" in general[96] proceeded on the assumption that a contractant should be given an election between abiding by or avoiding all the consequences of the contract. This approach can be justified in terms of the construction that rescission is allowed because of the presence of a "defect of will" in the sense that a contractant whose will is not conceived in a free and unfettered manner is not exercising his individual autonomy.[97]

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93 Cf eg the concepts of "relatieve nietheid" and "relative Nichtigkeit" which have been raised or are applied in some Continental systems of law; see Hijma *supra* fn 43 213 ff; Leclercq "Nietigheid en vernietigbaarheid in de artikelen 3.2.1, 2, 2a en 3 NBW" 1983 *Weekblad voor Privaatrecht, Notariaat en Registratie* 197.

94 Cf, however, the debate about decisions like *Vogel v Volkerz* 1977 1 SA 537 (T), *Du Plooy v Sasol Bedryf (Edms) Bpk* 1988 1 SA 438 (A) and *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) concerning the power of a contractant to decide whether a contract should have legal consequences or not.

95 See *Preller v Jordaan* 1956 1 SA 483 (A).

96 See *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk* 1986 1 SA 819 (A).

97 See Van der Merwe *et al supra* fn 4 71.

In the final analysis, the major consideration in instances of rescission is not the integrity of the will of the aggrieved contractant, but the propriety or impropriety of the conduct which causes the defect of will. Determining impropriety requires an evaluation of the conduct by means of objective standards or norms. These would generally be the same standards which serve to determine illegality, for example the *boni mores*, good faith and reasonableness. An obvious conclusion could then be that the evaluation of the conduct, as well as the decision whether the contract should have its full intended consequences, must be left to the courts and not to the aggrieved contractant. The development in Dutch law regarding abuse of circumstances as a potential ground for rescission illustrates the point. As pointed out, abuse of circumstances was originally construed as an instance of "illegality" for being against the good morals ("ongeoorloofd oorzaak"). In respect of this construction, it has been argued that either contractant or the court itself would then be empowered to rely on the presence of abuse of circumstances and accordingly to determine the effective consequences of the contract.[98] If, on the other hand, abuse of circumstances is construed as a ground for rescission causing a defect of will, the argument goes, the power to decide the destiny of the contractual relation and determine its consequences rests solely with the aggrieved contractant.[99] The remedies presently available in the *BW* are indicative of a nuanced approach to the matter. In principle, abuse of circumstances causes a defect of will and makes the contract voidable.[100] However, the aggrieved contractant loses the power to avoid the contract if the co-contractant timeously proposes an amendment of the consequences of the contract which eliminates the prejudice adequately.[101] Moreover, the court has the power, at the request of one of the contractants, to amend the consequences of the contract in order to eliminate the prejudice, rather than to declare the contract void.[102]

The ruling of the *BW* merits consideration. Particularly if situations like abuse of circumstances are construed in terms of both social and individual interests as reflected in public policy, it may not be necessary to restrict the power of deciding the effective consequences of the contract to the aggrieved party alone. Where individual interests are affected, but the social interests are also directly impaired, it may be sound legal policy to empower the court itself to intervene in the contractual relation by affording it limited consequences ranging between the extremes of total avoidability and full enforceability and effect.[103] After all, placing the "moral content of the law" only within the category of true illegality may achieve an analytically satisfactory position, but in doing so a legal system

98 See Calen *supra* fn 61.
99 See Calen *loc cit.*
100 *BW* 3:44.
101 *BW* 3:54.1.
102 *BW* 3:54.2.
103 In the context of a contractual restraint of trade Nienaber JA, in *Basson v Chilwan* 1993 3 SA 742 (A) 767C, declared that a restraint which is contrary to public policy may be rescindable ("aanvegbaar") totally or in part. It is, however, doubtful whether the word was being used in its technical meaning – the court probably merely intended to say that the covenantor may be empowered in effect to escape being held bound to the restraint.

would clearly run the risk of immunising the role and influence of justice and fairness from the remaining area in which the rules pertaining to contracts function.

The parameters of a construction of legality and rescission directly in terms of individual and social interests in accordance with public policy require careful consideration. So, for example, the legal system would have to take a clear stand on the argument that the construction may blur the distinction between the phases of creation and execution of the contract, thereby undermining legal certainty.[104] In the process one must consider whether the argument does not beg the question. The distinction may be more apparent than real: it may well be based simply on the perceived need to provide different remedies for different situations and not so much on a fundamental analysis of the actual circumstances which require redress. The further question arises whether the concept of legality as a constitutive requirement for a contract and the concept of defect of will as part of the basis for the grounds for rescission are indeed finally distinct. Both concepts flow from an application of the norms of good faith and reasonableness and it could be argued that the one is therefore subsumed into the other.[105] It may also be necessary to reconsider the concept of the juristic act, at least to the extent that "intended" consequences should not be the final distinguishing characteristic of such an act.[106]

> *As die uiteraard vae en idealistiese bepalings van die Grondwet gebruik sou word om goedsmoeds noukeurig gekonstrueerde en gedetailleerde denkbeelde en werkswyses van ons privaatreg te versteur, gaan ons 'n chaos beërwe wat die verwarring by die toring van Babel sal verdwerg* (per Conradie R in *Kotze & Genis (Edms) Bpk v Potgieter* 1995 3 SA 783 (K) 786).

104 See eg Lebens-de Mug *supra* fn 62 132 ff; De Bondt "Redelijkheid en billijkheid in het contractenrecht" 1984 *Tijdschrift voor Privaatrecht* 95 ff; Verougstraete "Wil en vertrouwen bij het totstandkomen van overeenkomsten" 1990 *Tijdschrift voor Privaatrecht* 1171.

105 See eg Abas *supra* fn 59 90; cf *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk* 1986 1 SA 819 (A), in respect of which one may ask whether Chemfos actually experienced a defect of will, or whether in the final instance Plaaslike Boeredienste had exceeded the limits of good faith.

106 See eg Hijma *supra* fn 43 44, who argues that a juristic act is a dispositive act ("beschikkingshandeling") which may be valid or invalid depending on whether it has juristic consequences or not.

The psychological fault concept versus the normative fault concept: *Quo vadis* South African criminal law?

(*continued*)*

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4 CRITICISM AND EVALUATION

4 1 "Psychological" fault

The psychological fault concept has been subjected to the following criticism:

(a) Not only conduct which transgresses the norm but also conduct which conforms to the norm may be perpetrated intentionally or negligently.[100] There is no difference between the psychological elements of the concept of fault and the psychological elements of the concept of merit.[101] Since a persons' conduct can be intentionally blameworthy and intentionally commendable and since a person can unwittingly bring about disaster and unwittingly bring about blessing, intention and negligence play the same role in fault as in merit.[102] However, this problem may be avoided by requiring, as South African criminal practice does, awareness of unlawfulness, alongside awareness of the deed, as an element of *criminal* intention and by requiring reasonable foreseeability of unlawfulness, alongside reasonable foreseeability of the deed, as an element of *criminal* negligence.[103] This is denied by opponents of the psychological fault concept who

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* See 1995 *THRHR* 361.

100 Dohna 1905 *GS* 306; Frank *Festschrift* 527 52; Merkel 1922 *ZStW* 344, who states: "[Es gibt] vorsätzliche und fahrlässige, aber schuldlose Taten", and who distinguishes them from "schuldhafter Vorsatz" and "schuldhafte Fahrlässigkeit" (337); cf Sturm 1909 *GS* 188, who distinguishes between "Vorsatz" and "vorsätzliche Schuld"; Snyman *Strafreg* 107–108 153 157, who apparently takes the view that the term "intention" is neutral and colourless; Bertelsmann 1981 *THRHR* 421.

101 Finger 1908 *GS* 254–255; cf Sturm 1909 *GS* 166; Rosenfeld 1911 *ZStW* 472–473, in cases of intention as a legally colourless concept, as opposed to negligence, since intentional conduct may be either blameworthy or praiseworthy whereas negligent conduct will always be blameworthy: "Vorsatz und Fahrlässigkeit lassen sich also nicht unter einen Oberbegriff bringen" (474).

102 Finger 1908 *GS* 264; cf Merkel 1922 *ZStW* 341 344; Snyman *Strafreg* 153 in respect of intention.

103 See eg Burchell and Milton 281 ff 311 ff; Snyman *Strafreg* 231–232.

endorse awareness of unlawfulness as a requisite of fault, but who contend that an accused who *lacked* criminal intention on account of *avoidable* or *reasonable* ignorance or mistake of law should indeed be held *liable* for a crime of intention.[104] To qualify as a defence to fault, ignorance or mistake of law must have been unavoidable or reasonable.[105] In more than one respect, this point of view is anything but convincing:

(i) It proceeds from the debatable assumption that only avoidable or reasonable ignorance or mistake of law should be an excuse and shapes, in a teleological fashion, its (normative) concept of fault accordingly, thus rationalising an *a priori* premise. Without debating the issue, it is at least open to doubt whether liability for crimes of intention should be a possibility where the accused was genuinely ignorant of or mistaken about the unlawfulness of his or her conduct. Why should a difference be made between the defences of ignorance or mistake of law and ignorance or mistake of fact in crimes of intention, which renders the latter a matter of subjective and the former a matter of objective judgment? If ignorance or mistake of law must have been avoidable or reasonable to succeed as a defence, why cannot the same apply to ignorance or mistake of fact? Is it because the criterion of avoidability or reasonableness of ignorance or mistake of fact and law, taken to its logical conclusion, would entail the abolition of the distinction between crimes of intention and crimes of negligence and the absorption of the former into the latter?[106] If so, what could the reason for maintaining the distinction between crimes of intention and crimes of negligence be?[107]

(ii) It gives no indication of how instances of a mixture or combination of ignorance or mistake of fact *and* law are to be handled in crimes of intention: as cases of ignorance or mistake of fact or ignorance or mistake of law?[108] Whether it is the one or the other,[109] how does one explain the contradiction that inevitably arises between "pure" ignorance or mistake of fact (avoidability/reasonableness not a requisite) or "pure" ignorance or mistake of law (avoidability/reasonableness a requisite) on the one hand, and mixed or combined ignorance or

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104 According to Rabie *Bibliography* 49 this reflects the most important practical difference between the psychological and normative concepts of fault.

105 See eg Badenhorst 406 407; Snyman *Strafreg* 153–154 213 ff; cf, however, Rabie 1994 *SACJ* 95–96, who points out (a) that there seems to be no clarity on the exact meaning and scope of the terms "avoidable" and "reasonable"; (b) that they are not necessarily identical; (c) that they entail either a repetition of a criterion which has already been invoked to determine unlawfulness or a confusion and identification with the criterion utilised to determine negligence; and (d) that the criterion of avoidability is unknown to South African criminal law.

106 See also Rabie 1985 *THRHR* 342–343, who points out that crimes of intention are regarded as more serious than crimes of negligence in principle and that, since the facts are generally easier to determine than the law, negligent ignorance or mistake of fact is more blameworthy than negligent ignorance or mistake of law.

107 See also Rabie 1994 *SACJ* 96.

108 Cf *idem* 96–97.

109 Presumably the mixed or combined cases of ignorance or mistake of fact and law will have to be dealt with on the footing of ignorance or mistake of fact on the basis that the accused should be given the benefit of the doubt in accordance with the *in dubio pro reo* principle.

mistake of fact *and* law (avoidability/reasonableness a requisite? or avoidability/reasonableness not a requisite?) on the other?

(iii) It creates a discrepancy between crimes of intention and crimes of negligence: the latter consistently require reasonable foreseeability of both the deed and the unlawfulness elements, whereas the former would inconsistently require awareness of the deed element (so-called colourless intention) but not awareness[110] of the unlawfulness element (so-called coloured intention).[111] This tends to be obscured by the lip service[112] recognition and acceptance of awareness of unlawfulness as an element of (normative) fault by supporters of the normative fault concept.

(iv) It is terminologically misleading and inaccurate and conceptually contradictory and unsound:

(aa) Requiring awareness of unlawfulness as an element of fault on the one hand, and unavoidable or reasonable ignorance or mistake of law for a successful defence to fault on the other, suggests that one can, at one and the same time, be both aware and unaware of unlawfulness. Moreover, it creates the impression not only that the element of awareness of unlawfulness is actually catered for in crimes of intention,[113] but also that awareness of unlawfulness instead of the reasonable foreseeability of unlawfulness is an element of crimes of negligence.

(bb) The expression "*awareness* of unlawfulness", within the context of normative fault, is inappropriate because it in fact refers to *expected* knowledge of unlawfulness rather than actual knowledge of unlawfulness as a requisite of fault.[114] Not only are expected knowledge and actual knowledge not quite the same thing,[115] but the notion of objective awareness[116] is also at variance with the inherently subjective nature of awareness.

(cc) Even the terminologically more accurate expression "reasonable foreseeability of unlawfulness" would be inappropriate if applied to crimes of intention. For a start, it would result in the relegation of crimes of intention to crimes of *pro parte* intention (in respect of the deed element) and *pro parte* negligence (in respect of the unlawfulness element)[117] and, therefore, in the contradiction of crimes of intention becoming, at one and the same time, crimes of intention and

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110 *Dolus eventualis* at least.

111 Cf Rabie 1994 *SACJ* 96–97.

112 See the next point of criticism.

113 Cf the statement by Snyman *Strafreg* 154 fn 22 that the notion that knowledge of wrongdoing is not *necessary* for culpability is applicable to crimes of negligence; cf 156.

114 Cf Bertelsmann 1974 *Acta Juridica* 36; see the statement by Snyman *Strafreg* 154 fn 22 that blame expresses the relationship between the accused's conduct and what the community could have *expected* of him (which, incidentally, is difficult to reconcile with his statement quoted in the previous fn) (cf 156).

115 Although, of course, they may coincide in given circumstances.

116 Even if the objective test is subjectively qualified by placing the reasonable person in the same situation as the accused.

117 Cf *S v Ngwenya* 1979 2 SA 96 (A) 100.

negligence.[118] In addition, it would result in an extension of the nature and scope of crimes of intention to include criminal liability for quasi-intention and quasi-negligence and, hence, in crimes of intention falling foul of the fundamental tenets of the principle of legality.[119]

(b) Although it may possibly be argued that a psychological relationship or condition between perpetrator and deed exists in cases of conscious negligence (*luxuria*), unconscious negligence (*culpa*) clearly denotes an absence rather than the presence of a psychological relationship or condition between perpetrator and deed.[120] Unless a purely subjective test of negligence is insisted upon,[121] this argument has indubitable merit. If, as is commonly accepted, however, the test of negligence is fundamentally an objective one, negligence hardly qualifies as a state of mind.[122] Indeed, since negligence has, in South African criminal practice, traditionally been regarded as a form of fault[123] and since its test[124] has always been a normative rather than a psychological one, negligence remains largely unaffected by the controversy over whether a normative fault concept or a psychological fault concept should prevail.[125]

(c) Without a normative assessment of fault, children, the mentally ill, the mentally defective, the intoxicated and the provoked may also be held to have acted intentionally or negligently and criminal capacity as part and parcel of the concept of fault would fall by the wayside.[126] This problem does not arise if

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118 Cf Du Plessis *Culpable homicide* 63 (cf Du Plessis 1984 *SALJ* 315: "If, as the finalists do, one removes intent and negligence from the subjective elements of criminal behaviour, and bundles them in with the objective element as so-called final conduct, the question arises: what remains of the subjective element? . . . Are the finalists prepared to go all the way and declare themselves to be behaviourists?"); Kok 1985 *SALJ* 394; Rabie 1985 *THRHR* 342.

119 Which has in recent times received clear statutory recognition in s 25(3)(f) of the Constitution of the Republic of South Africa Act 200 of 1993.

120 Rosenfeld 1911 *ZStW* 472 ff; Hegler 1915 *ZStW* 194–196 fn 80; Snyman *Strafreg* 154; De Villiers 46; Bertelsmann 1974 *Acta Juridica* 36 37; Van der Merwe 1976 *SALJ* 285–286; cf Nicolson 1983 *Responsa Meridiana* 270.

121 As De Wet 103–104 137 156 ff does; cf *S v Malatjie* 1981 4 SA 249 (B) 251 252; Nicolson 1983 *Responsa Meridiana* 270.

122 Cf De Wet 156 ff; Burchell and Milton 299–300; *S v Ngubane* 1985 3 SA 677 (A) 686 687.

123 Cf Burchell and Milton 243 298.

124 The question being what the reasonable person in the same position as the accused would have foreseen and would have avoided.

125 Cf Van der Merwe *Leerstuk* 433 fn 1; Visser and Maré 450; Burchell and Milton 306–307; Snyman 1991 *THRHR* 16; cf, however, Kok 1982 *SACC* 33–34.

126 Frank *Festschrift* 526–527: "[Z]ur Schuld gehört die Zurechnungsfähigkeit. Sie ist nicht Schuldfähigkeit, nicht Schuldvoraussetzung, sondern sie gehört zur Schuld" (527); Badenhorst 242 fn 2 395 fn 6; Snyman *Strafreg* 153; Kok 1982 *SACC* 32–33; cf Dohna 1911 *ZStW* 336: "Es ist . . . zweifellos, dass die Zurechnungsfähigkeit die Voraussetzung für ein pflichtwidriges Verhalten bildet, dass also ein Unzurechnungsfähiger zwar vorsätzlich oder fahrlässig, nicht aber pflichtwidrig und deshalb nicht schuldhaft handeln kann"; Goldschmidt 1913 *ÖZSt* 147 fn 25; Hegler 1915 *ZStW* 193 fn 77; Freudenthal 20; Bergenthuin 1985 *De Jure* 277–278; cf, however, Radbruch 1904 *ZStW* 338 ff, who regards criminal capacity as "Straffähigkeit"; Kohlrausch *Reform* 180–181, who regards

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criminal capacity is considered a separate and independent element of criminal liability and not as a prerequisite for or ingredient of fault. A reasonably intelligent and sensitive six-year-old *infans* who, as a demonstration of loyalty to his cuckolded father, sets his mother's lover's sports car on fire, well knowing not only the nature of his conduct but also its unlawfulness,[127] acts with criminal intention but is irrebuttably presumed to be criminally incapable. Likewise, a mentally ill serial killer who cuts his victims to pieces and disposes of their bodies to conceal his crimes, well knowing the nature and unlawfulness of his conduct, acts with criminal intention, but may lack criminal capacity on account of either lack of control over his conduct (for example, because of irresistible impulse) or lack of appreciation of the moral wrongfulness of his conduct (for instance, because he perceived his actions to be sanctioned by a divine blessing or satanic instruction).[128] Lack of control over one's conduct which is attributable to intoxication or provocation where provocation contributes to criminal intention may conceivably also exclude criminal capacity.[129] What this means, is that the reason why the criminally incapable are not criminally liable is not because they acted without criminal intention, but because they were criminally incapable.[130] In this regard, it has rightly been said:

> "Fault and capacity . . . are different and distinct concepts. Capacity relates to a person's ability to appreciate wrongfulness and ability to control his or her actions according to that appreciation. Fault relates to the person's free and informed decision to do that which he or she knows (or foresees) to be unlawful or his or her inadvertent failure to behave as a reasonable person[131] would in the same circumstances."[132]

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criminal capacity as a prerequisite of fault; De Villiers 46–47 48 fn 40 62: "[D]ie suiwer psigologiese skuldbegrip (as synde subjektief) [sien] nie toerekeningsvatbaarheid as afsonderlike voorvereiste vir skuld . . . nie. Toerekeningsvatbaarheid word maklik as inhoud van die subjektiewe gedeelte van die sistematiek (*mens rea*) gesien" (46); Van Zyl 1982 *THRHR* 438; Nicolson 1983 *Responsa Meridiana* 270, who states that an *infans* or the insane can have intention (ie the intention to act) but not *dolus* (ie the intention to act, including knowledge of unlawfulness) in terms of the present test of imputability.

127 The argument of Snyman *Strafreg* 153 that supporters of the psychological fault concept admit that an *infans* or insane person can have "colourless" intention, but are forced to resort to the concept of "coloured" intention (*dolus malus*) to come to the conclusion that an *infans* or insane person is incapable of forming a criminal intention is, of course, valid only if criminal capacity is regarded as a prerequisite for or a component of fault.

128 See Van Oosten "The insanity defence: its place and role in the criminal law" 1990 *SACJ* 6 ff.

129 Cf Van Oosten "Non-pathological criminal incapacity versus pathological criminal incapacity" 1993 *SACJ* 135 ff 139 ff 140 fn 88.

130 This point is missed by Badenhorst 395 fn 6 and Du Plessis 1985 *SALJ* 509, who fail to distinguish between criminal intention and criminal capacity as two separate and distinct concepts.

131 In criminal practice the test for both intention and capacity is subjective and hence, psychological, whereas the test for negligence is primarily objective and hence, fundamentally normative: see eg Burchell and Milton 195 247 ff 300 ff; Snyman *Strafreg* 164 ff 196–197 221 ff.

132 Burchell and Milton 246 (cf 196); see also *R v Mkize* 1959 2 SA 260 (N) 264; *S v Mahlinza* 1967 1 SA 408 (A) 414–415; *S v Lesch* 1983 1 SA 814 (O) 823; Viljoen JA in *S v Adams* 1986 4 SA 882 (A) 899 ff; Viljoen JA in *S v Campher* 1987 1 SA 940 (A) 955

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(d) If the notion of necessity as a ground of justification is rejected, necessity would be incapable of excluding criminal liability where the person acting in necessity acted with criminal intention.[133] To avoid this conclusion, the opponents of necessity as a defence to unlawfulness (a justification) in cases of killing of an innocent person[134] are obliged to resort to recognising and accepting necessity as a defence to fault (an excuse)[135] on the basis that the accused should, notwithstanding criminal intention, not be blamed for his or her unlawful conduct.[136] Without debating the issue whether a killing in necessity should be dealt with on the footing of a justification or an excuse, this viewpoint raises a number of difficulties:

(i) It again adopts a teleological *a priori* approach by assuming that the accused should, despite *criminal* intention, escape criminal liability for an *unlawful* killing in necessity and shapes its concept of fault accordingly.

(ii) It raises the question how the necessity requisites of *awareness* on the part of the accused of the emergency situation and *belief* that his or her legal interest is being endangered,[137] which are invariably indicative of a lawful disposition, can be reconciled with a *criminally* intended unlawful but *blameless* act in necessity.

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ff; Van der Merwe *Leerstuk* 98–99; De Villiers 44 46–47 49 fn 46 60–61 66; Visser and Maré 305, who point out that if it is argued that capacity is part and parcel of culpability because culpability cannot exist without capacity, it can also be argued that since criminal intention cannot exist without unlawfulness, unlawfulness is part and parcel of culpability; Van Oosten 1990 *SACJ* 6 ff; cf *S v Johnson* 204.

133 Frank *Festschrift* 524–525, who adds self-defence to necessity in this context (532–533 536–537); Snyman *Strafreg* 123 ff 128 ff 153 156–157 260–261; Van der Merwe 1983 *SACC* 38–39; cf Freudenthal 8 9 24 26: "Begrifflich . . . fehlt, wo Notstand besteht, mit dem Können des Täters die Vermeidbarkeit der Begehung, die Vorwerfbarkeit der Tat, die Zumutbarkeit des Nichthandelns oder . . . kurz die Schuld" (8); Bertelsmann 1981 *THRHR* 416 ff; Kok 1982 *SACC* 32; Van Zyl 1982 *THRHR* 438–439; cf, however, Visser and Maré 216–217, who point out that an acquittal, where the accused acted unlawfully, intentionally and with awareness of unlawfulness, would run counter to the tenets of current South African criminal law (see also Maré 1993 *SACJ* 178) and thus demonstrate the unacceptable consequences of the normative fault concept.

134 Cf Snyman *Strafreg* 124, who also regards necessity as an excuse where a prisoner escapes from prison in order to avoid homosexual attacks against which the prison authorities are unable to protect him.

135 According to Burchell 1988 *SACJ* the term is vague, "there is no clear definition of an 'excuse', as opposed to a 'justification' " and "[although] debate has concentrated on the *effect* of an excuse, the intrinsic jurisprudential nature of an excuse has not been clearly identified".

136 Snyman *Strafreg* 153; Bertelsmann 1981 *THRHR* 417–418.

137 Snyman *Strafreg* 126–127 (cf Snyman 1985 *SALJ* 120, who expresses the same idea in even stronger terms: "[A] person can rely on private defence or necessity as a ground of justification only if he *intends* to act in defence or necessity"); Van Oosten "Wederregtelikheid – 'n skuldtoets?" 1977 *THRHR* 93; Bertelsmann 1981 *THRHR* 422; cf (h) *infra*; cf, however, De Wet 76–77, *sed contra* 69–70; Van der Merwe 1976 *SALJ* 281–282, *sed contra* 285.

(iii) Real necessity as a defence to fault would ostensibly put it on par with putative necessity as a defence to fault, and may thus contribute to obscuring the distinction between putative necessity and real necessity on the one hand,[138] and to the contradiction arising from considering them both as defences to fault on the other.[139] As regards the former, whether real necessity is considered as an excuse or a justification, the requirements that must be satisfied for the defence to succeed remain the same. In contradistinction, putative necessity invariably signifies that the requisites of real necessity have not been satisfied. As regards the latter, the normative fault concept dictates that only putative necessity arising from unavoidable ignorance or mistake of law can afford the accused a defence to fault. Consequently, avoidable putative necessity would not avail the accused as a defence despite lack of awareness of unlawfulness and, hence, an absence of criminal intention in terms of the psychological fault concept, whereas real necessity may afford the accused a defence to fault notwithstanding the presence of criminal intention.

(iv) Real necessity would be a defence to fault regardless of whether the accused acted with or without criminal intention. This is unsatisfactorily explained by the argument that the psychological concept of fault confuses "feeling culpable" with "being culpable": Criminal intention points to the former (the relationship between the accused and his or her unlawful conduct), whereas criminal culpability relates to the latter (by setting a standard outside the accused's knowledge and intention, to wit, the conduct that society expects of the accused).[140] It raises the question how an *acquittal* on a charge of murder for an *unlawful* killing in necessity with *criminal* intention can be reconciled with a *conviction* of a crime of *intention* where awareness of unlawfulness was lacking because of *avoidable* ignorance or mistake of law.

(v) It raises the question whether an acquittal on a charge of murder based on necessity as a defence to fault also rules out a conviction for attempted[141] murder where the facts are that the accused acted, as the supporters of necessity as a defence to fault would have it, unlawfully and with criminal intention. If so, the normative concept of fault adds a whole new dimension to attempt[142] as a form

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138 Cf Van Zyl 1982 *THRHR* 437–438.

139 Cf Snyman *Strafreg* 110: "As die objektiewe faktore afwesig is, is daar geen sprake van 'n regverdigingsgrond nie, en om hierdie rede is putatiewe ('gewaande') regverdigingsgronde geen werklike regverdigingsgronde nie: X se gedrag bly wederregtelik"; Bertelsmann 1981 *THRHR* 413, who states that "[p]utatiewe noodtoestand is nie 'n noodtoestand nie, maar 'n geval van dwaling, dit wil sê 'n onjuiste geloof in omstandighede wat óf objektiewe óf subjektiewe noodtoestand sou daarstel", but fails to explain the difference between putative necessity and subjective necessity; Nicolson 1983 *Responsa Meridiana* 273: "[A]ccording to our present law necessity can never directly be a *skulduitsluitingsgrond*."

140 Snyman *Strafreg* 154 fn 22, who states that the accused cannot be measured by his or her own standards, because he or she could then not be blamed for doing wrong.

141 And, more particularly, impossible attempt.

142 And probably also to incitement, conspiracy and liability as an accomplice and an accessory after the fact.

of criminal liability. Moreover, it again raises the question how an acquittal on a charge of attempted murder of an accused who acted with criminal intention can be reconciled with a conviction of a crime of intention of an accused who lacked awareness of unlawfulness because of avoidable ignorance or mistake of law.

(vi) Real necessity as a defence to fault rather than to unlawfulness leads, all things being equal and in the final analysis, to the same result as necessity as a defence to unlawfulness rather than to fault. The following example illustrates the point: Suppose Y, an aggressive and violent gang leader, threatens X, a gang member, with death should X refuse to hold Z, the captured leader of an opposing gang, in order to enable Y to stab Z to death with a knife.[143] One of the principal reasons advanced for the proposition that necessity is an excuse rather than a justification is that if it were the latter, Z would not be able to ward off X's lawful attack in self-defence but would have to rely on necessity,[144] whereas if it were the former, Z would be able to ward off X's unlawful attack in self-defence.[145] However, it is interesting to note what happens when the process of attack and defence continues: If, on the one hand, X were to act in retortion against Z's *self-defence* (necessity being an excuse), he would again have to rely on *necessity*, and Z would, in turn, again be able to ward off X's unlawful attack in *self-defence*, and so on and so forth. If, on the other hand, X were to act in retortion against Z's act in *necessity* (necessity being a justification), he would also have to rely on *necessity*, and Z would, in turn, also be able to ward off X's lawful attack in *necessity*, and so on and so forth. What this means, is that if necessity is an excuse, X can be acquitted on the basis of necessity and Z on the basis of self-defence, whereas if necessity is a justification, both X and Z may be acquitted on the basis of necessity. But whether it is the one or the other, the final result remains the same: Both X and Z get off scot-free. Regarding necessity as an excuse in these circumstances, therefore, simply makes no practical difference.[146]

(vii) Real necessity will, in any event, all things not being equal, in the final analysis be a justification rather than an excuse even in cases of the killing of an innocent person in necessity. The following example illustrates the point: Suppose A, a doctor, is about to switch off the only respirator in the only hospital in a small town to which B, a neocortically dead patient in a persistent vegetative state, is connected, in order to make the ventilator available to save the life of C, a motor accident victim with a reasonable prognosis of recovery. If D, B's husband, comes to B's rescue and attacks A in order to save B's life, the position would, on the face of it, appear to be similar to that in the previous example. The

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143 Cf the facts of *S v Goliath*.

144 Cf Burchell 1988 *SACJ* 25.

145 Cf Wessels JA in *S v Goliath* 29–30; Du Plessis 1985 *SALJ* 510, who sidesteps the problem by taking the view that "[a]n easy solution to the XYZ riddle seems to be that Y, if he successfully defends himself and kills X, could submit that, on a true analysis of all the facts, he had defended himself against an unlawful attack on his life by Z, who was using X as an unwilling agent".

146 Cf Burchell 1988 *SACJ* 23 ff.

fundamental difference is, however, that in the present example A and D both act to save someone else's life and not their own. Whether the life of another person may be saved in necessity by killing an innocent person is an open question.[147] Here the issue is not that A and D consider their own lives to be more important than the lives of C and B, but that A considers C's life to be more important than B's life and D considers B's life to be more important than C's. Taking into account the difference in quality of life and prospect of recovery of B and C, it is difficult to conceive of A's act in necessity as being anything other than a justification.

(e) A purely psychological assessment of fault leaves no room for motive or purpose as a determinant of fault, notwithstanding the fact that motive or purpose not only generates will but also that a will underpinned by a blameworthy motive or purpose constitutes a breach of duty.[148] This argument not only confuses motive and purpose with intention, but also loses sight of the relationship between motive and purpose on the one hand and intention on the other. Purpose is adequately accounted for in the concept of intention by *dolus directus*, but *dolus eventualis* as a recognised and accepted form of intention demonstrates clearly that intention in the legal context is a wider concept than purpose. Moreover, although motive may contribute to intention, it is not congruent with intention. A reprehensible motive will not necessarily include criminal intention, as is borne out by seduction and adultery as non-criminal conduct, and a commendable motive will not necessarily exclude criminal intention, as is borne out by euthanasia as murder.

(f) The psychological concept of fault provides no indication which psychological relationships or conditions are relevant in determining fault and on what basis they are supposed to establish or exclude fault.[149] It fails to explain why, for instance, not only purpose, but also intention and negligence are relevant in determining fault and why, for example, only psychological factors establish or exclude fault.[150] This argument tends to overlook the fact that the human mental/psychological faculties of cognition/consciousness, conation/volition and affection/emotion are not only all accounted for in the elements of criminal capacity and criminal intention, but also that they are properly related to the unlawful deed. Thus criminal capacity accommodates the mental capacity of the accused to appreciate the nature and wrongfulness of his or her deed (cognitive function) and to control his or her conduct accordingly (conative function), and criminal intention accommodates the actual foresight of the possibility of the

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147 Cf Burchell and Milton 148–149 and Snyman *Strafreg* 125, who take the view that the legal interest of another person may be protected in necessity, but who make no mention of a killing in necessity in this regard.

148 Dohna 1905 *GS* 311–312.

149 Jescheck 378; Jakobs 471; Badenhorst 395; De Villiers 48; Bergenthuin 1985 *De Jure* 276.

150 Jakobs 471: "*Ein psychisches Faktum is für die Schuld weder notwendig noch hinreichend*" (471 fn 6); and: "Mehr als dass Vorsatz und Fahrlässigkeit mögliche Erscheinungsformen des Verbrechens sind, macht der psychologische Schuldbegriff nicht aus" (471 fn 7).

unlawful deed (cognition) and reconciliation with such possibility (volition). Obviously, there is a normative aspect to the policy decision of the criminal law that not only *dolus directus*, but also *dolus eventualis* constitutes intention, just as much as the decision of the criminal law to require fault at all for criminal liability is a policy decision on a normative level. This is hardly unique, insofar as each and every element of a crime has a normative dimension which is reflected in the crime as the overall norm.[151] This normative dimension of fault at the grass root level is, however, something quite different from the normative fault concept and should not be confused and identified with it.

(g) The descriptive and neutral psychological concept of fault leaves no room for questions involving value judgments, such as whether the accused could have been expected to have acted lawfully, whether the accused possessed a free will which enabled him or her to choose between lawful conduct and unlawful conduct and whether the accused can be blamed for his or her unlawful conduct.[152] This argument tends to overlook the fact that the act, unlawfulness and criminal capacity as elements of criminal liability specifically cater for a free will on the accused's part by recognising and accepting the defences of *vis absoluta* (superior force), *vis relativa* (duress/coercion) and lack of ability to exercise control over one's actions (absence of conation). Furthermore, the elements of unlawfulness and negligence specifically cater, in terms of the objective reasonableness test and the reasonable person test, for what can and what cannot be expected of the accused in the circumstances in question. Moreover, the legal *blame* for a criminally capable accused's intentional or negligent and unlawful deed which is proscribed and punishable by law lies in a conviction of the *crime* in question. Gathering all these questions under the single umbrella of the normative fault concept as a man for all seasons, confuses and identifies fault with the act, fault with unlawfulness, fault with criminal capacity and fault with criminal liability.

(h) The psychological concept of fault is irreconcilable with the undeniable presence of subjective components in the *Unrecht* concept. Indeed, in some instances, it is simply impossible to determine *Unrecht* without reference to intention or negligence on the accused's part.[153] Equating intention or negligence with fault in these instances causes the confusion and identification of fault with unlawfulness.[154] This argument tends to elevate the exception to the rule to status of the rule itself. The use of subjective components to determine unlawfulness can conveniently be restricted to a small number of categories of cases in which the objective test of unlawfulness either provides no solution to the problem in question or an unsatisfactory solution. The rule that exceptions to general principles of

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151 See also Labuschagne 1985 *De Jure* 383.

152 Snyman *Strafreg* 152–153; cf Bertelsmann 1974 *Acta Juridica* 35 ff; Bergenthuin 1985 *De Jure* 276.

153 Snyman *Strafreg* 72 ff 105 ff 15–155; De Villiers 46 62; Van Oosten 1977 *THRHR* 93 ff; cf De Wet 69–70, *sed contra* 76–77; Van der Merwe 1976 *SALJ* 285, *sed contra* 281–282; Kok 1981 *THRHR* 69 ff; Nicolson 1983 *Responsa Meridiana* 270; (d)(ii) *supra*.

154 De Villiers 46; Van der Merwe 1976 *SALJ* 285.

law are the rule rather than the exception, inevitably affects all legal concepts and theories to a greater or lesser extent. Hence, mere exceptions prove rather than disprove the rule and if exceptions were to undo rules, precious few legal concepts and theories would remain undone.

(i) Fault seen as a state of mind results in the anomaly of fault in respect of lawful conduct where an objectively lawful act is perpetrated with a blameworthy state of mind (putative unlawfulness).[155] The fact that a blameworthy state of mind may precede objectively unlawful conduct is hardly surprising: in practice, crimes of intention are usually generated by the formation of a criminal intention followed[156] by its execution.[157] A criminal intention prior to its realisation is no less a criminal intention than the selfsame intention put into action subsequent to its being formed. Indeed, it is a requisite of the fault element that fault (intention or negligence) existed prior to[158] or contemporaneously with the unlawful deed.[159] Moreover, in cases of a finding of impossible attempt as an inchoate offence, the accused invariably had the intention to commit the completed unlawful deed,[160] but could not be convicted of the completed crime precisely because, objectively, a completed unlawful deed was lacking.[161] Hence, the distinction between the intended completed crime and impossible attempt to commit it does not relate to the fault element, which is exactly the same in both instances, but to the unlawfulness and deed elements: the very same act which does not qualify as an unlawful deed for purposes of the completed crime qualifies as an unlawful deed for purposes of impossible attempt as an inchoate offence. In other words, one and the same intentional act may result in criminal liability for impossible attempt but not in criminal liability for the completed crime.[162] Where fault as blame is supposed to enter the picture to make the difference between the completed crime and impossible attempt,[163] is difficult to determine. If the difference lies in the presence or absence of unlawfulness, in the sense that fault as blame is present when unlawfulness is present and absent

155 Van der Merwe 1976 *SALJ* 281–282 285; see also De Villiers 45.

156 However brief the time lapse between the formation of a criminal intention and its execution.

157 Cf, however, Van der Merwe 1976 *SALJ* 281 fn 8. Similarly, the question of criminal capacity may in practice precede the determination of an unlawful deed (cf *S v Mahlinza* 414–415): If a five-year-old child or conspicuously mentally ill accused appears in the dock on a criminal charge, the presiding judicial officer is most unlikely to allow the case to continue until an unlawful deed has been established beyond reasonable doubt before coming to a finding that the accused is criminally incapable.

158 In *actio libera in causa* cases.

159 See eg Burchell and Milton 319 ff; Snyman *Strafreg* 162.

160 Attempted attempt ordinarily being out of the question.

161 Which demonstrates a material difference between the effect of fault in criminal law and the effect of fault in the law of delict, in the sense that in the same set of facts the former makes provision for liability for attempt where a conviction of the completed crime is out of the question, whereas the latter makes no provision for liability for anything less than the completed delict; cf, however, Van der Merwe 1976 *SALJ* 280 fn 3 281 fn 10.

162 Cf Van der Merwe 1976 *SALJ* 281–282; Kok 1981 *THRHR* 67 70 ff.

163 See Van der Merwe 1976 *SALJ* 281–282; Kok 1981 *THRHR* 71.

when unlawfulness is absent,[164] unlawfulness is identified with fault. If the difference lies in the fact that one and the same intentional act constitutes impossible attempt but not the completed crime,[165] fault as blame is identified with criminal liability. Whether it is the one or the other, fault seen as blame not only renders fault redundant in determining criminal liability but also raises the question what the status of intention and negligence is.

(j) The psychological concept of fault offers no explanation for the fact that culpability is capable of gradation: It is recognised and accepted that criminal capacity may range from full capacity to diminished capacity, intention may range from *dolus directus* to *dolus eventualis* and negligence may range from *culpa levis* to *culpa lata*. In terms of the psychological fault concept, criminal capacity and intention or negligence are either present or absent.[166] This argument may have some merit in the single-phase German criminal justice system which treats the issues of criminal liability and criminal punishment as part and parcel of one and the same inquiry. It lacks merit in the dual-phase South African criminal justice system which treats criminal liability and criminal punishment as two separate and distinct inquiries. During the former, the *existence* of criminal fault is in issue. During the latter the *degree* of criminal fault is in issue.[167]

(k) The psychological concept of fault makes no attempt to characterise the concept of fault as a characteristic general concept of crime.[168] What this argument is supposed to mean, is a matter of conjecture.

4 2 "Normative" fault

The normative fault[169] concept has elicited the following critical comments:

(a) Blame as the essence of fault renders the normative concept of fault not only meaningless and tautologous,[170] but also synonymous with actual criminal liability,[171] which in effect means that the accused is blamed twice: when a finding of fault is made and when convicted of the crime in question.

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164 As Van der Merwe 1976 *SALJ* 281–282 suggests.

165 As Van der Merwe *ibid* concedes.

166 Van der Merwe 1976 *SALJ* 282 ff, who also refers to euthanasia and remorse as factors mitigating sentence in this context; see also De Villiers 45 61; Snyman *Strafreg* 155 fn 27; Van der Merwe 1982 *THRHR* 146–147.

167 See also Du Plessis 1984 *SALJ* 316 ff; cf Visser and Maré 460.

168 Badenhorst 395.

169 And neonormative fault.

170 Cf Snyman *Strafreg* 153 ff, who speaks variously of "skuld of verwyt" (153), "skuld as *verwyt*" (155 fn 27), "die wese van skuld [is] geleë in . . . *verwytbaarheid*" (155), "[d]ie kern van die skuldbegrip is verwyt" (157) en "die skuldverwyt" (157 158, in other words "verwytverwyt", which opens the door for "skuldskuld"); see also Badenhorst 399 ff for similar terminology.

171 Rosenfeld 1911 *ZStW* 467: "Was aber ist 'Schuld'? Fasst man sie nur als Vorwerfbarkeit, als Tadelhaftigkeit, so bietet uns diese Erklärung inhaltlich nichts, ja sie läuft auf eine Tautologie hinaus. Denn im Grunde sagt sie nur, dass dort verantwortlich gemacht wird, wo verantwortlich gemacht werden kann. Schuld ist dann eben die Tatsache der strafrechtlichen Haftbarkeit, die faktische Verantwortlichkeit"; cf Du Plessis 1985

continued on next page

(b) The idea of fault as a mere value judgment passed by someone else ignores fault as an individual psychological relationship of the accused with his or her unlawful conduct.[172]

(c) The "am schärfsten formulierten, *streng individualisierenden Missbilligungsurteils*" of the normative fault concept is irreconcilable with current criminal law.[173]

(d) The details of the normative concept of fault are a matter of controversy, particularly "was materiell den Schuldvorwurf begründet" and the relationship between fault and blameworthiness.[174]

(e) Blameworthiness can be no more than a consequence of fault and not fault itself. Blameworthiness merely indicates that the perpetrator can be blamed for his or her deed. It is a judgment by someone else on something, not the something itself.[175]

(f) Being purely fault-oriented, the concept of blameworthiness presents an incomplete picture of the nature of the value judgment concerned. The value judgment involves not only the question whether fault can be imputed to the perpetrator, but also the question whether it is necessary, from the point of view of preventive punishment, to hold him or her criminally responsible. In this sense, blameworthiness is a necessary but not a sufficient condition for responsibility. Hence, the normative fault concept should be allowed to develop into a normative responsibility concept.[176]

SALJ 509, who objects to the rejection of intention as fault because it is only a necessary ground but not a sufficient ground for liability; cf, however, De Villiers 37–38 and Van der Merwe 1976 *SALJ* 287, who equate fault with liability.

172 Rosenfeld 1911 *ZStW* 468–469: "Man wird . . . eine . . . Definition nicht unterschreiben mögen, die aussagt: die Schuld eines Menschen stecke lediglich in den Köpfen anderer. Nur eine eigene seelische Beziehung des Verbrechers kann Schuld sein" (469); cf, however, De Villiers 61, *sed contra* 47 48 where the psychological fault concept's emphasis on the individuality of the accused is referred to as one of its advantages; Snyman *Strafreg* 157.

173 Maurach/Zipf 404–405 411 ff.

174 Schönke/Schröder/Lenckner Vor Par 13 Rdn 113; cf Jakobs 475–476; Lackner Vor Par 13 Rdn 22; De Villiers 54 61 66; Van der Merwe 1983 *SACC* 40 43.

175 Schönke/Schröder/Lenckner Vor Par 13 Rdn 114 115: "Die Vorwerfbarkeit bezeichnet das 'Das', die Schuld dagegen das 'Was', diese ist ein steigerungsfähiger Begriff . . . jene dagegen nicht . . . Zu unterscheiden ist deshalb zwischen dem *Schuldtatbestand* als dem Objekt der Wertung, der *Vorwerfbarkeit* als der Wertung selbst und der *Schuld* als dem Gegenstand mitsamt seinem Wertprädikat . . . In der Zusammenfassung von Objekt der Wertung und Wertung des Objekts ist der Schuldbegriff daher notwendig komplexer Natur" (Rdn 114); cf, however, Badenhorst 396–397, De Villiers 57 62 and Snyman *Strafreg* 157–158, who regard fault as blame or blameworthiness.

176 Roxin 540, who states that the great advantage of the normative fault concept over the psychological fault concept is its recognition of the fact "dass es bei der an das Unrecht anschliessenden Deliktskategorie um eine im Verhältnis zur Pflichtwidrigkeit andersartige Bewertung des Tatgeschehens und nicht um einen blossen psychischen Tatverhalt geht".

(g) The notion that the removal of intention from the element of fault and its assignment to the *Tatbestand* element renders responsibility a pure value judgment is incorrect:

> "[Man muss] zwischen verantwortlichkeitssachverhalt und Verantwortlichkeitsurteil differenzieren und die 'verantwortliche Handlung' als Einheit von Wertung und Gewertetem begreifen.[177] Zum Verantwortlichkeitssachverhalt im engeren Sinne gehören alle Umstände, die über das Unrecht hinaus für die Verantwortlichkeit bestimmend sind. Das sind teils subjektive, teils objektive Elemente, wie die psychische Verfassung des Täters, sein reales oder potentielles Unrechtsbewusstsein und das Fehlen exkulpierender Situationem. Zum Verantwortlichkeitssachverhalt im weiteren Sinne gehört auch das tatbestandliche Unrecht, da es ja die Gesamttat ist, für die der Täter verantwortlich gemacht wird. Alle Unrechtslemente sind also mittelbar auch Schuld- und Verantwortlichkeitskriterien. Die Frage, ob man den Vorsatz beim Tatbestand ober bei der Schuld einordnet, entscheidet lediglich darüber, ob er zum Verantwortlichkeitssachverhalt im weiteren oder im engeren Sinne gehört."[178]

(h) By requiring a so-called evaluation of intentional or conscious wrongdoing, the normative fault concept introduces an additional and unnecessary requirement for criminal liability. The grounds on which an intentional wrongdoing may be held not to have been "blameworthy" relate to unlawfulness or possibly criminal capacity rather than to fault. An "evaluation" of intentional or conscious wrongdoing is unnecessary for purposes of determining the existence of culpability. It becomes necessary only when determining the extent or *quantum* of culpability.[179]

(i) A finding, in terms of the normative fault concept, that someone acted intentionally while labouring under (unreasonable) ignorance or mistake of law is both unfair and unrealistic.[180]

(j) Resorting to the normative fault concept in cases of a (intentional) killing in necessity is unnecessary. These cases may be resolved by recognising and accepting that the accused acted lawfully in terms of the *boni mores* (objective reasonableness) test or that he or she lacked awareness of unlawfulness (putative necessity).[181]

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177 "[I]n derselben Weise wie man zwischen Unrechtssachverhalt und Unrechtsurteil unterscheiden muss und 'das Unrecht' den Gegenstand der Wertung mitsamt seinem Wertprädikat darstellt": Roxin 540.

178 Roxin 540.

179 Visser and Maré 216–217 451: "The normative theory of fault confuses fault in principle with the *quantum* of the reproach" (217).

180 De Villiers 58–59; Visser and Maré 451 460; Burchell and Milton 89–90 284; Rabie 1994 *SACJ* 95 ff.

181 Visser and Maré 451 460, who point out that an acquittal of an accused who "unlawfully, intentionally and with awareness of unlawfulness" kills someone else is not only contrary to South African criminal law (see also Maré 1993 *SACJ* 178), but also demonstrates the unacceptability of the normative fault concept in so far as "it introduces an additional element for criminal liability namely that no extenuating circumstances must exist" (216–217); cf Maré 1993 *SACJ* 165 ff.

(k) The normative fault concept tends to confuse and identify fault with unlawfulness, fault with capacity, fault with liability, fault with punishment and, hence, liability with punishment.[182]

(l) Recognising and accepting *Zumutbarkeit* as a requisite or element of fault without recognising and accepting its logical concomitant, *Unzumutbarkeit* or *Nichtzumutbarkeit* as a general defence to fault, is not only inherently anomalous but may also result in inconsistent and arbitrary adjudication.[183]

(m) Since the *Zumutbarkeit* requirement signifies that a person can reasonably be expected to conform to the criminal norm, its objective nature is not only at variance with a subjective test for intention, but also relegates crimes of intention to crimes of negligence, thus extending the scope of criminal liability for crimes of intention in violation of the principle of legality.[184]

5 CONCLUSION

Whatever the virtues attributed to the various successors of the classic concept of crime and the psychological concept of fault, none of them stands, in any of the sources consulted for the purposes of this article, accused of simplicity and clarity. In fact, the virtue of cogency of the (neo)finalistic concept of crime and the (neo)normative concept of fault, as extolled in some of the literature referred to, is contradicted by the concession that they have by and large failed to leave an impression upon German criminal practice. The current (neo)finalistic concept of crime and its concomitant, the (neo)normative concept of fault, are not only distinctly nebulous and exquisitely complicated,[185] but also in many respects exceptionally controversial and riddled with inconsistencies.[186] The

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182 See also Visser and Maré 451 and Du Plessis 1984 *SALJ* 316 ff, who also mention intention and motive; cf Maurach/Zipf 416 ff; De Villiers 37–38 57 58 60–61 and Van der Merwe 1976 *SALJ* 281–282 287, who equate fault with liability; Kok 1982 *SACC* 28 ff, who associates fault with blameworthiness, reasonableness, fairness, "regswetenskap", the legal convictions of society and the purposes and functions of punishment; Snyman 1985 *SALJ* 127.

183 Snyman 1991 *THRHR* 16 ff misses the contradiction, but blames the rejection of *Unzumutbarkeit* or *Nichtzumutbarkeit* as a general defence on Germany's codified criminal law system, pointing out that full acceptance of the *Zumutbarkeit* requisite is indeed possible in South Africa's uncodified criminal law system.

184 Cf, however, Snyman 1991 *THRHR* 20, who states: "Die normatiewe skuldbegrip, en die leerstuk van redelik verwagbare gedrag wat dit ten grondslag lê, weerspieël 'n *vermensliking* van die skuldbegrip en 'n beklemtoning van individuele geregtigheid" and who relates normative fault and the *Zumutbarkeit* requisite to the recognition of human rights.

185 See also De Villiers 54 61 66, who lists the simplicity and clarity of the psychological fault concept as one of its advantages (47), *sed contra* 48; Van der Merwe 1983 *SACC* 40 43; Labuschagne 1985 *De Jure* 381; Maré 1993 *SACJ* 170–171; cf Du Plessis 1984 *SALJ* 316, who remarks that it is a miracle that finalism was ever taken seriously (312; *contra* Snyman 1985 *SALJ* 132).

186 Eg a (neo)finalistic concept of crime and fault supported by opponents of the final conduct concept; a finalistic concept of crime of which the finalistic essence has fallen by the wayside with the decline of the original final conduct concept; *Zumutbarkeit* as a requisite of criminal liability without *Unzumutbarkeit* or *Nichtzumutbarkeit* as a general defence; and crimes of intention for which *pro parte* intention and *pro parte* negligence suffices, to mention but a few.

successive German concepts of crime and fault bear testimony to a seemingly infinite and progressively intricate rearrangement of largely the same elements of a crime (an act, *Tatbestandsmässigkeit*, unlawfulness and fault or *Unrecht* and fault)[187] and of largely the same objective-subjective evaluation criteria (*imputatio facti* and *imputatio juris*) under the disguise of a continually diverging and expanding vocabulary.[188] The actors take on different roles in each performance, but the play remains essentially the same. As intellectual gymnastics the performances are never less than impressive, but criminal law is applicable to and impacts on real people in the real world.

Moreover, an importation of the (neo)normative concept of fault and its concomitant, the (neo)finalistic concept of crime, would not only render South African criminal law heir to their vagueness, complexities, controversy and contradictions, but would also be inconsistent and irreconcilable with some of its fundamental tenets and notions. Whatever the demerits ascribed to the psychological fault concept, the main thrust of the criticism directed at the (neo)normative fault concept should not be overlooked: First, it confuses and identifies criminal fault with the various other elements of crime and the aims and objects of criminal punishment; secondly, it confuses and identifies criminal fault with criminal liability, thus rendering the fault requirement tautologous and redundant and leaving intention and negligence hanging in the air; thirdly, it transforms and expands crimes of intention to crimes of negligence and substitutes the specific notions of intention and negligence with a general notion of fault; and finally, it subverts or abandons the fault requirement by partially or wholly substituting it with policy considerations and general prevention. The present position in South African criminal practice is in any event that, generally speaking, both concepts of fault are accommodated to a large extent,[189] in so far as intention has a purely psychological content, while negligence has a predominantly normative content. Forcing both intention and negligence under a single normative fault umbrella[190] goes as much against the grain of South African criminal practice as forcing both intention and negligence under a single psychological fault umbrella.[191]

Finally, criminal law should strive to remain accessible and comprehensible to the lay public and in conformity to the prevailing notions of the society it purports to serve.[192] The (neo)finalistic concept of crime and the (neo)normative concept of fault appear to reflect lawyers' (professorial) criminal law rather than people's (societal) criminal law. If they were to become part and parcel of South African criminal practice, their intricacies and impracticalities would soon

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187 Cf Badenhorst 226 236 ff 243–244 248.

188 Cf Du Plessis 1984 *SALJ* 316 322–323: "On closer inspection [the normative fault concept] turns out to be a group of old acquaintances travelling incognito under a high-sounding collective title" (316).

189 The normative fault concept obviously without its (neo)finalistic connotation.

190 As Snyman attempts to do.

191 As De Wet has attempted to do.

192 Cf Van Warmelo 1984 *SACC* 53–54.

become an obstacle course, particularly for public defenders operating within the framework of the recently established public defender system, and for lay jurors,[193] should the reinstatement of the jury system in criminal trials become a reality. In this context, the following remarks, made seven decades ago, are still apposite:

> "Wir Strafrechtler . . . sind so eng zur Zunft zusammengeschlossen, dass wir uns bei der Bildung der Begriffe Schuld, Vorsatz, Fahrlässigkeit die Frage, ob sie mit den Anschauungen der Nichtjuristen im Einklange stehen, kaum vorgelegt haben . . . Dem Staat aber ist damit nicht gedient. Versteht man die Sprüche der Strafgerichte nicht, empfindet man, wenn auch rein gefühlsmässig, dass der Strafe Menschen verfallen, die man in der eigenen Sprache unschuldig nennt, so entsteht oder vertieft sich, was als Kluft zwischen Volk und Recht oft beklagt worden ist, und was wir Juristen mehr denn je zu meiden Anlass haben" – Berthold Freudenthal.[194] *

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193 Cf Du Plessis 1984 *SALJ* 129; De Villiers 48, who mentions the psychological fault concept's ability to accommodate different languages, cultures and backgrounds in a multicultural society as the prime reason for the South African courts' adherence to it (an argument which has some substance with regard to crimes of intention but less substance with regard to crimes of negligence), and who warns against replacing the psychological fault concept wholly with a normative fault concept which does not cater for South Africa's unique situation and for its various peoples (54 58).

194 1.

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Erfregtelike ontwikkelinge aan die Kaap: 1806–1828[1]

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SUMMARY

Developments in the law of succession at the Cape: 1806–1828

The law of succession played an important role in the day to day social life in the Cape during the period 1806–1828. This is evident from the numerous cases involving succession heard in the Court of Justice and the Court of Appeal.

A few cases during this period have been selected in order to discuss the law of succession in the Cape. Only those cases where the written pleadings referred to authorities or where an appeal was lodged to the Court of Appeal were used. Different problems pertaining to succession were discussed in the various cases, such as joint wills, the *fideicommissa familiae, substitutio, clausule reservatoir*, codicils, legitimate portion and the *querela inofficiosi testamenti*, intestate succession and formalities.

A few of these topics are discussed in this article. A short exposition of Roman law, Roman-Dutch law and South African law is given to serve as background for a discussion of the said cases in the Cape during 1806–1828. These cases are discussed in order to establish whether it can be said that a distinct Cape law developed during this period.

It seems that a multitude of authorities were cited by the different practitioners to substantiate their arguments. Not only Roman and Roman-Dutch law but also various European *ius commune* authorities were cited. This shows that the law applicable in the Cape was not the law as used in Holland but the European *ius commune*. The 18th century writers were also referred to. Blackstone was used as the most important English law authority although historical sources were also cited. The inference can be drawn that the influence of the English law of succession at this stage was minimal. The first reference to English succession law was in 1818. Cases of the Dutch Hooge Raad (High Court) and the Howe van Holland (Courts of Holland) were increasingly referred to. The inference can be drawn that the concept of *stare decisis* played a more substantial role during the period under discussion. It seems that the evolving customs and practice at the Cape were also prominent. The law had to adapt to new circumstances – the practitioner not only referred to the *costume locaal* (local customs), but also to Cape legislation. It may be said that a Cape law evolved.

Although there were not many legal practitioners in the Cape most of the pleadings were documented fairly well. It was also apparent from a perusal of the pleadings that the standard of the practitioners differed and that Roman-Dutch law was not always cited correctly. But overall it could be said that the practice of the law in the Cape was of a high standard.

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1 Die navorsing vorm deel van die RGN-ondersteunde Kaapse Regspraakprojek 1806–1828.

1 INLEIDING

Die erfreg het 'n belangrike rol in die Kaapse samelewing gespeel. Dit blyk uit die aantal hofsake wat voor die Raad van Justisie en die Siviele Appèlhof gedien het.[2] Die sake wat hieronder bespreek word, is hoofsaaklik gekies omdat daar in die pleitstukke na gesag verwys word[3] of omdat daar teen die betrokke beslissing na die Siviele Appèlhof geappelleer is.

Vir doeleindes van die ontleding van die erfreg aan die Kaap gedurende 1806–1828 is 'n aantal van die erfregsake ondersoek.[4] 'n Verskeidenheid erfregtelike probleme word deur die hofsake aangespreek, naamlik gesamentlike testamente, *fideicommissa familiae, substitutio, clausule reservatoir*, kodisille, legitieme porsie en *querela inofficiosi testamenti*, intestate erfopvolging en formaliteite.[5]

In hierdie artikel word daar telkens ten aansien van 'n onderwerp 'n kort oorsig van die huidige Suid-Afrikaanse posisie gegee en daarna word die Romeinse regsontwikkeling kortliks uiteengesit om as agtergrond vir die Kaapse regsontwikkeling te dien. By elkeen van die verskillende onderwerpe word die gesag waarna in die 1806–1828-hofsake verwys is, kortliks ontleed ten einde te bepaal of daar 'n eiesoortige Kaapse reg tot stand gekom het. Die huidige Suid-Afrikaanse erfreg bestaan uit 'n mengsel van die gemenereg (Romeins-Hollandse en Engelse reg)[6] en wettereg (soos die Wet op Intestate Erfopvolging 81 van 1987 en die Wet op Testamente 7 van 1953).[7]

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2 Vgl Visagie ea *Die Raad van Justisie, hofstukke en uitsprake wat betrekking het op siviele sake, 1806–1827* (1989) bylae 6 bv ingesleutel onder die trefwoorde "erfreg" 97; "intestate erfopvolging" 7; "bedoeling van die erflater" 41; "testamente" 73; "*clausule reservatoire*" 8; "*fideicommissum*" 7; "formaliteite" 2; "kodisil" 10; "uitleg van testamente" 4; "boedelreg" 11; "eksekuteur" 39; "legaat" 21; "legitieme porsie" 8; "erfgenaam" 4. Daar moet in gedagte gehou word dat 'n saak soms onder meer as een onderwerp geïndekseer is.

3 Daar moet in gedagte gehou word dat daar nie volledig redes vir uitsprake verleen is nie en dat verwysings na gesag slegs in die prosesbundels voorkom – vgl ook Visagie ea 23.

4 Waar toepaslik is sowel die Raad van Justisie as die Siviele Appèlhof-uitsprake bestudeer: *Weesmeester v Louw* 1818 CJ 1677 320–566; *Laubscher v Orphan Chamber* 1818 GH 48/2/38 235–392; *Laubscher v Watermeyer* 1808 CJ 1458 114–506; *Vermaak v De Wet* 1820 CJ 1725 149–310; *Roux en Hamman (Disch) v Nielen* 1811 CJ 1534 140–378; *Nielen v Roux & Hamman* 1814B GH 48/2/19 631–821; *Smuts v Fleck* 1809 CJ 1492 1–757; *Van Druten NO v Le Roux* 1814 CJ 1573 33–609, 1814 GH 48/2/21 578–1347; *Eksteen v Eksteen* 1823A GH 48/2/59 1–564; *Leeson v Cruywagen* 1820 CJ 1741 2–518, 1821 GH 48/2/44 444–674; *Ventura (Jansens) v Danielse (de Oude)* 1810 CJ 1509 264–544; *Anossi (Hayning) v Smuts (Buisinne)* 1817 CJ 1645 253–283; *Anossi v Weduwee Buisinne* 1818D GH 48/2/35 310–597; *Neethling (nms boedel en minderjariges van Munnik) v Weduwee Dreyer (eksekuteur Dreyer) Morkel (Rossouw, Melk) v Watermeyer* 1812 CJ 1546 1–405; *Anossi & Neethling (Smuts) v Fleck* 1806 CJ 1419 6–300; *Anderson v Morrisson* 1821 GH 4/2/48 211–682.

5 Sien die bespreking hieronder.

6 Van Zyl *Geskiedenis van die Romeins-Hollandse reg* (1983) 456.

7 Soos gewysig deur die Wysigingswet op die Erfreg 43 van 1992 wat op 1992-10-01 in werking getree het.

2 GESAMENTLIKE TESTAMENTE

> "'n Gesamentlike testament ('joint will') is 'n testament waarin meer as een testateur hulle onderskeie uiterste wilsverklarings gemaak het . . .
>
> 'n Wederkerige testament ('mutual will') is 'n gesamentlike testament waarin twee of meer testateurs mekaar oor en weer bevoordeel het."[8]

'n Gesamentlike testament kan te eniger tyd deur een van die testateurs gewysig of herroep word sonder die medewete van die ander testateur.[9] By sowel gesamentlike as wederkerige testamente word in die huidige Suid-Afrikaanse reg as uitgangspunt aanvaar dat die onderskeie partye slegs bedoel het om oor hulle eie boedelbates te beskik.[10] Boedelsamesmelting kan egter bewerkstellig word indien die langslewende erflater 'n gesamentlike voordeel (wat deel van sowel die oorledene as die bevoordeelde se boedels vorm) wat deur die oorlede erflater bemaak is, aanvaar.[11] Artikel 37 van die Boedelwet 66 van 1965 bepaal dat indien twee of meer testateurs 'n deel van hulle onderskeie boedels saamgevoeg het vir beskikking daaroor en die langslewende(s) die voordeel aanvaar het, die testament nie meer herroep kan word nie.[12] Slegs indien die langslewende dus geen voordeel uit die boedel van die erflater aanvaar nie, kan hy self oor sy eie deel van die boedel beskik.[13] Volgens Van der Merwe en Rowland[14] was gesamentlike testamente nie onbekend aan die Romeins-Hollandse reg nie. Wanneer die langslewende 'n voordeel aanvaar, mag hy egter nie op so 'n wyse oor die boedelbates beskik dat hy die ander erfgename van die eerssterwende benadeel nie. Boedelsamesmelting as afsonderlike leerstuk het egter eers in die 19de eeu ontwikkel.

2 1 Romeinse regsontwikkeling

Sover vasgestel kan word, is daar nie in die Romeinse reg spesifiek vir die gesamentlike/wederkerige testament voorsiening gemaak nie. Daar het verskeie vorme van testamente bestaan, naamlik in die vroeëre tye die *testamentum calatis comitiis, testamentum in procinctu, testamentum per aes et libram*, die praetoriese en keiserlike testamente en die Justiniaanse *testamentum tripertitum*.[15]

Die enigste geval waar die moontlikheid van 'n gesamentlike testament afgelei kan word, is waar die vader namens sy seun wat onder puberteit is, 'n testament maak. *Substitutio pupillaris* sou dus moontlik as sodanige testament aangesien kan word.[16]

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8 De Waal, Schoeman en Wiechers *Erfreg studentehandboek* (1992) 138.

9 De Waal, Schoeman en Wiechers 138; Van der Merwe en Rowland *Die Suid-Afrikaanse erfreg* (1990) 418–419.

10 De Waal, Schoeman en Wiechers 139; Van der Merwe en Rowland 419–420.

11 Vgl De Waal, Schoeman en Wiechers 139–140; Van der Merwe en Rowland 420–438.

12 Vgl De Waal, Schoeman en Wiechers 140–142; Van der Merwe en Rowland 438–448.

13 De Waal, Schoeman en Wiechers 142.

14 422.

15 Vgl *I* 2 10 1–3; *D* 28; *C* 6 23 21; Thomas *The Institutes of Justinian* (1975) 114.

16 Vgl *I* 2 16. Die vader moet ook self 'n testament gemaak het buiten die seun se "testament" (wat in 'n afsonderlike testament vervat is – *I* 2 16 3). Is die vader se testament

vervolg op volgende bladsy

In Engeland het die kanonieke reg die erfreg beïnvloed.[17]

In die Oud-Nederlandse reg het die gemeenskaplike of wederkerige testament wel voorgekom. In 'n gemeenskaplike testament het twee persone een testament opgestel en in 'n wederkerige testament het die twee persone mekaar in dieselfde testament wedersyds bevoordeel.[18]

2 2 Die reg van toepassing aan die Kaap

Verskeie van die erfreghofsake handel oor die geval waar twee gades 'n gesamentlike testament gemaak het, die een sterf en die ander 'n tweede huwelik aangaan en haar of sy gedeelte van die gesamentlike testament herroep.[19] Die problematiek rondom die gesamentlike testament word gewoonlik in samehang met die ander moontlike eisgronde (soos hieronder bespreek) in die prosesstukke uiteengesit.

In *Eksteen v Eksteen*[20] was ene JP Eksteen met appellant se ma Johanna van Reenen getroud. JP en Johanna het op 21 Februarie 1790 'n gesamentlike testament opgestel waarvolgens hulle kinders in ouderdomsvolgorde by wyse van 'n prelegaat 'n manlike of vroulike slaaf kon kies wanneer die langslewende sterf. In 1817 sterf Johanna en JP trou met tweede respondent. JP moes egter voor sy hertroue die gemeenskaplike boedel verkoop en die kinders die moederlike helfte laat toekom. JP gaan 'n ooreenkoms met sy kinders aan dat hy aan elkeen 40 000 gulde sal gee vir hulle aandeel in die gemeenskaplike boedel. Hulle sou steeds by sy dood elk 'n slaaf kon kies. JP verly egter met sy hertroue weer 'n gesamentlike testament met tweede respondent en bevestig daarin die prelegate en dat sy kinders in die vaderlike helfte sal deel. JP en sy kinders raak vervreem van mekaar en in 1821 stel JP en tweede respondent 'n tweede gesamentlike testament op waarin slegs die prelegate van die kinders bevestig word. Tweede respondent kon daarvolgens vir die duur van haar lewe die dienste van die tien beste slawe benut. Vir die kinders het daar net 'n paar slawe (volgens hulle die swakkeres) oorgebly om uit te kies. Bowendien is hierdie slawe wat hulle sou kies met *fideicommissa* ten gunste van hulle kinders belas. Indien hulle nie kinders sou hê nie, sou die slaaf na appellant se jongste broer (die gunsteling) gaan. Die appellante het almal egter groot gesinne gehad en was van mening dat die tweede gesamentlike testament ten aansien van die *fideicommissa* onredelik was. In die hof *a quo* is beweer dat die *fideicommissum*-bepaling moet verval en dat die kinders soos in die oorspronklike gesamentlike testament uit al die slawe kon kies. Die hof *a quo* het die appellante gelyk gegee ten aansien van die

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weens die een of ander gebrek ongeldig, sou die seun s'n ook ongeldig wees – *I* 2 16 5. Vgl ook *D* 28 6 4.

17 Buckland en McNair *Roman law and common law* (1974) 148–149.

18 De Smidt *Compendium van de geschiedenis van het Nederlands privaatrecht* (1977) 55 – sodanige testamente word tans in Nederland verbied.

19 *Anossi & Neethling (Smuts) v Fleck* 1806 CJ 1419 6–300; *Eksteen v Orphan Chamber and Widow Eksteen* 1823 GH 48/2/59 211–682; *Ventura (Janssens) v Danielse (De Oude)* 1810 CJ 264–544; *Nielen v Roux en Hamman* 1814B GH 481; *Laubscher v Orphan Chamber* 1818 CJ 1677 320–566, 1819 GH 48/2/38 235–392.

20 1823 GH 48/2/59 1–14.

fideicommissa-reëling maar bepaal dat hulle slegs uit die oorblywende slawe (na tweede respondent haar keuse uitgeoefen het) mog kies. Die redes vir appèl was die volgende:[21]

(1) Die herstel van die oorspronklike 1790-testament met die prelegaatbepaling word gevra. Appellante voer aan dat volgens die Hollandse reg 'n prelegaat eerste uitbetaal moet word. Die moontlikheid sou volgens hulle bestaan dat die prelegate geadieer en die erfenis gerepudieer kan word.[22]

(2) Prelegate het dikwels aan die Kaap voorgekom en die algemene reëls met betrekking tot prelegate moet gevolg word.[23]

(3) Volgens die Hollandse reg kan prelegate nie deur 'n latere testament gewysig word nie. Die appellante verwys na *C* 5 9 6 in dié verband.

(4) Wanneer 'n tweede gesamentlike testament opgestel word, vind boedelskeiding ten aansien van die eerste boedel plaas en moet die oorledene se boedel eers volgens die eerste testament verdeel word. Hierdie reëling sou volgens die regspraktisyn ter beskerming van die kinders dien.[24]

Respondente het aangevoer dat die laaste gesamentlike testament die geldige testament is en dat die boedel daarvolgens verdeel moet word.[25] In respondente se antwoord (*respondent's reply*)[26] is Pothier as gesag aangevoer.[27] Volgens respondente moet in gevalle waar die woorde van 'n kontrak, 'n testament of verdrag eenvoudig en verstaanbaar is, dit dienooreenkomstig uitgelê word. Volgens dié uitleg sou daar nie aan die respondente 'n reg om te kies verleen gewees het nie.

Appellant (*rejoinder of appellants*)[28] verwys weer eens na die *Codex*-teks wat volgens hom baie streng in Holland toegepas is. In die verband verwys hy ook na Voet *Commentarius ad Pandectas* 23 120.[29] Die Siviele Appèlhof het die hof *a quo* se beslissing tersyde gestel en beveel dat die kinders geregtig is om uit die slawe wat tydens die lewe van die eerste twee erflaters gebore is, te kies.[30]

Dit blyk dus dat die hof waarskynlik appellant se betoog ten aansien van die regsposisie soos uiteengesit in die *Codex*-teks en Voet se standpunt gevolg het. In geval van 'n tweede gesamentlike testament waarin prelegate voorkom, moet daar eers aan die eerste gesamentlike testament uitvoering gegee word en kan die langslewende nie die testamentêre bevoordeling herroep wat deel van 'n kindsdeel uitmaak nie.

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21 15–28.
22 15–16.
23 19–24.
24 27–28.
25 99–288.
26 289–320.
27 293.
28 321–348.
29 341–342.
30 1821 GH 48/1/2 164. Kurators is vir die slawe aangestel – 174.

In *Roux en Hamman (Disch) v Nielen*[31] is in appèl aangevoer dat volgens die regspraktyk aan die Kaap die gewoonte ontstaan het dat partye in 'n huwelik binne gemeenskap van goed 'n gesamentlike testament (vervat in een akte) opstel.[32] Dié testament bestaan uit twee verskillende testamente.[33] Appellant voer aan dat dit die natuurlike reg van vrymense is om 'n testament te maak en te herroep.[34] Sou die hof bevind dat die langslewende nie die gesamentlike testament in geheel kan herroep nie, dan sou die begunstigdes slegs op die helfte van die voordeel geregtig wees. In hierdie geval was daar volgens 'n eerste gesamentlike testament van 1796 ('n kodisil is in 1806 bygevoeg) 'n bemaking van Rd 12 000 aan die Sendinggenootskap van Rotterdam. In 1807 stel die oorledene en eerste appellant weer 'n gesamentlike testament (met haar tweede eggenoot) op waarin sy die 1796- en alle latere testamente herroep (sy sterf in 1810).[35]

Respondente voer aan dat die legaat kragtens die eerste gesamentlike testament nie herroep kan word nie, aangesien die langslewende voordele uit die testament aanvaar het en dat die Rd 12 000 aan die Sendinggenootskap oorbetaal moet word. Dié bemaking sou ook nie uitdruklik deur haar herroep gewees het nie – sy het wel uitdruklik na ander legate verwys.[36] Volgens die gebruike in "hierdie kolonie" sou iemand wat in gemeenskap van goed getroud was en 'n gesamentlike testament verly net oor sy/haar eie helfte kan beskik. Die Rd 12 000, so is aangevoer, moet uit die helfte van die gemeenskaplike boedel ingevolge die eerste gesamentlike testament betaal word. As die langslewende weer sou wou trou, is dit die gebruik in "hierdie kolonie" dat die boedel van die eerste eggenoot eers afgehandel moet word.[37]

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31 1811 CJ 1534 140–378 handel oor die geldigheid van die 1807-testament wat 'n tweede gesamentlike testament van die langslewende was. Hier word die saak in appèl 1814 GH 48/2/19 631–821 bespreek aangesien dit hoofsaaklik oor die aard van die gesamentlike testament handel.

32 GH 48/2/19 643–644.

33 644. Vgl ook *Anossi & Neethling (Smuts) v Fleck* 1806 CJ 1419 26.

34 Vgl ook *Anossi & Neethling (Smuts) v Fleck* 1806 CJ 1419 25 waar verwys word na Peckius *De testamentis* 1 43 en Groenewegen *in notis*; De Groot *Inleydinge* 2 17 24; Everardus *Consilia sive responsa iuris* 79; Hynsing art 1 obs 8; Faber *Breviarium in Codicem C* 6 5 18; Gaill 2 117 1–2; *Hollandsche consultatien* 2 282; Lybrechts *Redeneerend vertoog D* 1 296; adv Munniks *Inleyding tot de hedendaagse rechtsgeleerdheid* 18 2 pag 136 (1776): "Dusdanige verandering van dispositie en herroeping van het vorige gemaakte daalt af uit het Publyke recht /: D qui test 3 en 33; C de pact leg 15:/ kan met geen mogelykheid zoo lang iemand leeft hem verhindert werden, nog de oor beedigde overeenkomst, nog zelfs door den flexkoten bepaaling in het testament vervat, deswijl elk sig zelve hier in een Wet stellende ook bevoegd is deeze Wet weederom te veranderen /: leg 22 D FF de leg 3, leg 7 FF de denot inter viv uxor:/ en de nalaatenschappen door geene contracten mogen overgebragt werden, want schoon man en vrouw hun laatsten willen te zamen op een papier kunnen stellen, nogtans vermag ieder, in het byzonder, hunne dispositie veranderen, wanneer het haar welgevalt door vernietigende het eerste Naamen in gerichte, met volkoomen behouwd van het gestelde dood degeene die zulks wil opgevolgd hebben" (25–27). Vgl ook Lybrechts *Redenerende practycq* 213.

35 633–639.

36 683–684.

37 766–768 810.

Die Siviele Appèlhof gee die respondente en appellante gedeeltelik gelyk en beveel dat Rd 6 000 (ipv 12 000 soos deur die Raad van Justisie op 1813-06-24[38] beveel is) aan die sendinggenootskap oorbetaal word.[39] Dit lyk of die hof aanvaar dat dit die gebruik in die kolonie is dat waar twee persone binne gemeenskap van goed getroud is en 'n gesamentlike testament opgestel het, die boedel by die dood van die eerssterwende afgehandel moet word. Die helfte van die boedel waaroor beskik is, kan uitbetaal word. Dit staan die langslewende vry om sy/haar helfte van die bemaking te herroep.

In die vroeëre 1806-saak van *Anossi & Neethling (Smuts) v Fleck*[40] is ook verwys na gesamentlike testamente wat volgens die landsgewoonte en *coutume locaal* erken is as dit aan al die formaliteite voldoen het.[41]

In *Smuts v Fleck*[42] is 'n saak van 1644 (*Wouter van Hendoorn cum locus requiranten contra Michiel Tormein* in die Howe van Holland waarna Groenewegen sou verwys), De Groot,[43] *C* 6 23 27, Guido Papaquest[44] en Faber[45] aangehaal ten einde te staaf dat die blote herroeping van die testateurs voldoende is om 'n testament kragteloos te maak.[46]

In *Ventura (Jansens) v Danielsen (De Oude)*[47] is 'n aansoek gerig dat 'n gesamentlike testament van Janssen en Danielsen nietig verklaar word aangesien die kinders nie as erfgename ingestel is nie.[48] Volgens *Hollandsche consultatien* 14[49] moet ouers elkeen van hulle kinders uitdruklik as erfgenaam instel anders is die testament kragteloos. Om legate na te laat, is nie voldoende nie.[50] Voet[51] stel dat as die *suus heres* oor die hoof gesien is, dit geag word dat die erflater nie by sy sinne was toe hy die testament opgestel het nie.[52] Daar word ook na Lybrechts se *Rechtsgeleerd, practicaal en koopmans handboek*[53] verwys waar ook gesê word dat

> "praeteritie is eene *onbedagsame voorbijganing* van ouders, of kinderen in hunne legitieme portie en dat zulks geschied zijnde *het Testament kragteloos is en direct vernietigd kan worden*".[54]

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38 Soos gevind in GH 48/2/19 650. Raad van Justisie-stukke kon nie opgespoor word nie.
39 GH 48/1/1 236(211).
40 1806 CJ 1419 6–300.
41 269–270.
42 1809 CJ 1492 1–797.
43 *Inleydinge* 2 34 13.
44 200.
45 *Breviarium in Codicem* 5 29.
46 269.
47 1810 CJ 1509 264–544.
48 Die applikant beroep hom op *Hollandsche consultatien* 1 158: 264 (308).
49 309–311.
50 312.
51 *Commentarius* 2 17 2 en 2 18, 2e druk Leydensche editie (313–316).
52 314–315.
53 3 59.
54 316. Respondent is van mening dat die appellant hierdie tekste verkeerd interpreteer en dat die legate en ander erfinstellinge soos hieronder uiteengesit, steeds van krag bly (516–517).

Die respondent voer daarenteen aan dat die "Roomsche wetten" (*N* 115 3) die gevalle noem waar erfgename op grond van 'n wettige rede onterf kon word – in hierdie geval het die testateurs nie met enige kwaadwillige bedoeling opgetree nie en kan die *querela inofficiosi testamenti* nie slaag nie.[55] Hy voer verder aan dat De Groot[56] (en dit lyk of die hof hierdie standpunt in sy uitspraak aanvaar het[57]) en andere die volgende mening het:

> "Het is volgens het gevoelen der meest geaccrediteerde Rechtsgeleerden buite twyffel dat een Testament houdende exheriditatie ten opzigte van oudere of ten aanzien van kinders door middel van de querela inofficiosi tesamenti . . . ofte petitione haereditatis by den Rechter wordende vernietigt ende geannulleerd de legaten en praelegaten en andere diengelijke makingen, en verder Dispositien nogthans in haar geheel en van volkomene waarde blyven."[58]

Huber[59] ondersteun hierdie standpunt. Hy gaan selfs verder en noem ook "ondererfstellinge" of *fideicommissa*.[60] Van Leeuwen[61] word as verdere gesag vir die standpunt aangehaal.[62] Respondent wys ook daarop dat by die berekening van die legitieme porsie voordele wat die erfgename voor die testateurs se dood ontvang het, bereken kan word. In die verband verwys hy na die "Roomsche recht", Wurm,[63] Gail[64] en Van Leeuwen.[65] Volgens respondent sou selfs legate in 'n *clausula codicillair* bemaak in stand gehou word. In dié verband word 'n beroep gedoen op *Hollandsche consultatien* 36 1[66] en *cons* 121.[67]

2 2 1 Ontleding van gesag

In feitlik al die sake oor die gesamentlike testament word daar sterk op die 17de-eeuse Romeins-Hollandse outeurs, in besonder De Groot, Voet, Huber en Van Leeuwen gesteun. Veral die *Hollandsche consultatien* word geraadpleeg. Die *Codex*- en *Novellae*-tekste is veral by die kwessie oor prelegate aangehaal. In sekere gevalle word daar ook na nie-Romeins-Hollandse outeurs verwys wat ook deel van die Europese *ius commune* uitmaak. In *Ventura v Janssens* is daar byvoorbeeld verwys na die "moderne" 18de-eeuse Romeins-Hollandse reg, 16de eeuse *mos italicus* (Mantica en Menochius), Gaill (uit die Duitse resepsietydperk 1526–1587) en Wurm (Duitsland, 14de eeu).

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55 388–389.
56 *Inleydinge* 2 24 7.
57 1810 CJ 927 115.
58 391.
59 *Heedendaegse rechts-geleertheyt* 6 1 44: 189 (391–393).
60 Die respondent verwys in hierdie verband na die Hollandse regsgeleerdes se standpunt in *Consultatien* 22 2 (392–394). Ander gesag waarna respondent sonder bespreking verwys ter ondersteuning van hierdie standpunt is Mantica *De conjectsult volunt* 9 5 8–11; Menochius *De prosum* 4 8 31 10 (393). Sien ook Lybrechts *Redeneerend vertoog over 't notaris ampt* 20 31 (508–510).
61 *RHR* 3 2 2.
62 394–396.
63 *Pract* 42 2 3.
64 2 91 5–6.
65 *RHR* 3 5 4 (399), vgl ook Huber *Heedendaegse rechts-geleertheyt* 2 4: 192 (425).
66 38 (507).
67 507.

In meerdere sake word daar verwys na die "gewoontes van hierdie kolonie" en die praktyk aan die Kaap dat partye wat binne gemeenskap van goed getroud is, gesamentlike testamente verly. Ook prelegate sou volgens die Kaapse gewoonte gereeld voorkom. Volgens Kaapse praktyk moet die eerste boedel eers afgehandel wees alvorens 'n tweede huwelik se boedel verdeel kon word. Hieruit kan wel afgelei word dat daar 'n spesiale praktyksreël met betrekking tot gesamentlike testamente aan die Kaap tot stand gekom het.

2 3 *Fideicommissa familia*

> " 'n *Fideicommissum* is 'n regsfiguur ingevolge waarvan 'n persoon (die *fideicommittens*) 'n bevoordeling aan 'n bepaalde bevoordeelde (die *fiduciarius*) laat toekom onderhewig daaraan dat die bevoordeling by die afloop van die aangeduide termyn of by die vervulling van 'n voorwaarde aan 'n verdere bevoordeelde (die *fideicommissarius*) oorgedra moet word."[68]

Aanvanklik was daar geen beperking op die aantal *fideicommissêre* substitusies wat in 'n testament opgelê kon word nie, maar kragtens die Wet op die Opheffing of Wysiging van Beperkinge op Onroerende Goed 94 van 1965 word *fideicommissêre* substitusie tot twee opeenvolgende *fideicommissarii* beperk.[69]

2 3 1 Romeinsregtelike ontwikkeling

In die Romeinse reg is die *fideicommissum* aanvanklik gebruik om die streng werking van die *ius strictum* te omseil.[70] Keiser Augustus het na aanleiding van 'n versoek regskrag verleen aan 'n *fideicommissum* wat nie in 'n testament vervat was nie.[71] Verskeie vorme van *fideicommissa* het bestaan, naamlik die *fideicommissum hereditatis*[72] en die *fideicommissum residui* waarvolgens die *fiduciarius* slegs driekwart van die boedel mag vervreem – ten minste 'n kwart moet aan die *fideicommissarius* oorgedra word.[73] Hierdie vorm is in die oud-Nederlandse reg geresipieer.[74]

Die *fideicommissum familia*[75] het ten doel gehad om 'n bepaalde saak in die familie te hou. Aanvanklik kon die *fideicommissum* nie aan *incerta pesona* nagelaat word nie, maar Justinianus het in *Novellae* 159 die aantal geslagte tot vier uitgebrei.[76] Tydens die resepsieperiode van die Romeinse reg is hierdie *fideicommissum* veral deur die adelike families gebruik om die sogenaamde eersgeboortereg te handhaaf.[77] Volgens Buckland en McNair[78] het die beperking

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68 De Waal, Schoeman en Wiechers 100; vgl ook Van der Merwe en Rowland 293.
69 Van der Merwe en Rowland 294.
70 Vgl *I* 23 1; Van Zyl *Geskiedenis en beginsels van die Romeinse privaatreg* (1977) 238; Thomas *Textbook of Roman law* (1976) 512.
71 *I* 2 25*pr* – Van Zyl *Geskiedenis en beginsels* 220; Thomas *Institutes of Justinian* 160–162.
72 Van Zyl *Geskiedenis en beginsels* 239–241; Van der Merwe en Rowland 303–308.
73 Van der Merwe en Rowland 315–317.
74 Feenstra *Romeinsrechtelijke grondslagen van het Nederlands privaatrecht* (1990) 284; De Smidt 54.
75 Eintlik latere Europese terminologie "fideicommissum familiae relictum" – Feenstra 283 (*D* 31 69 3; *D* 31 32 6 en *N* 159).
76 Sien ook Buckland en McNair 173–174.
77 Feenstra 283–284.
78 174–175.

van vier geslagte ook in die Middeleeue gegeld en die invloed daarvan is ook in die Engelse reg sigbaar. Die *fideicommissum familia* het 'n belangrike rol in die oud-Nederlandse reg gespeel.[79] In Frankryk is die aantal geslagte in 1560 tot twee verminder en na die Franse revolusie totaal en al verbied vanweë die adelike verbintenis daarvan.[80] Die *fiduciarius* was as eienaar bevoeg om die saak te gebruik en die vrugte te trek. Hy moet egter die saak in stand hou.[81]

In die oud-Hollandse reg was die *fideicommissum* beskou as 'n uiterste wilsbeskikking waardeur die ingestelde erfgenaam of legataris belas is om 'n legaat geheel of gedeeltelik in stand te hou en op 'n latere tydstip aan die bevoordeelde uit te keer.[82] Dit word onderskei van die Romeinse terminologie wat 'n veel breër betekenis aan die begrip geheg het.[83]

2 3 2 Die reg van toepassing aan die Kaap

Die toonaangewende sake in die Kaap wat oor *fideicommissa* handel, is *Laubscher v Watermeyer*,[84] *Morkel (Rossouw) v Laubscher (Watermeyer)*,[85] *Smuts v Fleck*,[86] *Van Druten v Le Roux*[87] (in appèl *Van Druten & Sappe v Widow Kiesewetter & Haupt*),[88] *Weesmeester v Laubscher*[89] (in appèl *Laubscher v Orphen Chamber*).[90]

In *Laubscher v Watermeyer*[91] het die vraag ter sprake gekom of die erflater die bedoeling gehad het om 'n *fideicommissum familia* of 'n legaat in te stel. Die testateurs het op grond van 'n *clausule reservatoir* sekere beskikkings gemaak en 'n aantal legate (verskillende plase) aan hulle seuns nagelaat. Ten aansien van sommige van die plase is die woorde bygevoeg dat die plaas altoos in die familie sal bly en daar sal "overgaan". Jacob het die plase Bergrivier en Patrysberg geërf. Na Jacob se dood wou sy kinders die plase verkoop en die opbrengs proporsioneel verdeel.[92] Die Raad van Justisie het 'n interdik teen die openbare verkoop van die plase verleen.[93]

Die eiser het hom op *D* 50 17 12 en Van Leeuwen[94] beroep dat daar na die bedoeling van die testateur gekyk moet word. Daarvolgens het geblyk dat 'n

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79 Feenstra 284; De Smidt 53.
80 Nicholas 269. Hierdie beperking is gedeeltelik in die *Code Civil* opgeneem.
81 De Smidt 53–54. Die saak was nie altyd teen uitwinning deur derdes beskerm nie en daarom het 'n plakkaat van 1624-07-30 vir registrasie voorsiening gemaak – dié reëling is egter nie behoorlik afgedwing nie.
82 Feenstra 280; De Smidt 53.
83 Feenstra 282.
84 1808 CJ 1458 114–506.
85 1812 CJ 1546 1–405.
86 1809 CJ 1492 1–757.
87 1814 CJ 1573 33–609.
88 1814–1815 GH 48/2/21 578–1347.
89 1818 CJ 1677 320–566.
90 1819 GH 48/2/38 235–392.
91 1808 CJ 1458 114–506.
92 121–133.
93 1808 CJ 922 339.
94 *RHR* 3 2 12–13.

fideicommissum ingestel is.[95] Indien die plase verkoop sou word, sou dit buite die familie-eiendom val en sou daar nie aan die erflater se wense gevolg gegee kon word nie.[96] Van Leeuwen[97] vermeld dat as die testateur 'n bepaling in die testament insluit dat sekere sake nie "uit sy geslag" moet gaan nie maar nie die tydperk vermeld nie, 'n *fideicommissum familia* ter sprake is. Die aantal *fideicommissêre* geslagte word tot vier beperk.[98] Volgens Voet[99] moet waar twyfel bestaan die waarskynlike "begeerte" van die testateur vasgestel word.[100] As daar nie 'n spesifieke persoon as *fideicommissarius* ingestel is nie, kan hy benoem word of anders erf die "naaste bloed".[101]

Die verweerder beweer dat daar geen *fideicommissum* tot stand gekom het nie en dat daar "erfstelling uit die hand" en nie "oor die hand" was nie. In dié verband word na De Groot[102] verwys. *Substitutio* is al wat ter sprake is.[103] Na aanleiding van Vinnius[104] sit die verweerder die verskil tussen gewone substitusie en *fideicommissêre* substitusie uiteen. Gewone substitusie vind slegs plaas wanneer die erfgenaam of legataris by die dood van die erflater ontbreek of sy erflating of legaat repudieer.[105] By die *fideicommissum* moet die *fiduciarius* eers aanvaar om "naderhand uit de hand van dezen over te gaan in de hand van den fideicommissairen erfgenaam of legataris".[106] Vinnius gebruik *D* 34 2 om die volgende voorbeeld te formuleer:

> "Titio fundum Cornelianum do lego, Si Titius fundum quem ei legari, non ceperit, eundem fundum Sejo do lego."[107]

Die uitwerking van die substitusie is *legatum agnoscente primo legatario evannescit.*[108]

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95 133–134.
96 135–136.
97 *RHR* 3 5 7.
98 138.
99 *Commentarius* 20 7 22 (140). Daar word verder verwys na *D* 35 1 19.
100 27 7 3 en 30 (140–142).
101 Voet 27 7 2; *D* 32 6 (144). Volgens Van Leeuwen *RHR* 6 3 4 moet daar gekyk word na woorde soos "ek wil/begeer/versoek" (147).
102 *Inleydinge* 2 19 1–4 (167).
103 170.
104 *Commentarius ad Institutiones* 2 15 2 (171–172).
105 171–172.
106 172–173. Daarom dan volgens verweerder dat De Groot dit "erflaating over de hand" noem. Die verweerder vind dit nie nodig om oor die basiese beginsels van die reg gesag aan te haal nie maar as dit nodig sou wees, verwys hy die ander party na die uiteensetting van Vinnius wat volledig aangehaal is.
107 Wat hy vertaal as "Ik legateer myn landgoed genaamd Cornelianum aan Titius. Zoo Titius het landgoed, het welk ik aan hem heb gelegateerd niet aanvaard dan legateer ik het zelfde landgoed aan Sejus" (175–176).
108 "Het legaat houdt geheel en al op te bestaan, zodra de eerste genoemde of geinstitueerde legataris het zelve heeft aanvaard" (179). Daar word ook verwys na *C* 6 37 6: "Si legati relicta primus agnovit legatarius substitutio eorum in personam Pontianae facta evanuit", vertaal as "Zo de eerste/geinstitueerde legatarus de legaaten aan hem nagelaaten heeft aanvaard, dan wordt de substitutie in dezelve, welke geschied is aan de persoon van Contiana geheel en al krachteloos en nietig" (180).

Die verweerder verwys na die *Romeinsche wetboek* wat die regsgeleerdes as "heilige wette" beskou het en wat voorbeelde in bogenoemde verband bevat: Averanius,[109] Cuiacius,[110] *D* 28 5 9 3 en *D* 9 27 1.[111] Die Romeinse reg sou nie toelaat dat iets verdraai word nie en daar word verwys na *D* 35 1 72 6: "Falsam causam legato non obesse verius est quia ratio legandi legato non cohaeret."[112] Die uitleg of daar met 'n legaat gewerk word, moet uit die bemaking self afgelei word en kan nie ingelees word nie.[113] Volgens *D* 32 69 1

> "[mag men] niet eerder van de beteekenis der woorden afwijken dan wanneer het zeker is dat het Testateuren iets anders gedachte hebben dan met de woorde is uitgedrukt".[114]

Die eiser meen dat die verweerder se interpretasie van die Romeinse reg spitsvondig is.[115] Die grondslag van die reg is egter geleë in die reg van die kolonie en dié van Holland en die Romeinse reg kom slegs ter sprake as die Nederlandse reg sou swyg.[116] Die Romeins-Hollandse outeurs wat die verweerder aanhaal, is diegene wat die suiwer Romeinse reg bestudeer het (bv Vinnius).[117] Aan die Kaap van Goeie Hoop moet volgens hom na die "eenvoudige leer van Hollandse regsgeleerdes" gekyk word.[118] Die verwysing na Van Leeuwen dat daar aan die erflater se wil gevolg gegee moet word, staaf juis die eiser se standpunt.[119] Na aanleiding van Voet[120] moet ook die ander woorde in die testament (soos die voorrede) in ag geneem word. Daaruit kan afgelei word dat die plase in familiebesit moet bly.[121] Die eiser is dus met 'n beroep op Voet[122] (wat volgens hom oor die Hollandse praktyk skryf) van mening dat die erflater wel 'n *fideicommissum familiae relictum* daargestel het.[123] Hy is van mening dat die tekste wat die verweerder aanhaal juis sy standpunt dat dit 'n *fideicommissum* is, steun.[124]

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109 17de-eeuse Italiaanse regsgeleerde – Van Zyl *Geskiedenis* 266; *Interpretationis iuris* 4 16 1.

110 *Observationes* 17 15.

111 199.

112 Vertaal as "Eene verkeerde raadgeving obsteert niet aan het legaat omdat de reden waarom men legateert met het legaat zelve niet te zamen hangt" (200–201).

113 201.

114 "Non aliter a significatione verborum recedi oportet, quam quum manifestum est aliud sensisse testatorum" (203). Sien ook die latere betoog 412–416 419–420 waar *D* 31 32 6 en Voet *Commentarius* 36 1 28 as gesag aangehaal word dat direkte substitusie van toepassing is.

115 228. Hy beskuldig verweerder dat hy een van die "Scholastieke geleerden" sou wees aangesien hy hom op die Romeinse reg beroep – 332–335.

116 246–247.

117 247–249.

118 249.

119 250–252.

120 *Commentarius* 28 7 2 (262).

121 263. Ook Voet *Commentarius* 28 17 30; 20 7 30 en 22 (266) dat die bedoeling is dat die plase in besit van die familie moet bly (266–267).

122 *Commentarius* 36 18 27 (282).

123 282–283 442–443.

124 *D* 32 6 (284–285).

Die verweerder is van mening dat die term Romeins-Hollandse reg uit Van Leeuwen se boek *Rooms-Hollands regt* kom en dat die sogenaamde Romeins-Hollandse reg eintlik maar op die Romeinse reg gebaseer is aangesien Van Leeuwen nie na Nederlandse reg verwys het nie maar slegs na die Romeinse reg.[125] Die "hedendaagse" regsgeleerdes sou volgens hom slegs 'n uitleg van die Romeinse reg gee.[126] Solank die eiser nie bewys dat die wette of *costumen* van die kolonie of Nederland-Oos-Indië of Nederland strydig met die Romeinse standpunt is nie, bied die Romeinse reg die finale antwoord.[127] Die boeke van Fagel H[128] en Van der Hoop JC[129] word vir die eiser se advokaat aanbeveel om te lees aangesien die geskiedenis van en gesag vir die Nederlandse reg daarin uiteengesit word.[130]

Dit blyk dat die hof wel die eiser se standpunt oor die Kaapse en Nederlandse reg aanvaar asook dat 'n *fideicommissum familiae* deur die testament geskep is. Daar was dus nie sprake van direkte substitusie nie. Die nadeel daarvan dat die hof nie redes vir die verlening van die interdik gegee het nie, blyk daaruit dat die hele aangeleentheid vier jaar later weer voor die hof gekom het.

In opvolg van voormelde saak het die bogemelde testament en *fideicommissum* in *Morkel (Rossouw) v Laubscher (Watermeyer)*[131] ter sprake gekom. Pieter Laubscher en Johanna Eksteen se gesamentlike testament het soos hierbo uiteengesit op grond van 'n *clausule reservatoir* 'n plaas en opstalle daarop aan hulle seun Jacob Laubscher bemaak. 'n Eksekuteur en voogde is vir hulle minderjarige kinders aangestel. Uit die testament blyk dat daar 'n *fideicommissêre* beskikking ten aansien van Jacob se wettige kinders gemaak is. Dit blyk dat Jacob weer eens die plaas wou verkoop. Eisers het egter aangevoer dat die plaas onder erfgename van die oorledene moet vererf. Die *hereditas petitio* moet ingestel word.[132]

'n Interdik is vantevore verleen dat die plaas nie verkoop mag word nie en dat die erfenis in stand gehou moet word totdat die seun 25 jaar oud is. Die vraag was of die opstalle nie verkoop en die opbrengs onder die minderjarige kinders

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125 368–370.
126 370.
127 372–373.
128 *De origine et usu iuris Romani in Hollandia.*
129 *Necessario Romani et subinde quoque canonici juris in Hollandia studio.*
130 373–374. In dié verband verwys hy verder na die "lofspraak" van De Groot in *Epistolae ad Gallos* 148 dat die Romeinse reg op grond van "rechtvaardigheid" selfs lande (soos Pole) binnegedring het wat nie deur die Romeine met wapengeweld oorgeneem is nie (375–378).
131 1812 CJ 1546 11–14.
132 Met 'n beroep op Westenberg *Principia juris* 5 8 8 (32 205); Voet *Commentarius* 10 22 12 (32), *D* 5 4 1 (33 205); 10 2 34–35 (34–35); 5 4 8 (205); 41 1 19 (tav die *bona fide possessor* – 253); Carpzovius *Jurisprudentia forensis* 2 34 11 (35); *N* 119 (205). Die eiser beroep hom op De Groot *Inleydinge* 3 48 4 (28). Verweerder kritiseer sy beroep op hierdie teks as sou dit op *restitutio in integrum* by die koopkontrak betrekking hê (121–122). Die verweerder kritiseer ook die beroep op die *hereditas petitio* en die gesag daarvoor uiteengesit aangesien dit geen betrekking op die saak het nie (123).

verdeel kon word nie. Die verweerder het 'n eksepsie *inaequalificati* opgewerp aangesien die eisers nie bevoeg sou wees om as *negotiorum gestores* vir die kinders op te tree nie.[133]

Die eiser voer verder aan dat die testament vir 'n *legatum familia relictum* voorsiening maak wat een van die kinders bevoordeel.[134] Na sy dood sou die voordeel op sy seun, en as hy nie 'n seun het nie op sy broers en dié se kinders na hulle, oorgaan.[135] Die erfenis mag dus nie vervreem word nie.[136] Die testament moet volgens die "letter" uitgelê word[137] en oordrag ("transport") kan nie *contra* die testament geskied nie.[138] Die bedoeling van die erflater dat die twee plase in die familie moet bly, kan afgelei word uit die feit dat die plase spesifiek aan die seun nagelaat is om "altoos die Plaatsen aan een der kinderen na hen te doen verallen".[139] Die eksepsie van die verweerder is gehandhaaf.[140] Uit die saak kan egter afgelei word dat daar aan die Kaap wel sprake van 'n *fideicommissum familia* was. Alhoewel die tekste waarop 'n beroep gedoen is, meestal na die *hereditas petitio*, legate en "transport" verwys, blyk dit tog dat daar veral 'n beroep op Voet en De Groot gedoen is. Wat wel interessant voorkom, is die beroep op Westenberg en Carpzovius.

Peter Laubscher en Johanna Eksteen het in 'n kodisil tot die gesamentlike testament 'n plaas tot in oneindigheid aan hul kinders nagelaat in *Laubscher v Orphan Chamber*.[141] Respondent het die administrasie van die eiendom *nomine officii* oorgeneem en by die hof aanbeveel dat die eiendom verkoop word.[142]

Die feite van die saak is kortliks dat appellant se grootouers die testament gemaak het en dat hulle by die dood vyf seuns en vyf dogters nagelaat het. Die oudste (vader van appellant – Hendrik) wou die plaas in die familie behou. Die grondslag vir dié reg word volgens appellant in die Hollandse (feodale) reg gevind waar die oudste seun telkens die plaas geërf het. Appellant se ouers het besit van die plaas geneem en 'n gesamentlike testament opgestel waarin nie hul oudste seun (appellant) nie maar sy vier susters alles erf. Na appellant se vader se dood het sy moeder nog sewe jaar geleef. Respondent was van mening dat sy intestaat gesterf het en het alle moontlike intestate erfgename kennis gegee dat die boedel daarvolgens verdeel gaan word. Appellant het beswaar aangeteken as enigste manlike erfgenaam maar die hof bevind dat die plaas verkoop en die opbrengs verdeel moet word.[143]

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133 111. Die verweerder doen 'n beroep op *C* 2 18 20 en 6 en Voet *Commentarius* 3 5 7.
134 220.
135 221.
136 *Ibid.*
137 223.
138 228 252. Sien ook die beroep op Voet 41 (311).
139 247. Daar word ook 'n beroep gedoen op *D* 11 10–12 (249); *C* 6 24 13 (320).
140 1812 CJ 931 137.
141 CJ 1677 320–566 en GH 48/2/38 235–392.
142 GH 48/2/38 237–239.
143 1818 CJ 2235 951–956.

Die volgende word as redes vir die appèl aangevoer:[144]

(1) Ingevolge die Hollandse reg is die testateur geregtig om sy grond met 'n *fideicommissum* te belas. Hierdie reëling sou volgens die advokaat presies dieselfde wees as wat in Engeland aangetref word.[145] De Groot[146] definieer dit soos volg (soos in hofstukke vertaal): "An estate is hereditary indivisible right on another person's immovable property."

(2) Kragtens die grootouers se testament moet die plaas na die oudste seun gaan en in die familie bly.[147] Volgens De Groot[148] bepaal die algemene reëls van erfopvolging dat die boedel van seun tot seun oorgedra moet word. As daar geen seuns is nie, erf die oudste dogter (mans sou altyd voorkeur bo vrouens geniet – en oudste kinders bo jongeres). Daar word dus van "tak tot tak" in die *descendentes* se linies beweeg. Volgens die advokaat laat die Hollandse reg dus nie slegs hierdie vererwing toe nie maar word daar spesifieke reëlings voorgeskryf.[149]

(3) Die hof *a quo* het die testament in die "gees" van die Hollandse reg, veral die *ius feudii*, geïnterpreteer en bevind dat bovermelde interpretasie aan die testament verleen moet word.[150]

(4) As appellant dus kan bewys dat hy die enigste manlike erfgenaam is, is daar geen rede waarom die hele familie daarin moet deel nie.[151]

(5) Die appellant het uit die gesamentlike testament van sy vader net 'n manlike slaaf geërf terwyl die res van die boedel onder sy susters verdeel is. Daaruit moet afgelei word dat sy vader onder die indruk was dat hy na behore deur sy grootvader se testament versorg was.[152]

Respondent voer egter aan dat die moeder nie 'n testament gemaak het nie en dat die boedel intestaat moet vererf. In 'n ongetekende en ongedateerde testament het sy die Weeskamer as eksekuteur aangewys om die plaas te verkoop en die restant onder die kinders te verdeel.[153] Die volgende redes is aangevoer waarom die Raad van Justisie-uitspraak gevolg moet word:[154]

(1) Die vader van appellant het 'n keuse gehad om in sy testament die plaas aan een of al sy erfgename te bemaak – dit moet net in die familie bly.[155] Daar word 'n beroep gedoen op Scaevola.[156]

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144 GH 48/2/38 266–382.
145 267.
146 *Inleydinge* 2 41 7.
147 268.
148 *Inleydinge* 2 41 7.
149 268–269.
150 270–272.
151 272.
152 278. Die vertaalde testament lui soos volg: "Hendrik Ostwald Laubscher . . . Roodebloem . . . under that condition that this place shall always remain and devolve in our and his family and that further those that may succeed to this place shall keep in good repair the burying place on this property . . ." (282).
153 310.
154 322–334.
155 324.
156 *D* 34 2 15 (325–327).

(2) Daar moet spesifiek na 'n *fideicommissum* verwys word en die begunstigdes by name genoem word. "In our and his family" beteken dat 'n spesifieke persoon nie aangewys is nie en dat 'n erfgenaam benoem mag word.[157]

(3) 'n Algemene *fideicommissum* het nie slegs betrekking op manlike erfgename nie – die testament verwys net na familie en sou dus alle Laubschers insluit.[158]

(4) Die algemene regsreël *indefinitum universale acquipullit* meld dat dit wat nie gedefinieer is nie as geheel gesien moet word en daarom sluit die woorde alle familie en nie net spesifieke lede daarvan in nie.[159]

Respondent toon verder aan dat die regverdigheid, billikheid, onregverdigheid of onbillikheid van die testament geen rol speel nie maar dat daar na die bewoording van die testament gekyk moet word.[160] 'n Legaat met 'n voorwaarde is nie noodwendig 'n *fideicommissum* nie.[161]

Ten aansien van die tweede grond wat aangevoer is om die Raad van Justisie-uitspraak te bevestig, word 'n beroep op Wissenbach[162] gedoen dat alle erfgename in 'n gelyke mate in die erfenis moet deel.

D 32 69 3 toon aan dat daar na die woorde van die testateur gekyk moet word en dat appellant geen groter voordeel as dié van sy susters kan eis nie.[163] Ook Cuiacius ondersteun die standpunt.[164] Leyser[165] toon aan dat daar spesifiek na die bedoeling van die testateur gesoek moet word. Appellant kon ook nie aantoon dat hy bo sy susters "in favour" was nie.[166] Die ander erfgename en hulle kinders het dus in 'n gelyke mate dieselfde regte as appellant.[167]

Respondent kritiseer appellant se beroep op De Groot in verband met die leenreg of *ius feudii*.[168] Die argument wat die appellant aanvoer, steun juis nie sy saak nie aangesien geen kolonie in die wêreld die feodale regte erken nie en dit selfs in die grootste deel van Europa (veral in Holland) nie meer bestaan nie.[169] Die teks kan dus nie op die Kaap van toepassing wees nie want die plaas Roodebloem is nie feodale grond nie; bowendien bestaan daar nêrens in Afrika enige sodanige grond nie – die gewone erfopvolgingsreëls moet dus toepassing vind.[170]

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157 328.
158 329–333.
159 334. In lg verband word daar 'n beroep op Pothier *Pandecta* 31 98 2 (587) (350–353) gedoen.
160 346.
161 349.
162 Hfst 6 (353–354).
163 355–356. Sien ook *D* 50 17 12 (357).
164 358.
165 *Meditationes ad Pandectas* 34 5 2 en 4.
166 359–360. Leyser *Meditationes ad Pandectas* 34 5 2 en 5.
167 360.
168 Vertaal as "Loan right, is an hereditary indivisible right to another and their landed property with the obligation of protection on the other part and the duty of homage . . . to the other part" (364).
169 365.
170 365–366.

In die appellant se "rejoinder" het hy gepoog om die argumente van die respondent omver te werp. Volgens hom sou hy bewys dat die testament uitgelê moet word volgens die reëls van die reg en billikheid.[171] In die eerste plek meen hy dat die verwysing na familie juis aantoon dat die *descendentes* van die oudste seun erf.[172] In die tweede plek het sy moeder nie intestaat gesterf nie aangesien sy en haar eggenoot 'n gesamentlike testament gemaak het.[173] In die derde plek verwys die *Digesta*-tekste slegs na roerende eiendom en daarom kan dit aan enigeen oorgedra word. In die geval van onroerende goed is daar net twee gevalle bekend naamlik (a) erfpag en (b) die leenreg (*feudum et emphyteusis*).[174] Hierdie grondbeheervorme het hulle oorsprong in die feodale reg en lê die grondslag vir erfopvolging van *descendentes* in feitlik elke Europese land. Sodanige erfopvolging kom in sowel die Engelse as die Hollandse reg voor.[175] Hy gee toe dat feodale regte van die landheer as sodanig nie meer voortbestaan nie maar dat die erfopvolgingsreëls nog dieselfde gebly het. In sowel Holland as die kolonie word talle gevalle van erfopvolging vanaf die vader na die seun in familietestamente aangetref.[176]

In verband met interpretasie verwys hy na Voet[177] wat sê dat daar aan die bedoeling en woorde van die testateur gevolg gegee moet word en dat dit nie verdraai moet word nie.[178]

Die erfgenaam kan dus nie vryelik oor die plaas beskik nie want dit was 'n *legata cum onere fideicommissi*.[179] Volgens die appellant sal alleen aan die "rules of equity and justice" gevolg gegee kan word as die bedoeling van die testateur nagevolg word.[180]

Die Siviele Appèlhof verander die vonnis van die Raad van Justisie en bepaal dat appellant as enigste manlike erfgenaam die plaas Roodebloem erf, maar dat hy die ander erfgename van sy vader en moeder die som van Rd 60 000 moet betaal.[181]

Dit lyk of die hof in hierdie saak aan beide die appellant en respondente se betoë gevolg gegee het. Alhoewel appellant dus as oudste manlike erfgenaam die plaas erf, moet hy steeds sy susters vir hulle verlies aan die "intestate erfdeel" vergoed. Hieruit kan afgelei word dat hier moontlik sprake kan wees van 'n eie Kaapse regsontwikkeling.

In hierdie saak word vir die eerste keer spesifiek na die Engelse reg (as synde dieselfde as die Romeins-Hollandse reg) verwys. Geen spesifieke bronne is in

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171 En dat respondent volgens hom in die lug redeneer – 368–369.
172 371–372.
173 372.
174 De Groot *Inleydinge* 2 40 1.
175 575–576.
176 376.
177 *Commentarius* 7 1 8 (383).
178 384. Sien ook *D* 24 (387).
179 Voet *Commentarius* 7 1 13 – die plaas word vir die nageslag in "trust" gehou.
180 392.
181 GH 48/1/1 313–314 316 333. Die koste moes deur die boedel gedra word.

die Siviele Appèlhof aangehaal nie. In die Raad van Justisie is verwys na Solme (Holme) wat oor die regeringsvorme in Engeland geskryf en daarop gewys het dat ten aansien van familievererwing die grond in die hande van die familie moet bly.[182]

Soos reeds uit die ander sake geblyk het, is daar aan die Kaap aan die *fideicommissum familia* gevolg gegee. Dit blyk dat die Romeins-Hollandse reg, soos aangevul deur Kaapse gewoontes en gebruike, die reg in dié verband gereël het. In 1818 is die Engelse reg vir die eerste keer betrek maar in die betrokke saak is daar onsamehangend daarna verwys. Die bronne wat in die prosesstukke voor die Raad van Justisie aangehaal is, is nie regsbronne nie.

(*Word vervolg*)

It is clearly for the patient to decide whether he or she wishes to undergo the operation, in the exercise of the patient's fundamental right to self-determination. A woman may be informed by her physician that the only way of avoiding death by cancer is to undergo a radical mastectomy. This advice may reflect universal medical opinion and may be, in addition, factually correct. Yet, to the knowledge of her physician, the patient is, and has consistently been implacably opposed to the mutilation of her body and would choose death before the mastectomy. I cannot conceive how the 'best interests of the patient' (as seen through the eyes of her physician or the entire medical profession, for that matter) could justify a mastectomy or any other life-saving procedure which entailed a high risk of the patient losing a breast. Even if the risk of breast-loss were insignificant, a life-saving operation which entailed such risk would be wrongful if the surgeon refrains from drawing the risk to the patient's attention, well knowing that she would refuse consent if informed of the risk. It is, in principle, wholly irrelevant that her attitude is, in the eyes of the entire medical profession, grossly unreasonable, because her rights of bodily integrity and autonomous moral agency entitle her to refuse medical treatment. It would, in my view, be equally irrelevant that the medical profession was of the unanimous view that, under these circumstances, it was the duty of the surgeon to refrain from bringing the risk to his patient's attention (per Ackermann J in *Castell v De Greeff* 1994 4 SA 408 (C) 420).

182 CJ 1677 537. Daar is selfs na William Shakespeare (1616) verwys as bewys dat die leenreg in Engeland voorgekom het – 538–543.

The development and significance of the title "officer of the court"

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OPSOMMING

Die ontwikkeling en belang van die titel "beampte van die hof"

Die uitdrukking "beampte van die hof" kom periodiek in die Suid-Afrikaanse regspraak voor, veral in die konteks van likwidateurs en kurators van insolvente boedels. In die onlangse saak *James v Magistrate, Wynberg* 1995 1 SA 1 (K) het die vraag of 'n likwidateur 'n beampte van die hof is in ons reg weer ter sprake gekom.

Die titel "beampte van die hof" het sy oorsprong in Engeland in die Middeleeue gehad. Aanvanklik het persone na wie verwys is as beamptes van die hof, amptelike posisies in die hof beklee. Dit het onder meer behels dat hulle onderworpe was aan regulering deur die hof en dat hulle sekere voorregte geniet het. Later het ook prokureurs wat nie hierdie amptelike posisies beklee het nie, daarop aanspraak gemaak om beskou te word as beamptes van die hof (waarskynlik ter wille van die voorregte wat daarmee saamgehang het). Hierdie praktyk het daartoe gelei dat die begrip begin het om sy oorspronklike betekenis te verloor.

Die plig van prokureurs en advokate om behoeftige kliënte te verteenwoordig, het ook sy oorsprong in Engeland gehad. Die skrywers argumenteer egter dat hierdie verpligting nie teruggevoer kan word tot hulle status as beamptes van die hof nie aangesien advokate in Engeland nooit as sodanig beskou is nie.

Dit is duidelik dat die inhoud van die vertrouensplig van likwidateurs en kurators nie afhang daarvan of hulle beamptes van die hof is of nie. Die titel "beampte van die hof" is nou afgewater in so 'n mate dat dit, in die woorde van regter Coetzee in *Gilbert v Bekker* 1984 3 SA 774 (W), "a nebulous concept at best" geword het. Daar word gevolglik aan die hand gedoen dat hierdie uitdrukking nie langer enige regsbetekenis het nie en daarom vermy behoort te word.

INTRODUCTION

In the recent case of *James v Magistrate, Wynberg*[1] the question was raised whether in our law, as opposed to that of England, a liquidator is an officer of the court. The phrase "officer of the court" has appeared periodically in South

1 1995 1 SA 1 (C).

African case law, mostly in relation to the position of liquidators and trustees.[2] In *James v Magistrate, Wynberg*, the question when a person can be regarded as an officer of the court, was once again not conclusively answered.[3] The purpose of this article is to consider the development and significance of this phrase.

THE ENGLISH POSITION

The title "officer of the court" originated in England in medieval times.[4] It appears from Holdsworth[5] that solicitors were subject to the discipline of the court and were officers of the court. Barristers, who were mainly under the control of the Inns of Court and not directly under the control of the court as solicitors, were not considered to be officers of the court. However, according to Robert J Martineau,[6] this explanation ignores the fact that solicitors were, at least until the sixteenth century, permitted to be members of the Inns of Court.

Birks[7] states that initially, court clerks and others associated with the sheriff's office performed services similar to that of an attorney. This early association of attorneyship with the clerks of the court gave rise to the present-day solicitor (whose predecessor was referred to as an attorney) being regarded as an officer of the court.[8] Martineau's explanation is that most solicitors originally enjoyed some independent official status, for example, as clerk of the court or under-sheriff. Certain privileges were conferred on them, such as an exemption from certain public duties, immunity from being sued except in their own court, and being able to wear court gowns.[9] Subsequently, solicitors who did not hold any official position in the court, wished to be treated on the same footing. This ultimately resulted in their also being referred to as officers of the court.[10]

One of the questions that arises is whether the duty to represent indigents, which has its roots in ancient England, flows from the fact that a person is an officer of the court. According to Holdsworth, serjeants-at-law, who were originally pleaders, were obliged to act on behalf of indigent persons.[11] Barristers now perform the work of serjeants-at-law.[12] Martineau suggests that this

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2 See, eg, *Price v The Deputy-Sheriff of the Witwatersrand* 1903 TH 467; *Engelbrecht v The Sheriff* 1904 TS 615; *Chermont v Lorton* 1929 AD 84; *Trustee, Assigned Estate Wall v Illovo Trading Co* (1909) 30 NLR 522; *Gluckman v Wylde* 1933 EDL 322; *Estate Behr v Klotz* 1926 TPD 353; *Gilbert v Bekker* 1984 3 SA 774 (W).

3 *Supra*.

4 Holdsworth *A History of English Law* vol II 317–318 vol VI 432–433.

5 *Idem* vol VI 434.

6 "The attorney as an officer of the court: time to take the gown off the bar" 1984 *South Carolina LR* 548; see also Holdsworth vol VI 441; Birks *Gentlemen of the law* (1960) 42.

7 32.

8 Birks 37–38. Note that there was an early distinction between attorneys and solicitors in English law; see Holdsworth vol VI 454–456; Van Zyl *The theory of the judicial practice of South Africa* (1921) vol 1 5.

9 Birks 37–38.

10 *Idem* 37–38; Martineau 547. For the duties of solicitors as officers of the court, see *Halsbury's Laws of England* 4 ed vol 44 100 ff.

11 Vol II 491.

12 *Ibid*; see also Birks 6.

duty could not have arisen from the status of officer of the court, as barristers, who were also subject to this obligation, were never regarded as officers of the court in England.[13] He asserts that this obligation was in exchange for the monopoly enjoyed by solicitors and barristers to represent clients in court.[14]

Although it seems to be settled that in English law the solicitor is regarded as an officer of the court and the barrister is not, the position of the official receiver, the liquidator and the trustee in insolvency pose some difficulties.

The official receiver is an official of the Department of Trade and Industry, and is appointed to his position and may be removed from office by a direction of the Secretary of State,[15] under whose directions he acts.[16] His main function is to act as receiver and manager of an insolvent estate until such estate vests in the trustee and to investigate the conduct and affairs of the insolvent and report thereon to the court where appropriate.[17] The Secretary of State may also from time to time assign other functions to the official receiver.[18] The latter is designated by statute as an officer of the court in relation to which he exercises the functions of his office.[19]

The trustee is appointed by the creditors of the insolvent estate, by the Secretary of State, or by the court.[20] In terms of section 305, the general functions of the trustee are to get in, realise and distribute the insolvent's estate. In carrying out these functions, he may use his own discretion. Apparently the trustee in insolvency is an officer of the court.[21] As such he "ought to be as honest as other people".[22] In *Ex parte Simmonds; In re Carnac*,[23] this proposition was extended and interpreted by Lord Esher MR to mean that a trustee as officer of the court has to act in a high-minded manner and therefore should not take advantage of a mistake of law and enforce a right that an ordinary person would be entitled to insist upon.[24] In *In re Wigzell; ex parte Hart*[25] Salter J agreed with earlier decisions which had held that the court has a discretion to disregard a trustee's legal right if enforcing such a right would be contrary to natural justice. However, this discretion should not be exercised unless the enforcement of the legal right would lead to obviously unjust results. The judgment of Salter J was confirmed on appeal.[26]

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13 561 fn 62.
14 558 fn 53.
15 S 399(2) Insolvency Act, 1986 (c 45).
16 S 400(2) Insolvency Act, 1986.
17 S 287(1) and 289(1) Insolvency Act, 1986.
18 S 400(1) Insolvency Act, 1986.
19 S 400(2) Insolvency Act, 1986. See also *Bottomly v Brougham* [1908] 1 KB 584 589; *Burr v Smith* [1909] 2 KB 306 CA 311.
20 S 292(1) Insolvency Act, 1986.
21 James LJ in *Ex parte James; In re Condon* [1874] 9 Ch 609 614; *In re Wigzell; ex parte Hart* [1921] 2 KB 835 (CA) 851; *Halsbury's Laws of England* vol 3(2) 249.
22 *Ex parte James; In re Condon supra* 614.
23 (1885) 16 QBD 308 312.
24 See also the comments and interpretation of Kekewich J in *In re Opera Ltd* [1891] 2 Ch 154 159–161 dealt with below.
25 [1921] 2 KB 835 845.
26 857.

A company may be wound up either by a winding-up order made by the court, or by the passing of a resolution by the company for its voluntary winding-up.[27] There are three kinds of liquidator in a winding-up by the court, namely a provisional liquidator, an official receiver acting as liquidator *ex officio*, and a liquidator appointed by creditors, the court or the Secretary of State to replace the official receiver.[28] A liquidator in a winding-up by the court, whether he is an official receiver or some other person,[29] is an officer of the court,[30] but only for certain purposes.[31] The liquidator is placed in the position of officer of the court when he is discharging duties originally given to the court but which have been delegated to him to exercise subject to the control of the court.[32]

According to *Re Contract Corp, Gooch's case*,[33] the liquidator in a winding-up by the court is required to be even-handed and impartial in his dealings with all those who have an interest in the winding-up. He has a duty to become thoroughly conversant with the affairs of the company and must not conceal or suppress any knowledge which he acquires during his investigation that is material to ascertain the true position. This duty is owed to the shareholders, the creditors and the court and the judge should ensure that he complies with it.[34]

As an officer of the court, the liquidator must act fairly and honourably when dealing with persons who have claims adverse to his own. The liquidator should not merely "stand on his rights at law or in equity".[35] In *In re Opera Ltd*,[36] Kekewich J discussed the interpretation of the principle laid down in *Ex parte James; In re Condon*,[37] as extended in *Ex parte Simmonds; In re Carnac*.[38] The judge concluded that the correct interpretation of the principle is as follows:

> "[I]f the assets in the hands of an officer of the Court, on behalf of creditors or others, have been increased by a transaction occasioned by an honest mistake of law, then, notwithstanding such mistake is not capable of rectification as between ordinary adverse litigants, the Court will compel its officer to recognise the rules of honesty as between man and man, and to act accordingly."[39]

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27 S 73(1) Insolvency Act, 1986.
28 S 135(1), 136(2) and 136(4) Insolvency Act, 1986.
29 *Halsbury's Laws of England* vol 7(2) 1168.
30 *Ex parte James; In re Condon supra* 614; *Ex parte Simmonds; In re Carnac supra* 312; *Re Contract Corp, Gooch's case* (1872) 7 Ch App 207 211.
31 S 160 Insolvency Act, 1986.
32 *In re Hill's Waterfall Estate and Gold Mining Company* [1896] 1 Ch 947 954.
33 (1872) 7 Ch App 207.
34 *Supra* 211. See also *Re Sir John Moore Gold Mining Company* (1879) 12 Ch D 325 CA 332; *Re Charterland Goldfields Ltd* [1909] 2 TLR 132 133; *Re Rubber and Produce Investment Trust* (1915) 1 Ch 382 388; *Re Lubin, Rosen and Associates Ltd* [1975] 1 All ER 577 (Ch) 580–581.
35 *Halsbury's Laws of England* vol 7(2) 1170.
36 (1891) 2 Ch 154 159–161.
37 *Supra*. This principle provides that the liquidator ought to be as honest as other people.
38 *Supra*.
39 162. Although *In re Opera Ltd supra* was reversed on appeal, it was on other grounds. See also *Re Wyvern Developments Ltd* [1974] 1 WLR 1097 1105.

In *In re TH Knitwear (Wholesale) Ltd*[40] Slade LJ was of the view that a liquidator in a voluntary winding-up cannot properly be called an officer of the court within the principle laid down in *Ex parte James; In re Condon.*[41] The reason is that the court does not appoint him and does not control the exercise of his powers unless some interested party approaches the court for directions.[42] Slade LJ discussed section 273 of the Companies Act, 1948 (which is almost identical to s 160 of the Insolvency Act, 1986) in terms of which the liquidator is referred to as an officer of the court and is said to be subject to the control of the court. The judge pointed out that this section and section 364, which requires officers of the court acting in the winding-up of companies to make returns of business to the Board of Trade, apply only to liquidators in a compulsory winding-up.[43] Although Slade LJ was of the opinion that the principle is a noble one, he warned that the extension of it to liquidators in a voluntary winding-up, who are not officers of the court, may lead to uncertainty.[44] The judge concluded that this principle does not extend to a liquidator in a voluntary winding-up because he is not an officer of the court and must distribute the assets amongst the creditors strictly according to the law.[45] In *In re Sandiford (No 2)*[46] it was held that the principle in *Ex parte James; In re Condon*[47] would not apply to an executor as he was not an officer of the court, even though the estate was being administered by the court.

THE SOUTH AFRICAN POSITION

An "officer" has been defined in *Ketteringham v The Cape Town City Council*[48] as

> "a person who has been appointed to an office, that is a person who has been appointed to perform certain duties which have been duly prescribed as the duties of that office".

However, the meaning of the concept "officer of the court" remains uncertain.

In the early case of *Price v Deputy Sheriff of the Witwatersrand*[49] the question arose whether the sheriff or his deputy was, for the purposes of a certain rule of

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40 [1988] 2 WLR (CA) 276 286. See also the discussion of the application of this principle in *In re TH Knitwear (Wholesale) Ltd* [1987] 1 WLR 371 377.

41 *Supra.*

42 Although it does not seem to be a general power conferred on the court, s 108 of the Insolvency Act, 1986 (a provision which applies to a voluntary winding-up) does authorise the court to appoint a liquidator if, from any cause whatsoever, no liquidator is acting. In terms of the same section, the court also has the power to remove a liquidator and appoint another, where cause is shown. For an interpretation of the phrase "cause shown", see *Re Sir John Moore Gold Mining Company supra* 332, *Re Charterland Goldfields Ltd supra* 133 and *Re Rubber and Produce Investment Trust supra* 388.

43 S 364 of the Insolvency Act, 1986 was incorporated into the Companies Act, 1985 (c 6) as s 662 but was subsequently repealed by Schedule 12 of the Insolvency Act, 1986.

44 287.

45 This overrules *Re Temple Fire and Accident Assurance Co* (1910) 129 LT Jo 115; see also *Re London County Commercial Reinsurance Office Limited* [1922] 2 Ch 67; *In re John Bateson & Co Ltd* 1985 BCLC 259.

46 [1935] Ch 681–692.

47 *Supra.*

48 1933 CPD 316 318.

49 1903 TH 467.

court, an officer of the court and was accordingly obliged to serve process free of charge in proceedings *in forma pauperis*. This rule provided that no fee should be taken by "any advocate, attorney or officer of the court" from any person admitted to proceed as a pauper for anything done by him in the conduct of the case. It was held that the term "officer of the court" in the wide sense includes advocates and attorneys. However, it was not intended to have such a wide application to include the sheriff or deputy-sheriff.[50] It seems that the court was influenced by the fact that the sheriff is not a salaried officer of the court but depended for his remuneration on the charges that he was entitled to make.[51]

Lewis[52] states, without reference to any authority, that an attorney is an officer of the court. Van Zyl[53] appears to agree with this view. He also states that attorneys are subject to the court's summary jurisdiction and discretion regarding their professional conduct.[54] The term "officer of the court" was considered in its widest meaning to include both attorneys and advocates.[55] No authority is given for this statement either and one can only assume that it is derived from English law. However, the inclusion of advocates as officers of the court is a deviation from the position in English law, where barristers have never been considered to be officers of the court.[56] As an officer of the court, one of the duties of an attorney is to inform the court of any authority which may be adverse to his own case. The same duty rests on counsel in the supreme court.[57] Both attorneys and advocates also have a duty to accept work in the assistance of the poor.[58] However, the fact that they are subject to the duty to represent indigent clients is no authority for the conclusion that they are officers of the court, since in English law the barrister, who was subject to the same obligation, was never considered to be an officer of the court.

Although it seems to be accepted in South Africa that attorneys and advocates are officers of the court, the position of the trustee is not clear. Certain cases have been relied upon in support of the view that a trustee in insolvency is indeed an officer of the court. In *Trustee, Assigned Estate Wall v Illovo Trading Co*[59] Bale CJ was of the view that where a trustee acts *ultra vires*, he would not be entitled to benefit from his own wrong. The reason given for this *obiter* statement is that the trustee is an officer of the court.[60] Broome J was of the

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50 467.

51 *Supra* 468; see also *Engelbrecht v The Sheriff supra*; *Chermont v Lorton supra* 92–93.

52 *Legal ethics – a guide to professional conduct for South African attorneys* (1982) 128. See also *Re Cairncross* 7 Buch (1877) 122 126 where Dennysen J described an attorney as an officer of the court.

53 Vol 1 45 51–52.

54 7 62–63. See eg *Incorporated Law Society v Mccolla* 6 CTR 85 where the court struck an attorney off the roll.

55 *Price v Deputy Sheriff of the Witwatersrand supra* 467.

56 See *supra*.

57 Lewis 128.

58 *Idem* 76. For a discussion of the general duties of attorneys, see Lewis 7–18.

59 (1909) 30 NLR 522.

60 527.

opinion that the trustee is a statutory officer who must exercise his powers in the interests of creditors strictly in terms of the law.[61] Although Smith[62] favours the view that a trustee should be described as a statutory officer, she points out that as the trustee steps into the shoes of the Master, he could perhaps be considered to be an officer of the court.[63] Whether the Master himself is an officer of the court seems open to debate. Mars states that the Master is not an officer of the court although he is referred to as the Master of the Supreme Court.[64] As authority for this statement, reference is made to section 34(1)(*a*) of the Supreme Court Act[65] where it is pointed out that this section provides for the appointment of officers of the supreme court but does not specifically refer to the Master.[66] It is submitted that although the section provides that the minister may appoint for the supreme court "registrars, assistant registrars and other officers" without specifically mentioning the Master, this does not necessarily mean that the Master is not an officer of the court.[67] In *Gluckman v Wylde*[68] the question arose whether a trustee could waive the provisions of section 67 of the Insolvency Act.[69] This section provides that any party who has instituted legal proceedings which have been suspended by sequestration, and who intends to continue with those proceedings, must give the trustee three weeks notice in writing before doing so. According to Pittman AJP, the trustee could waive this provision as he was not a public officer entrusted with the exercise of rights on behalf of the public at large. He represents only the creditors and the debtor.[70] Gane AJ, relying on *Trustee, Assigned Estate Wall v Illovo Trading Co*,[71] stated that it was certain that a trustee was "in some sense" an officer of the court. The judge pointed out that the election of the trustee is confirmed by the Master,[72] that the trustee is not entitled to resign without the permission of the court,[73] and that the trustee *inter alia* has to investigate the transactions of the insolvent and assist in prosecutions of the insolvent if required by the Master.[74] In *Estate Behr v Klotz*[75] Greenberg J referred in an *obiter* statement to the trustee as an officer of the court and stated this as the reason for his conduct being open to censure.[76]

Gilbert v Bekker[77] is the only case in which our courts have considered in some detail whether a trustee is an officer of the court. Coetzee J referred to

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61 529.
62 *The law of insolvency* (1988) 186.
63 185.
64 De la Rey *Mars: The law of insolvency in South Africa* (1988) 14.
65 59 of 1959.
66 14 fn 44.
67 It is interesting to note that in the old Transvaal Proclamation 14 of 1902 s 8 refers to the Master as an officer of the court.
68 1933 EDL 322.
69 32 of 1916.
70 327.
71 *Supra*.
72 S 64 Insolvency Act 32 of 1916.
73 S 61(1) Insolvency Act 32 of 1916.
74 S 153(1) Insolvency act 32 of 1916.
75 1926 TPD 353 361.
76 See also *Enyati Resources Ltd v Thorne* 1984 2 SA 551 (C) 556.
77 1984 3 SA 774 (W).

Mars[78] who states that a trustee is an officer of the court. After having considered the cases of *Trustee, Assigned Estate Wall v Illovo Trading Co*,[79] *Gluckman v Wylde*[80] and *Estate Behr v Klotz*,[81] Coetzee J took the view that in none of these cases was it necessary to decide pertinently whether a trustee is an officer of the court.[82] These cases are therefore insufficient authority to establish that the trustee is indeed an officer of the court and that something flows from it.[83] Coetzee J went on to say that, at best, it is a nebulous concept[84] and concluded that it is inappropriate to regard a trustee as an officer of the court.[85] He simply holds one of the many offices created by statute. Moreover, the judge felt that even if a trustee is an officer of the court, no legal consequences flow from such position.[86]

As Coetzee J pointed out in *Gilbert v Bekker*[87] insolvency administration in England is fundamentally the function of the court.[88] Section 363 of the English Insolvency Act, 1986 provides that every bankruptcy is under the general control of the court which has full powers to decide all questions of priorities and all other questions of law or fact arising in any bankruptcy.[89] This approach differs completely from that followed in South Africa.[90] It is clear that the court has retained its common law power to remove a trustee on the grounds of misconduct.[91] However, this does not necessarily lead to the conclusion that a trustee is an officer of the court.

There is scant authority in South Africa for the proposition that the liquidator is an officer of the court. In *Concorde Leasing Corporation (Rhodesia) Ltd v Pringle-Wood NO*[92] Beadle ACJ simply quoted the following paragraph from *Halsbury's Laws of England*[93] when referring to the duties of a liquidator:

> "The liquidator must, as an officer of the Court, maintain an even and impartial hand between all the individuals whose interests are involved in the winding-up."

Relying on *Concorde Leasing Corporation*,[94] Henochsberg states that in a compulsory winding-up the liquidator is an officer of the court.[95] Without

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78 *The law of insolvency in South Africa* (1980) 239. It is interesting to note that in the 8th edition of Mars 15, the approach of *Gilbert v Bekker supra* that a trustee is not an officer of the court although he exercises his functions under the Master's supervision, was adopted. See also Smith 185–186.

79 *Supra*.

80 *Supra*.

81 *Supra*.

82 *Supra* 780.

83 *Gilbert v Bekker supra* 780.

84 *Ibid*.

85 *Gilbert v Bekker supra* 781.

86 781E–F.

87 *Supra*.

88 778.

89 This power is subject to the provisions of Part IX of the Insolvency Act, 1986.

90 *Gilbert v Bekker supra* 778.

91 *Fey NO and Whiteford NO v Serfontein* 1993 2 SA 605 (A) 612.

92 1975 4 SA 231 (R) 234.

93 Par 1112.

94 *Supra*.

95 Meskin (ed) *Henochsberg on the Companies Act* vol 1 (1994) 788.

referring to any direct authority, the following is simply stated in *The Law of South Africa*: "As an officer of the court the liquidator must maintain an even and impartial hand between all the individuals whose interests are involved in the liquidation."[96]

The question whether the court has control over the liquidator may have led to his being perceived as an officer of the court. Previously, the court did have the power to appoint a liquidator[97] and to fill a vacancy in the office of the liquidator.[98] However, it is now the Master who appoints a liquidator, whether in a voluntary winding-up or in a winding-up by the court and it is the Master, and not the court, who can fill vacancies in the office of a liquidator.[99] Although the Master may remove a liquidator in terms of section 379(1) of the Companies Act,[100] the court may also, on the application by the Master or any interested person, remove a liquidator from office if the Master fails to do so in any of the circumstances mentioned in subsection (1) or for any other good cause.[101] In *Ex parte Bowman: In re International Rock Products (Pty) Ltd*[102] the court, declaring the dissolution of a company void, held that although section 420 empowers the court to make an order upon such terms as it thinks fit, it does not empower the court to appoint an entirely new liquidator – that was the Master's duty.[103]

In *James v Magistrate, Wynberg*[104] application was made by a sole member of a close corporation in liquidation for an order preventing his interrogation in terms of section 415 of the Companies Act.[105] The basis for the application was that the liquidator was not impartial and was biased in favour of one of the interested parties. Thring J, in discussing the duties of the liquidator,[106] referred to relevant authorities dealing with the question whether a liquidator is an officer of the court[107] and concluded that it was unnecessary to decide this point.[108] Whatever the status of the liquidator, it is clear that he stands in a fiduciary position in relation to the company, its members, and its creditors, as a whole.[109] Thring J held that the liquidator must not only be independent, but must also be seen to be so.[110]

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96 See Blackman "Companies" 4 *LAWSA* par 522.
97 *Murray v Edendale Estates Ltd* 1908 TS 17 19. See also s 124(1) Companies Act 46 of 1926.
98 S 124(5) Companies Act 46 of 1926.
99 S 367 and 377 Companies Act 61 of 1973.
100 61 of 1973.
101 This is very similar to the power which the court in England has to remove voluntary liquidators in terms of s 108 Insolvency Act, 1986.
102 1985 1 SA 70 (W).
103 73.
104 *Supra*.
105 61 of 1973.
106 12–13.
107 13.
108 *Ibid*.
109 *Ibid*.
110 14. See also *Re Allebart (Pty) Ltd (in liq); Re Home Holdings (Pty) Ltd (in liq)* [1971] NSWLR 24; *Re Intercontinental Properties (Pty) Ltd (in liq)* 1977 (2) ACLR 488.

CONCLUSION

The issue of whether trustees or liquidators are officers of the court generally arises where their conduct is being scrutinised by the court. It is clear that both trustees and liquidators occupy a fiduciary position and must act accordingly. Whether they are officers of the court or not does not alter the content of their fiduciary duty. Furthermore, the duty of attorneys and advocates to represent indigent clients cannot be traced back to their status as officers of the court, since barristers of England, where this concept originated, were never considered to be officers of the court.

Originally, those who were referred to as officers of the court, held official positions in the court. This included their being subject to regulation by the court and their having certain specific privileges. Subsequently, when solicitors who were not official court appointees, laid claim to being regarded as officers of the court (presumably to enjoy the privileges that went hand in hand with such a position), the concept started to lose its original meaning. It has now been watered down to such an extent that it has, in the words of Coetzee J in *Gilbert v Bekker*, become "a nebulous concept at best".[111] Accordingly, it is submitted that this phrase no longer has any legal significance and should therefore be avoided.

> *When interpreting the Constitution and more particularly the Bill of Rights, it has to be done against the backdrop of our chequered and repressive history in the human rights field. The State, by legislative and administrative means, curtailed the common-law human rights of most of its citizens in many fields while the courts looked on powerless. Parliament and the executive reigned supreme.*
>
> *It is this malpractice which the Bill of Rights seeks to combat. It does so by laying down the ground rules for State action which may interfere with the lives of its citizens. There is now a threshold which the State may not cross. The Courts guard the door* (per Von Dijkhorst J in *De Klerk v Du Plessis* 1995 2 SA 40 (T) 46).

111 *Supra* 780.

Deliktuele aanspreeklikheid weens nadeel deur onbekende lede van 'n groep toegebring II: Terminologiese lig op die aard van aanspreeklikheid en die benaderingswyses in die Anglo-Amerikaanse en Duitse reg

(*vervolg*)[1]

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SUMMARY

Delictual liability for harm brought about by unknown members of a group II: Terminological light on the nature of the problem and the approaches in Anglo-American and German law

In this article the attempt to discover the nature of the present problem is continued.

It appears that the Anglo-American legal systems approach the matter from the angle of different categories of tortfeasorship, whereas the Romano-Germanic systems deal with it in terms of different categories of causality. In view of the hybrid character of the South African legal system, it seems profitable to study both approaches.

As far as South African law is concerned, attention has been given to questions concerning the matter of contribution, but that is as far as it has gone.

From the discussion of other legal systems, it appears that the need to make some provision for dealing with the problems arising from the malfunctioning of the *conditio sine qua non* test for causality in these cases is generally recognised. This need has been addressed in different ways by legislatures, courts and academics in the legal systems covered here. However, it has become clear that no satisfactory answers to the manifold questions caused by group activities where causality cannot be directly proven, have as yet been found in the Anglo-American or German legal systems. Nevertheless, the results of their struggle encourage us to look further.

In the next part of this report, the position in Swiss law having been set out, the interesting route taken in the Netherlands recently will be considered. From this it will become clear that elements such as tortfeasorship and causation will have to be refined in order to reach our ultimate goal. It is most important that the law of delict, in tandem with other legal and non-legal disciplines, should be enabled to provide suitable remedies for

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1 Deel 1 van die verslag oor hierdie ondersoek het verskyn in 1995 *THRHR* 421–439. Die finansiële en ander ondersteuning wat verleen is deur die Sentrum vir Wetenskapsontwikkeling, Getrouheidsfonds vir Prokureurs en PU vir CHO het meegehelp dat hierdie ondersoek onderneem kon word. Elke bydrae word met dank erken. Standpunte hierin ingeneem, moet uiteraard slegs aan die navorser toegeskryf word.

these cases of multi-causal harm caused through demonstrations, otherwise the fundamental right of all citizens to demonstrate cannot be upheld.

1 INLEIDING

Alvorens nagegaan word wat geput kan word uit die regsvergelykende gegewens oor die moontlike aard van en vereistes vir die aanspreeklikheid van 'n groepslid waar 'n onbekende uit 'n groep nadeel onregmatig toegebring het, moet enkele verdere begrippe wat spesifiek in hierdie verband gebruik word, vasgestel word. Daaruit kan reeds iets meer agtergekom word van waarmee ons hier te make het. Daarna word gekyk na die hantering van sodanige gevalle in die Anglo-Amerikaanse en Duitse regstelsels.

2 MOONTLIKE TERMINOLOGIESE LIG OP DIE AARD VAN AANSPREEKLIKHEID IN DIE ONDERHAWIGE GEVALLE

'n Opvallende verskil in benadering tussen die Anglo-Amerikaanse en Romeins-Germaanse regstelsels wat hier na vore kom, is dat die kwessie in eersgenoemde geval volgens *verskillende kategorieë daders* gehanteer word,[2] en in laasgenoemde gevalle as een van *verskillende kategorieë waarin die kousaliteitselement* onderverdeel kan word. Die twee benaderingswyses lewer nie in alle opsigte heeltemal ooreenstemmende indelings op nie, en dit kompliseer begripsvorming oor die onderwerp en bemoeilik die ondersoek enigsins. Met die oog op die gemengde aard van die Suid-Afrikaanse reg, moet met invloede uit albei hierdie twee regskulture rekening gehou word by die bespreking van die onderwerp. Op plekke kan selfs 'n mate van herhaling in die bespreking nodig wees ten einde verwarring te voorkom.

2 1 Gesamentlike daders

Gesamentlike daders[3] is persone wat saam (kragtens "some common enterprise"[4]) dieselfde nadeel veroorsaak.[5] Hier bestaan konkurrensie ten opsigte van die *common enterprise* én die nadeel.[6] Elke gesamentlike dader se besondere bydrae tot die nadeel hoef nie vasgestel te kan word nie en dit maak in beginsel nie saak of elkeen op sy eie of hulle almal weens opset of nalatigheid verwyt kan word, en of van hulle skuldloos of weens risikoverhoging aanspreeklik gestel word nie. Hier, so word kragtens die *common law* geoordeel, bestaan daar slegs een skuldoorsaak.[7] Gesamentlike daders is gesamentlik en afsonderlik

2 Dieselfde problematiek doen hom ook in die strafreg voor (sien bv Snyman *Strafreg* (1992) hfst 5 6). Die bespreking van deelneming, begunstiging, poging, sameswering en uitlokking kan as agtergrondmateriaal met vrug gelees word alhoewel dit ongelukkig nie 'n antwoord bied vir die probleem waarmee die deliktereg in die onderhawige verband gekonfronteer word nie.

3 Fleming *The law of torts* (1992) (hierna Fleming) 255.

4 *Ibid.*

5 Hulle word "joint concurrent tortfeasors" genoem.

6 Fleming 255.

7 *Idem* 255 258.

aanspreeklik vir al die nadeel wat ontstaan het uit enige lid van die groep se deliktuele handeling.[8] Prestasie deur een bevry die ander en hulle het onderlinge verhaalsregte teenoor mekaar.

Die begrip "gesamentlike dader" word veral in die Anglo-Amerikaanse reg aangewend om iemand wat op daardie bepaalde manier deel van 'n groep was, se aanspreeklikstelling vir nadeel veroorsaak deur 'n onregmatige daad van 'n onbekende persoon uit daardie groep te beskryf. Dit is dus vir hierdie aspek van die ondersoek van belang.

2 2 Mededaders

2 2 1 Algemeen

Mededaders is afsonderlike konkurrente daders, dit wil sê verskillende persone wat onafhanklik van mekaar dieselfde nadeel veroorsaak, ongeag of dit eenmalig of in fases intree.[9] Konkurrensie bestaan hier slegs ten opsigte van die nadeel. Dit veronderstel dat bewys kan word welke persone aan die benadeling meegewerk het *maar nie wat elkeen se aandeel daaraan was nie.*[10] Hier maak dit in beginsel ook nie saak of hulle elkeen of almal weens opset of nalatigheid verwyt kan word, en of van hulle skuldloos of weens risikoverhoging aanspreeklik gestel word nie. Volgens die *common law* is daar soveel skuldoorsake as wat daar mededaders was.[11] Mededaders is hoofdelik aanspreeklik vir al die nadeel wat veroorsaak is (elkeen afsonderlik vir die geheel). Prestasie deur een bevry die ander en hulle het onderlinge verhaalsregte teenoor mekaar.

Hierdie begrip word soms aangewend om iemand wat deel van 'n groep was, aanspreeklik te hou vir nadeel aangerig deur 'n onregmatige daad van 'n onbekende persoon uit daardie groep, deurdat *die mate waarin elke mededader tot die benadeling bygedra het*, nie bekend hoef te wees nie. Aangesien die kousale verband tussen elke mededader se handeling en die intrede van die nadeel egter wél vasgestel moet wees, maar net nie die kousale uitwerking (graad) daarvan nie, is hierdie gevalle vir hierdie ondersoek net deels van belang.

2 2 2 Die onderskeid tussen gesamentlike daders en mededaders

Uit die voorgaande is dit al duidelik dat dit in die *common law* stelsels nie juis meer so belangrik is om tussen gesamentlike daders en mededaders te onderskei nie.[12]

Die ou reël van die *common law* – dat geen bydrae van ander gesamentlike daders geëis kan word waar een gesamentlike dader die eiser se eis bevredig het nie[13] – is in die Verenigde State van Amerika tot ongeveer 1970 baie algemeen

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8 *Sir John Heydon's Case* [1613] 11 Co Rep 5, 77 ER 1150.

9 Hulle word "several concurrent tortfeasors" genoem.

10 Sien par 2 5 2 hieronder.

11 Fleming 255 257–258.

12 Ingevolge a 6(1) van die Law Reform (Married Women and Tortfeasors) Act 1935, vervang deur a 1 Civil Liability (Contribution) Act 1978 (soortgelyke wetgewing geld ook in Australië (Fleming 258 fn 31 260–262) en in die RSA, waar die posisie deur die Wet op Verdeling van Skadevergoeding 34 van 1956 soos gewysig deur die Wysigingswet op Verdeling van Skadevergoeding 58 van 1971 gereël word.

13 *Merryweather v Nixan* 8 TR 186 (1799) 101 ER 1337; Keeton *Prosser and Keeton on the law of torts* (1984) (hierna Prosser) 336; Fleming 259.

toegepas op enige konkurrente dader, hetsy hy 'n gesamentlike dader of 'n mededader was. Geen onderskeid is dus tussen die twee klasse daders gemaak nie. Sedertdien is wetgewing egter in die meeste Amerikaanse state[14] aanvaar om bydrae in albei gevalle tog op 'n manier toe te laat, steeds sonder om tussen die twee klasse daders te onderskei.[15] Ter uitvoering daarvan kan 'n eiser wat weens enige skuldoorsaak (nie meer net onregmatige daad nie) vonnis teen 'n verweerder verkry het, nou in 'n latere aksie vonnis verkry teen enige iemand anders wat ook vir die benadeling aanspreeklik is, en kan selfs in die tweede aksie meer verhaal word as wat in die eerste aksie die geval was.[16]

Vir Australië verdedig Fleming[17] steeds die voorskrif dat nié in die tweede aksie meer as in die eerste aksie verhaal kan word nie omdat dit glo "verdict shopping" sou help voorkom. Uiteraard kan in totaal nie méér as die volle nadeel verhaal word nie.[18] Koste word in die tweede aksie ook slegs toegestaan as daar na die mening van die hof redelike gronde was om die tweede aksie in te stel.[19] Hoe dan ook, is die enigste oorblywende verskil tussen gesamentlike daders en mededaders in die *common law* dat 'n notariële kwytskelding ("release under seal") of skikking met een gesamentlike dader ook die ander bevry, terwyl dit nie die geval by mededaders is nie.[20]

Hierdie twee kategorieë daders moes in die Suid-Afrikaanse reg van mekaar onderskei word voordat die Wet op Verdeling van Skadevergoeding 34 van 1956 op die wetboek geplaas is.[21] Die redes daarvoor was dat, net soos in die *common law*-stelsels, hier te lande voorheen geen onderlinge bydraeplig tussen gesamentlike daders erken is nie, en dat die 1956-wet die posisie tussen gesamentlike en mededaders eenvormig reël. Vanweë die siening dat die 1956-wet nie gevalle van afsonderlike daders[22] of *iniuria*[23] dek nie, het die gemenereg egter vir daardie gevalle van belang gebly.[24] Bogenoemde onderskeid moet hier dus ongelukkig nog steeds gemaak word. Dat dit verwarring kan laat ontstaan, is duidelik.

2 2 3 Die onderskeid tussen sekere gevalle van mededaderskap en kumulatiewe kousaliteit

In die Anglo-Amerikaanse literatuur word by die verklaring van die term mededaders[25] nie onderskei tussen gevalle waar elkeen se afsonderlike gedraging vir

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14 En Australiese state (Fleming 258 fn 31 260–262).

15 Prosser 337–341. Tans verhinder 'n vonnis teen een gesamentlike dader nie meer 'n eis of die voortsetting van 'n aksie teen die ander nie.

16 Brazier *The law of torts* (1993) (hierna *Street on torts*) 579 wys op hierdie verskil tussen die 1935- en 1978-wette. Dit is ook in die VSA die geval (Prosser 330–331).

17 258.

18 Prosser 330–331.

19 Fleming 258.

20 *Street on torts* 579.

21 Bv Van der Walt *Delict: principles and cases* (1979) par 60. Hulle word steeds in verband met a 1 van die 1956-wet van mekaar onderskei.

22 Tap.

23 Tap.

24 Tap.

25 Dws "several concurrent tortfeasors".

die intrede van die nadeel nodig was maar geeneen van hulle op sigself die nadeel teweeg kon gebring het,[26] en dié waar die volle nadeel reeds deur enige een van die kumulerende, afsonderlike gedraginge kon ingetree het nie;[27] laasgenoemde word eenvoudig aangemerk as gevalle waar dit nie moontlik is om die nadeel tussen die mededaders te verdeel nie.[28] Gevolglik word hulle solidêr aanspreeklik gehou. Die deelbaarheid van die nadeel word sodoende 'n belangrike faktor wanneer besluit moet word of iemand aanspreeklik gehou moet word vir nadeel wat (in 'n onbekende mate) deur 'n ander groepslid aangerig is.

Fleming[29] maak wel die bogenoemde onderskeid in verband met die kousaliteitsvereiste, maar wys daarop dat die howe geneig is om in sodanige gevalle beleidsoordele te vel.[30] Elke mededader word dan eenvoudig vir die volle nadeel aanspreeklik gehou – en daarmee word die kwessie van kumulatiewe kousaliteit in die groepskonteks vir die Anglo-Amerikaanse reg as afgehandel beskou!

2 3 Afsonderlike daders

Afsonderlike daderskap kom voor waar verskillende persone onafhanklik van mekaar verskillende nadele aan dieselfde eiser of aan verskillende eisers berokken.[31] Elke aangesproke dader se besondere bydrae tot die benadeling moet hier vasgestel word, maar dit maak in beginsel nie saak of hulle elkeen of almal weens opset of nalatigheid verwyt kan word, of skuldloos of weens risikoverhoging aanspreeklik gestel word nie. Hier sal daar ook 'n veeltal van skuldoorsake bestaan.

Ook hierdie begrip word soms aangewend om iemand wat deel van 'n groep was, aanspreeklik te hou vir nadeel veroorsaak deur 'n onregmatige daad van 'n onbekende persoon uit daardie groep, en is dus vir hierdie ondersoek van belang. Hiervan kan enkele voorbeelde genoem word: Een manier is waar uit die feit dat samevoeging van verweerders toegelaat word,[32] afgelei word dat 'n aangesprokene aanspreeklik gehou kan word vir nadeel wat deur 'n onbekende ander groepslid aangerig is. Nog 'n voorbeeld is waar afsonderlike daders verskillende nadeel veroorsaak het terwyl hulle tóg gemeenskaplike opset gehad het.[33]

2 4 Middellike aanspreeklikheid- en volmaggevalle

In sodanige gevalle word, heel algemeen gesproke, iemand aanspreeklik gehou vir onregmatige dade wat in sekere omstandighede deur ander gepleeg is. Die

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26 Hierdie geval word ook nie in die OR of *BGB* genoem nie.
27 Dws kumulatiewe kousaliteit.
28 *Street on torts* 576–577.
29 196.
30 Fleming 196–197. Hy maak die onderskeid nie met verwysing na die gevalle van aanspreeklikheid weens onregmatige dade in groepsverband gepleeg nie.
31 Hulle word "several tortfeasors" genoem.
32 Sien (f) hieronder oor die verskil in benadering tussen Engeland en die VSA.
33 Ingevolge a 50 OR (Brehm *Berner Kommentar Band VI 1e Abteilung, 3e Teilband, 1e Unterteilband* (1990) (hierna Brehm) 385). Brehm "Zur Haftung bei alternativer Kausalität" 1980 *JZ* 585 (hierna Brehm 1980) kan ook geraadpleeg word.

aanspreeklikgestelde pleeg dus nie self 'n onregmatige daad nie. Op hierdie gevalle word nie verder ingegaan nie.

2 5 Kumulatiewe, bydraende en hipotetiese kousaliteit[34]

2 5 1 Kumulatiewe kousaliteit

Die algemeenste voorbeeld hiervan[35] is waar meerdere persone deur die kombinasie of gesamentlike uitwerking van hulle onafhanklike onregmatige gedraginge dieselfde nadeel veroorsaak het[36] en dit nie bekend is wie van hulle se gedraging daarvoor deurslaggewend was nie, terwyl die volle nadelige gevolg deur elkeen van hulle se gedraging kon ingetree het.[37] Elke mededader se gedraging was hier *'n* oorsaak van die nadeel en hulle word elkeen afsonderlik vir die volle nadeel aanspreeklik gehou.[38]

2 5 2 Bydraende kousaliteit

Fleming onderskei voorts "concurring", oftewel "jointly sufficient causes".[39] Dit is faktore wat gelyktydig of opeenvolgend tot die intrede van die nadeel bydra sonder dat enige faktor op sigself vir die intrede van die nadeel genoegsaam is *of sonder dat elkeen se bydrae daartoe bepaal kan word.*[40] [41] 'n Mens kan dit ter wille van die onderskeid *bydraende kousaliteit* noem. Elke bydraende gedraging was hier *'n* oorsaak van die nadeel en elke dader kan vir die hele nadeel aanspreeklik gehou word.[42] Dit stel elke mededader dus vir die hele nadeel aanspreeklik.[43]

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34 Daar bestaan eintlik geen standaardbetekenis van enige van hierdie begrippe of ander kategorieë waarin "kousaliteit" onderverdeel word nie. Elke skrywer kies oënskynlik maar 'n terminologiese indeling wat vir die uitbou van sy gedagtegang dienlik is. Hier word nie gepoog om hieroor 'n standaard oftewel nuwe standaard neer te lê nie; verder word nie tot die moontlike verwarring bygedra deur verdere begrippe aan die gebruiklikes toe te voeg nie; nietemin moet nou eenmaal taaltekens vir die verloop van die betoog gebruik word en sal die tradisionele terme aangewend word, behalwe waar hulle werklik ontoereikend is en kritiese kommentaar en aanpassing verdien.

35 Wat Hart en Honoré *Causation in the law* (1985) (hierna Hart en Honoré) 205 "additional causation" noem, en wat Fleming 196 "alternative sufficient causes" noem. Die uitdrukking *cumulative* gebruik Fleming anders (bv 201), nl om faktore aan te dui wat elkeen net 'n bydrae tot die intrede van die nadeel maak, sonder dat enige een op sigself die nadeel kon laat intree het (Hart en Honoré 205 noem dit "contributory causation"), wat hieronder in par 2 5 2 "bydraende kousaliteit" genoem word.

36 Dws mededaders was.

37 Bv Quendoz *Modell einer Haftung bei alternativer Kausalität* Zürcher Studien zum Privatrecht Nr 85 (1991) (hierna Quendoz) 107. Fleming 196 noem ook 'n tweede verskyningsvorm van *alternative sufficient* causes, nl waar die waarskynlike nadelige uitwerking van die tweede alternatiewe oorsaak reeds deur die eerste alternatiewe oorsaak vooruitgeloop is: sien egter par 2 5 3 hieronder.

38 Sien par 2 2 3 hierbo.

39 200–201.

40 Sien par 2 2 1 hierbo.

41 Hierin lê die verskil met die vorige kategorie gevalle.

42 Fleming 201.

43 Solidariteit kan dus daaruit ontstaan.

2 5 3 Überholende Kausalität

Dit word (dalk ietwat onakkuraat) dubbele veroorsaking, "supervening causes",[44] "alternative causes"[45] of [46] hipotetiese kousaliteit[47] genoem. Hier kon die tweede gedraging die nadeel *wat deur die eerste gedraging reeds (minstens gedeeltelik) teweeggebring is*, ten volle veroorsaak het.[48] Die Engelse howe het – myns insiens tereg – in só 'n geval die eerste dader steeds aanspreeklik gehou vir die nadeel wat hy aangerig het en die tweede dader net vir wat hy daaraan toegevoeg het.[49] In latere uitsprake het die House of Lords[50] hierdie rigting bly verdedig met die argument dat dit onbillik sou wees om die eiser tussen twee "stoele" (dit wil sê daders) te laat deurval. Die Law Lords het egter tereg daarop gewys dat die eerste verweerder andersins sal kan sê dat sy aanspreeklikheid staak wanneer die tweede onregmatige daad plaasvind, terwyl die tweede verweerder sal kan sê dat hy die eiser aangetref het nadat die eiser reeds die nadeel gely het!

Die tweede verskyningsvorm van "alternative sufficient causes" wat Fleming[51] noem, naamlik waar die nadeel wat daadwerklik ontstaan het ook deur 'n tweede gedraging veroorsaak sou kon gewees het as dit nie reeds deur die eerste gedraging teweeggebring was nie, is die enigste wat eintlik 'n geval van dubbele veroorsaking genoem kan word. Hier is net die eerste faktor kousaal verbonde en nie die tweede nie[52] – die tweede is dus werklik net 'n hipotetiese oorsaak van die nadeel omdat dit nooit werksaam geword het wat die intrede van die nadeel betref nie. Op beleidsgronde kan die skadevergoedingsbedrag natuurlik by die feite aangepas word.[53]

Albei die voorgaande verskyningsvorme kan van gesamentlike daderskap[54] onderskei word, omdat geen "common enterprise" daarby voorkom nie. Die probleem wat dit met betrekking tot kousaliteit oplewer, is nietemin soortgelyk, te wete dat die *conditio sine qua non*-benadering tot die algehele vryspraak van albei mededaders sal lei, en dit is onsinnig.[55] "Praktische Vernunft"[56] vereis

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44 Fleming 197.
45 Hart en Honoré 205.
46 Dit is onbevredigend omdat die tweede gedraging inderdaad plaasgevind het maar net nie sy volle werking kon uitoefen nie omdat die gevolg reeds deur die eerste gedraging teweeggebring was.
47 Sien bv Visser en Potgieter *Skadevergoedingsreg* (1993) 85 ev.
48 Bv Quendoz 108; kyk ook die uitspraak van die House of Lords in *Baker v Willoughby* [1970] AC 467 (CA) 475D–476H.
49 Krities hieroor is Fleming 197.
50 Volgens Fleming 198.
51 196.
52 *Ibid.*
53 Soos om by die berekening daarvan die reeds verhoogde kans op nadeel of die reeds verminderde lewensverwagting weens die aanwesigheid van sodanige alternatiewe faktore in ag te neem.
54 Wat Peter *Allgemeiner Teil des Schweizerischen Obligationenrechts von Andreas von Tuhr 1e Band, 1e Lieferung*, 3e Aufl (1974) (hierna Von Tuhr-Peter) 93 "gemeinsame Kausalität" noem.
55 Fleming 196 noem daardie moontlikheid "idiotic".
56 Von Tuhr-Peter 94.

gevolglik dat sodanige mededaders vir die volle nadeel aanspreeklik gehou moet kan word – of ten minste dat die bedrag skadevergoeding op beleidsoorwegings aangepas moet kan word.[57]

2 5 4 Gevalle waar die kousale verloop nie vasgestel kan word nie

Die kousale verloop is in die gevalle wat tot nou toe bespreek is, bekend[58] en dit is duidelik dat 'n beleidsoordeel oor aanspreeklikheid gevel sal moet word – dit is des te meer waar as dit gaan oor aanspreeklikheid weens 'n onregmatige daad in groepsverband. Elkeen van die genoemde kousaliteitskwessies kan dus ook op die gebied van aanspreeklikheid weens onregmatige dade in groepsverband voorkom, maar dit lewer as sodanig nie nuwe probleme in daardie konteks op nie en verdien geen uitgebreide bespreking in verband met hierdie ondersoek nie.

Waar nadeel deur A of B se gedraging in die geheel veroorsaak is maar nie bepaal kan word deur watter een van die twee dit gebeur het nie,[59] is in die Switserse reg 'n analoë reëling as vir die voorgaande gevalle getref: In sodanige gevalle, asook waar verskillende persone andersins weens verskillende aanspreeklikheidsgronde vir dieselfde nadeel aanspreeklik is,[60] volg daar volgens die Switserse regspraak solidêre aanspreeklikheid.

2 5 5 Vrae oor hoe gevalle soos die onderhawige ingevolge die Suid-Afrikaanse reg benader word

In die Suid-Afrikaanse reg was dit voor die 1956-wet nodig om te onderskei tussen gesamentlike mededaders en konkurrente daders. Albei klasse daders was gesamentlik en afsonderlik aanspreeklik, maar anders as by konkurrente daders was daar geen verhaalsreg in die geval van gesamentlike mededaders nie. Of dit alleen genoeg rede was vir die invoeging van hoofstuk 2 van die 1956-wet, is moeilik om te bepaal. Hoofstuk 2 het in elk geval eintlik net te make met die bydraevraag en lê die nodige prosedurereëls neer om dit makliker te maak. Hoofstuk 2 se bepalings kan nie help met die beantwoording van die vraag óf daar aanspreeklikheid moet wees nie. Dit lyk eerder of hoofstuk 2 gesamentlike aanspreeklikheid veronderstel, en bloot die betrokke onderskeid uitdruklik vir doeleindes van 'n bydrae irrelevant gemaak het. Gesien die klem wat daarin op die posisie van die afhanklike en eggenoot geplaas word, is dit duidelik dat eintlik net bedoel is om duidelik te maak dat ook in daardie gevalle van gesamentlike en afsonderlike aanspreeklikheid van die broodwinner/eggenoot se boedel (mededaderskap genoem) sprake is, en om 'n bydraereëling in verband daarmee te tref – iets wat voorheen nie bestaan het nie. Hoe dan ook, die oogmerk was dalk net om die laaste geleentheidsreël vir die betrokke gevalle af te

57 Sien ook bv Visser en Potgieter 86.

58 Alhoewel die kousale bydrae van elke gedraging nie noodwendig bekend hoef te wees nie.

59 Die *BGB* bevat wel 'n bepaling hieroor maar nie die OR nie.

60 Merz *Obligationenrecht Allgemeiner Teil, Erster Teilband* in *Schweizerisches Privatrecht* Von Greyerz, Gutzwiller, Hinderling, Meier-Hayoz, Merz, Piotet, Secrétan, Von Steiger en Vischer 6e Band (1984) (hierna Merz) 102.

skaf. Die opvallende ooreenkomste tussen bepalings van die 1956-wet en die posisie in die *common law* soos gewysig deur die Engelse wetgewing versterk hierdie indruk. Dit lyk desnietemin of die uitwerking daarvan nie was om die onderskeid in die algemeen op te hef nie maar net vir sover dit oor bydrae handel.

Uit die voorgaande is dit duidelik dat die aandag wat tot dusver aan die onderhawige probleem gegee is, beperk gebly het tot die kwessie van onderlinge bydrae. In verband met nadeel wat deur 'n onbekende lid van 'n groep toegebring is, is egter nog geen deurbraak gemaak nie.

3 AANSPREEKLIKHEID VIR NADEEL VEROORSAAK DEUR ONREGMATIGE DADE IN GROEPSVERBAND GEPLEEG VOLGENS ENKELE ANDER REGSTELSELS

3 1 Die Anglo-Amerikaanse regsfamilie

3 1 1 Inleiding

3 1 1 1 Algemeen

In die Anglo-Amerikaanse regsfamilie word die onderhawige gevalle gewoonlik benader as gevalle waar iemand vir 'n onregmatige daad gepleeg deur iemand anders aanspreeklik gehou kan word. 'n Voorbeeld is die verskillende maniere waarop iemand sogenaamd middellik aanspreeklik gehou kan word, wat hieronder ter sprake is. Dit gaan daarvolgens dus nie soseer oor 'n eie deliktuele aanspreeklikheid van die aangesprokene nie. Hierdie opvallende feit moet verstaan word teen die agtergrond van die kasuïstiese "writ"-stelsel wat kenmerkend van die *common law torts* was, en die feit dat nog nie heeltemal aan die nawerkinge daarvan ontsnap kon word nie.[61] 'n Algemene aanspreeklikheidsbeginsel is naamlik ook nog nie oral in hierdie regsfamilie van krag nie. Om die gevalle waaroor hierdie ondersoek handel, eenvoudig te tipeer as gevalle waar iemand vir 'n ander se onregmatige daad aanspreeklik is, gaan nie op nie. Dit sluit dan ook byvoorbeeld verteenwoordiging en volmag en middellike aanspreeklikheid in, en sal die ondersoek te ver uitbrei. Gevolglik sal gepoog moet word om vas te stel watter van die tradisionele begrippe aangewend word om die gevalle van onregmatige dade gepleeg in groepsverband te hanteer.

3 1 1 2 Historiese ontwikkeling

Oorspronklik is onder *joint tort* die verbintenisskeppende regsfeit verstaan wat middellike aanspreeklikheid weens gesamentlike optrede (*concerted action*) ten grondslag lê.[62] Almal wat gesamentlik (*in concert*) opgetree het om 'n *trespass* te pleeg terwyl hulle 'n *common design* nagestreef het, word ten volle aanspreeklik gehou vir die gevolge van daardie optrede. In die *Heydon*-saak word

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61 Dink aan Maitland se bekende woorde oor die voortgesette invloed van die formalistiese spoke uit die verlede in Maitland *The forms of action at common law* (Chaytor en Whittaker (reds)) (1968) 1.

62 *Sir John Heydon's Case* [1613] 11 Co Rep 5, 77 ER 1150; Prosser 322; Harper, Fleming en Gray *The law of torts* vol 3 (1986), met *1991 Cumulative Supplement No 2* (hierna Harper *et al*) 1 ev.

hierna verwys as 'n "joint enterprise"; dit is waar elkeen as lid van 'n groep aan die onregmatige optrede deelneem en die handeling van enige enkele persoon dan as't ware almal daar aanwesig se handeling word. Afgesien van die vraag van wat en hoeveel elke individuele party dus self gedoen het, word elkeen vir die geheel aanspreeklik gehou asof hy self die gewraakte handeling verrig het. Geen verdeling van skadevergoeding of beperking van aanspreeklikheid volgens redelike voorsienbaarheid vind gevolglik plaas nie.

Die agtergrond hiervan is volgens Prosser[63] die primêr strafregtelike aard van die aksie weens *trespass*, 'n aksie wat steeds ook in die strafreg voortbestaan.[64] Fleming[65] wys daarop dat dit grootliks ooreenstem met die omskrywing wat in die strafreg gegee word van *principals in the first and second degree*. Dit sluit dus almal in wat hulp verleen, aanmoedig of doelbewus aanwesig is, sonder dat aktiewe optrede vereis word: "Knowingly assisting, encouraging or merely being present as a conspirator at the commission of the wrong would suffice."[66]

3 1 1 3 Die vereiste van opset of nalatigheid

Daar word vereis dat elke lid van die groep wat aangespreek word, die opset of nalatigheid wat vir aanspreeklikheid op grond van 'n onregmatige daad nodig is, moet gehad het.[67] Hieruit is dit duidelik dat die howe slegs aan skuldaanspreeklikheid dink – waar skuld ontbreek, is geen gesamentlike mededaderskap voorhande nie al bevorder sodanige onskuldige optrede van een ook die deliktuele oogmerke van die ander.[68]

Delikte waarvoor nalatigheid vereis word, word oor dieselfde kam geskeer as die waarvoor opset vereis word. Hoe ver daarmee gegaan is, blyk uit *Brook v Bool*.[69] Dit was die geval waar 'n verhuurder sy huurder gevra het om hom te help om 'n gaslek op te spoor. Hulle was beide nalatig deur albei met 'n ope vlam na die gaslek te soek. 'n Ontploffing het gevolg en die verhuurder is vir al die gevolge daarvan aanspreeklik gehou. Die redes daarvoor was dat hulle

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63 323.

64 Glanville Williams *Textbook of criminal law* (1983) 915 ev; Archbold *Criminal pleading, evidence and practice* (1994) 29–50 ev.

65 256.

66 *Ibid*. Volgens wat Prosser 324 meedeel, was "conspiracy" die "writ" wat gebruik is waar twee of meer persone saamgesweer het om die regsprosedure te misbruik, en was dit die voorloper van die aksie weens kwaadwillige gedingvoering. Later is dit vervang deur 'n aksie "on the case" en is dit uitgebrei na sowel die deliktuele as die strafregtelike aanspreeklikheid van diegene, anders as die dader self, wat by die beplanning van, hulpverlening by of aanmoediging tot die verrigting van die daad betrokke was.

67 Prosser 324: "It is furthermore, essential that each particular defendant who is to be charged with responsibility shall be proceeding tortiously, which is to say with the intent requisite to committing a tort, or with negligence."

68 Prosser 324 met verwysing na hofsake. Die vereiste dat elke gesamentlike mededader self ook *shall be proceeding tortiously*, beklemtoon waarskynlik net dat hy bewustelik of nalatig moet gehandel het om 'n onregmatige daad (vermoedelik die een wat die dader gepleeg het) daar te stel. Uit hierdie stelling kan nie afgelei word dat die posisie is dat die aangesprokene sélf deur sy deelname 'n onregmatige daad pleeg nie.

69 [1928] 2 KB 578: Fleming 256.

gesamentlike mededaders was, onder andere omdat hulle met 'n *concerted action* besig was (die ander rede was dat die verhuurder die huurder gemagtig het om só te handel). Hulle het kennelik nie afgespreek om op 'n nalatige manier na die gaslek te soek nie, maar die feit dat die verhuurder self nalatig meegedoen het en, meer nog, dat hy die voorbeeld gestel het deur eerste die vlam aan te steek, asook die feit dat hy as verhuurder in 'n gesagsposisie teenoor die huurder gestaan het, het tot die bevinding dat hy aanspreeklik was, gelei.[70]

3 1 1 4 Pleeg die aangesprokene self 'n onregmatige daad?

Vir die onderhawige bespreking is dit belangrik om te bepaal of die aangesproke groepslid self 'n onregmatige daad begaan het wanneer nadeel deur 'n onbekende dader uit die groep aangerig is. Prosser[71] deel mee dat dit omstrede is of die *conspiracy* op sigself reeds 'n delik daarstel, en of dit van 'n ander delik afhanklik is. Enersyds moet daar 'n handeling wees alvorens van 'n delik enige sprake kan wees (afgesien van wat vir misdade vereis word) – en die blote afspraak sonder dat 'n delik ten gevolge daarvan gepleeg word, kan nie 'n handeling daarstel nie.[72] Diegene wat net by die beplanning, hulpverlening of aanmoediging betrokke was, kan dus nie aanspreeklik gehou word nie tensy daar metodes aangewend of doeleindes verwesenlik word wat self deliktuele aanspreeklikheid kan laat ontstaan. Desondanks is daar gevalle waar sekere klasse optrede, ofskoon dit nie onregmatig sou gewees het as dit deur net een mens begaan is nie (soos boikotte), wanneer dit deur 'n groep gedoen word dermate dwangmatig word of op onbehoorlike beïnvloeding of 'n beperking van handelsvryheid neerkom, dat dit as onregmatig aangemerk moet word. Die kategorie waarin hierdie soort gevalle ingedeel kan word, word deur Prosser[73] as onbelangrik aangemerk – belangrik is vir hom net dat die kombinasie van persone (*combination*) of sameswering (*conspiracy*) dan 'n bepalende faktor vir die vestiging van aanspreeklikheid is. By sy voorbeeld van boikotte wil ek in die konteks van hierdie ondersoek ook optogte en demonstrasies insluit.

3 1 1 5 Gevalle van skuldlose of risiko-aanspreeklikheid

Fleming[74] wys daarop dat dit dalk nie altyd nodig is dat die partye moet weet dat hulle 'n delik begaan nie. Ter stawing hiervan verwys hy na die posisie by *libel*, waar dit vir aanspreeklikheid nie vereis word dat die partye hoef te weet dat wat hulle gepubliseer het lasterlik is nie.[75] Die regspraak bepaal dat waar gekwalifiseerde privilegie teen beweerde laster opgewerp word, en kwaadwilligheid dus bewys moet word om oorskryding van die regverdigingsgrond te bewys, slegs die persone by wie kwaadwilligheid bewys word gesamentlike mededaders sal wees.[76]

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70 Fleming 256.
71 324.
72 Die ou saak *James v Evans* 3d Cir 1906 159 F 136 140 bied hiervoor steun.
73 324.
74 255.
75 Fleming 255 vn 8 en gesag daar gegee; *Street on torts* 576 bevestig dat dit die geval is, nav wat die Porter Committee (Cmd 7536 29) oor laster gesê het.
76 *Gardiner v Moore* [1969] 1 QB 55; [1966] 1 All ER 365.

3 1 2 Verskyningsvorme ingevolge die Anglo-Amerikaanse reg

Gesamentlike mededaderskap kom volgens *Street on torts*[77] op gesag van uitsprake in *The Koursk*[78] voor:

(a) Wanneer 'n werkgewer middellik aanspreeklik gehou word vir die delik van sy werknemer. Hierdie kategorie word om twee redes tersyde gelaat: (i) omdat die identiteit van die persoon wat die nadeel deur sy onregmatige daad aangerig het, bekend moet wees alvorens middellike aanspreeklikheid kan vestig, en (ii) dit hier in elk geval nie oor middellike aanspreeklikheid handel nie.

(b) Wanneer 'n plig verbreek word wat gemeenskaplik op meer as een persoon gerus het (soos op twee okkupeerders van 'n grondstuk; nog 'n voorbeeld sou die plig van naburige grondeienaars ten opsigte van 'n gemeenskaplike muur wees). Hierdie kategorie behels gevalle waar dit vasstaan dat almal op wie die gemeenskaplike plig gerus het, die plig versaak en dus onregmatig gehandel het waardeur nadeel veroorsaak is. Weens die gemeenskaplike aard van hierdie tipe plig kom die vraag of die identiteit van die dader vasgestel kan word nie sinvol voor nie. Hier is die aangesprokene immers weens sy eie pligsversuim aanspreeklik – al is dit 'n plig wat uiteraard net gemeenskaplik kan wees – sodat dit onduidelik is waarom *Street on torts* dit aandui as 'n geval waar iemand weens die onregmatige daad van 'n ander aanspreeklik gestel word.

As sodanig bied hierdie voorbeeld nietemin dalk 'n raakpunt met die onderhawige problematiek. Die aangesprokene word immers weens sy eie onregmatige pligsversuim ten volle aanspreeklik gehou al was sy versuim nie noodwendig die *proximate cause* van die nadeel nie.

(c) Wanneer iemand 'n ander tot die pleeg van 'n delik aanstig (*instigate*).[79] Hier is dit dikwels duidelik wie die aanstigter en wie die aangestigte is en doen die probleem met 'n onbekende dader uit 'n groep hom dus nie noodwendig voor nie. Die aanstigter handel self onregmatig terwyl die nadeel fisies deur die aangestigte aangerig word. Dit laat die geval in daardie sin dus vertoon soos 'n ooreenkoms met aanspreeklikheid weens onregmatige daad in groepsverband gepleeg. Hierdie verwantskap word nog duideliker waar die aanstigter hom tot 'n groep mense gerig het. Iemand wat ander mense aangestig het tot optrede wat voorsienbaar tot nadeel kon lei, behoort immers nie aan aanspreeklikheid te kan ontkom waar 'n onbekende dader uit die aangestigte groep nadeel onregmatig aangerig het nie.

(d) Wanneer persone opgetree het "[in] concerted action to a common end".[80] [81] Hierdie kategorie is hier van belang omdat dit per definisie onregmatige dade

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77 575. Uit bv Harper *et al* 1–7 blyk dit dat nie in al die gevalle werklik van *joint torts* sprake is nie, maar dat dit gevalle is wat na analogie van *joint torts* met gesamentlike en afsonderlike aanspreeklikheid verbind word en daarom saamgegroepeer word.

78 (1924) P 140 (CA) 152 155.

79 Met verwysing na *Brooke v Bool* [1928] 2 KB 578.

80 *Street on torts* 576, met verwysing na Bankes LJ in *The Koursk* 152: "All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by co-operation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit, are equally liable" (Prosser 323).

81 Prosser 323–324. *Street on torts* 576 vn 20 noem as voorbeelde van hierdie kategorie die geval van direkteure van 'n maatskappy wat die maatskappy gevorm het om delikte te

vervolg op volgende bladsy

gepleeg in groepsverband insluit. 'n Uitdruklike afspraak word nie vereis nie; 'n stilswyende verstandhouding is dus genoegsaam. Waar iemand bloot bewus is van die onregmatige optrede van 'n ander kan dit dien as getuienis van so 'n stilswyende verstandhouding.[82] Dit sluit ook gevalle in waar twee daders wesenlik verskillende *torts* gepleeg het (een het byvoorbeeld 'n slagoffer vasgehou (*imprisonment*) terwyl 'n ander een hom geslaan het (*battery*), 'n derde sy horlosie geneem het (*robbery*) en 'n vierde hom met die dood gedreig het as hy 'n klag sou lê (*assault*). (Hier het 'n mens te make met afsonderlike daders wat deur verskillende *common law torts* te pleeg, onderskeibare nadeel kragtens 'n *common enterprise* veroorsaak het en wat daarom as gesamentlike mededaders gehanteer word.) Die posisie van die verskillende betrokkenes in die geval van laster deur die gedrukte media bied ook 'n voorbeeld hiervan. By die elektroniese media sal dieselfde moet geld. Dit val op dat die afsonderlike gedraginge in die uitvoering van 'n gemeenskaplike onderneming, nadeel moet veroorsaak het waarvoor elkeen se gedraging nodig was (bydraende kousaliteit, dus).

(e) In verband met die voeging van verweerders as medeverweerders.

(i) Voeging en die *single cause*-benadering van die *common law*. Ingevolge die *common law* was dit nie moontlik om afsonderlike konkurrente daders in een aksie saam te voeg nie omdat hulle nie op een en dieselfde skuldoorsaak aangespreek word nie, terwyl gesamentlike mededaders wel gevoeg kon word omdat hulle aanspreeklikheid op dieselfde skuldoorsaak sou berus. Gevolglik is die vraag of die persone as verweerders gevoeg kon word of nie gebruik as die kriterium om te besluit of hulle gesamentlike mededaders of afsonderlike konkurrente daders was. Myns insiens sou dit tot 'n sirkelredenasie moet lei.

(ii) Gevolge van die aanwending van die moontlikheid om te voeg as kriterium om gesamentlike mededaders en onafhanklike konkurrente daderskap gelyk te skakel. Prosser[83] deel mee dat die begrip *joint tortfeasor* ook in die VSA vir hierdie doel gebruik word. Dit geskied op grond van 'n beweerde *mutual agency* of *common duty* tussen hulle omdat daar dan net een skuldoorsaak ten opsigte van hulle sou bestaan. Voeging word egter in die VSA toegelaat – dieselfde posisie heers tans in Engeland en dit word in Australië[84] ook toenemend toegelaat bloot omdat dit prosesregtelik gerieflik is om net een keer te dagvaar. Voeging word sodoende deur sommige howe selfs toegelaat ten opsigte van afsonderlike daders, dit wil sê waar onafhanklike onregmatige dade tot

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pleeg, of wat in hulle bestuur van die maatskappy 'n delik pleeg of laat pleeg (nav *Rainham Chemical Works Ltd v Belvedere Fish Guano Co* (1921) 2 AC 465 (HL) 476), of wat na die stigting van die maatskappy besluit om delikte te pleeg (*Oertli AG v EJ Bowman Ltd* (1956) RPC (Reports of Patent Cases) 282 292 (nie tot my beskikking nie). Die aanspreeklikheid van vennote weens 'n delik deur een vennoot in die uitvoering van die vennootskap se besigheid gepleeg en die aanspreeklikheid van gesamentlike werkgewers vir delikte deur hulle werknemer in die uitvoering van sy take gepleeg is glo verdere voorbeelde (*Street on torts* 576). *Brooke v Bool* [1928] 2 KB 578 kan ook hieronder ingedeel word.

82 Prosser 323–324.

83 322 ev.

84 Fleming 257–258.

onderskeibare, onafhanklike gevolge gelei het, maar dit die beslissing van feitlike geskille, soos vir die verdeling van skadevergoeding nodig is, makliker sal maak as die verweerders gevoeg word.[85]

(iii) Die moontlikheid om te voeg en die effek van kwytskelding. Die gelykskakeling van afsonderlike konkurrente daders met gesamentlike mededaders bloot omdat hulle saam gedagvaar kan word, het in verband met die effek van kwytskelding van een van die mededaders verdere verwarring meegebring.

Kwytskelding, wat ingevolge die *common law* met beseëling gepaard gegaan het (*release under seal*), het as uitwerking dat die bedrag in die skriftelike stuk vermeld – indien enige, en ongeag daarvan of dit toereikende teenwaarde daarstel – die betrokke vordering ten volle uitwis. Gevolglik wis kwytskelding van een gesamentlike mededader (waar twee of meer *in concert* gehandel het) die enkele skuldoorsaak uit; en omdat daar dan net één skuldoorsaak voorhande is, bevry dit natuurlik ook die ander mededader(s). Waar dit oor afsonderlike konkurrente daders gaan, is daar egter geen rede waarom kwytskelding van een die ander sou bevry nie behalwe vir sover die kwytskelding wel die eis bevredig het – daar is immers net een nadeel gely. Die howe het hierdie reël egter ook op afsonderlike konkurrente daders gaan toepas.[86] Regspraak en wetgewing hieroor kon nog nie al die probleme oplos nie. Meestal word gebruik gemaak van 'n omweg deur te redeneer dat die kwytskelding van een verweerder gepaardgaande met 'n voorbehoud van regte teenoor die ander verweerders op 'n *pactum de non petendo* neerkom, wat dan nie die skuldoorsaak uitwis nie.

Prosser[87] stel voor dat die reël eerder moet wees dat geen eiser 'n skuldoorsaak teen enige verweerder deur kwytskelding verloor nie tensy hy daardie verweerder spesifiek kwytgeskeld het, of reeds wesenlik volledige skadevergoeding ontvang het. Geen verdere vereiste behoort volgens Prosser gestel te word dat die eiser uitdruklik sy aanspraak teen enige verweerder moet voorbehou het nie, en dit behoort ook nie nodig te wees om bogenoemde kunsgreep te gebruik nie. Latere regspraak kom daarop neer dat kwytskelding van minder as die volle bedrag skadevergoeding slegs bevrydend werk ten gunste van daardie verweerders wat spesifiek genoem of andersins geïdentifiseer word. 'n Kwytskelding wat voorgee om alle verweerders kwyt te skeld, is dus kragteloos waar minder as die volle skadevergoeding kwytgeskeld word, asook teenoor verweerders wat nie spesifiek genoem of andersins geïdentifiseer word nie.[88]

(f) Om daardie konkurrente dader aan te dui wie se onregmatige handeling met ander se onregmatige handelinge saamgeval of meegewerk het om die nadeel te veroorsaak (wat hierin afsonderlike konkurrente daders genoem word), maar welke handeling tóg die *proximate cause* van die eiser se nadeel was.[89] Uit die

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85 Volgens Prosser 327 geskied dit tereg. Dit kom veral tov verkeersbotsings voor.

86 Prosser 332.

87 335.

88 Dobbs *et al Prosser and Keeton on the law of torts, 1988 Pocket Part* (1988) ad: page 335 "new text after n 41".

89 Hierdie geval is in Engeland nie soos in die VSA met gesamentlike mededaderskap verwar nie omdat in Engeland weens die afwesigheid van *concerted action* in sulke ge-

vervolg op volgende bladsy

voorbeelde wat Prosser gee,[90] blyk dat dit hier gaan oor kumulatiewe/konkurrerende kousaliteit sonder dat die gevalle onderskei word (i) waar die identiteit van die opeenvolgende daders bekend is en elkeen van die gedraginge die nadelige gevolge in die geheel sou veroorsaak het, van gevalle (ii) waar die identiteit van die opeenvolgende daders bekend is en hulle gedraginge almal vir die intrede van die nadeel nodig was.

Normaalweg is dit volgens Fleming nie genoeg om tot gesamentlike aanspreeklikheid te lei indien twee mense gemeenskaplik besig is met 'n aktiwiteit wat nie op sigself onregmatig of inherent gevaarlik is nie en nie een van hulle enige rede gehad het om te verwag dat die ander nalatig gaan handel nie. As voorbeeld meld hy[91] die bekende een[92] van twee vriende wat gaan jag en een van hulle dan 'n derde per ongeluk verwond. Selfs al het die vriende ooreengekom dat hulle alles wat hulle sou skiet sou deel (*sic*!), kan hulle tóg nie as gesamentlike mededaders aangemerk word nie.

Fleming[93] wys daarop dat dit kan gebeur dat gevalle van andersins onskuldige *joint enterprise*, deur gebruik te maak van 'n uitgebreide verteenwoordigingskonstruksie, tot gevalle van gesamentlike aanspreeklikheid omskep kan word. Dit gebeur volgens hom egter net soms, en dan net waar dit in verband met skade aan motorvoertuie handel oor eise wat ingestel word om beskikbare versekeringsuitkerings uit te buit.

3 1 3 Gevolge van die onderskeid tussen mede- (konkurrente) daders (hetsy gesamentlike of afsonderlike) en ander afsonderlike daders

(a) Konkurrente daders (hetsy gesamentlike mededaders of afsonderlike konkurrente daders) is aanspreeklik vir die geheel van die nadeel wat gely is (of die nadeel verdeelbaar is, is dus irrelevant), terwyl afsonderlike daders slegs aanspreeklik gehou kan word vir die nadeel wat hulle veroorsaak het.[94]

(b) Voldoening deur 'n konkurrente dader (hetsy 'n gesamentlike mededader of afsonderlike konkurrente dader) bevry al die konkurrente daders, terwyl voldoening deur 'n afsonderlike dader net homself bevry.[95]

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valle geen samevoeging van die afsonderlike konkurrente daders as medeverweerders sou kon geskied nie (Prosser 328).

90 Van 'n perd wat agtereenvolgens in twee uitgrawings inval; drie agtereenvolgende verkopers van vloeistof, wat daarna ontplof; opeenvolgende mediese dokters wat fouteer; twee onafhanklike verweerders wat 'n besending vertraag, ens (Prosser 326 fn 15).

91 Fleming 256.

92 *Street on torts* 578 gee 'n soortgelyke voorbeeld nav *Arneil v Paterson* [1931] AC 560 (HL); [1931] All ER 90 (HL) (waar twee honde van twee verskillende eienaars gesamentlik 'n aanval op 'n trop skape uitgevoer en verskeie skape beseer het, en die twee eienaars gesamentlik en afsonderlik aanspreeklik gehou is vir die volle nadeel omdat elke hond regtens die hele nadeel veroorsaak het aangesien hulle saam gejag het en nie bewys kon word watter een welke deel van die nadeel veroorsaak het nie).

93 256.

94 *Street on torts* 578.

95 *Ibid. Townsend v Stone Toms and Partners (a firm)* [1981] 2 All ER 690 (CA) bespreek die effek daarvan as die eiser 'n geregtelike inbetaling deur een verweerder aanvaar, op sy reg om ander verweerders wat saam gedagvaar is aan te spreek.

(c) Voeging van verweerders word meer geredelik deur die howe kragtens *Order 16, rule 4* toegelaat in geval van afsonderlike daders as in geval van konkurrente daders.[96]

(d) Tussen konkurrente daders is daar 'n algemene bydraeplig maar nie tussen afsonderlike daders nie.[97]

(e) 'n Verdere reël van die *common law* was[98] dat geen bydrae geëis kan word waar een gesamentlike mededader die eiser se eis bevredig het nie.[99] In die VSA is hierdie reël tot ongeveer 1970 baie algemeen op enige konkurrente dader toegepas hetsy hy 'n gesamentlike of afsonderlike mededader is; sedertdien is wetgewing in die meeste state aanvaar om 'n bydrae op 'n manier toe te laat.[100]

3 1 4 Bewysregtelike posisie

Wanneer eenmaal bewys is dat meerdere mense nalatig opgetree het ten opsigte van 'n nadelige gevolg, moet ook nog bewys word wie van hulle, indien nie almal nie, dit veroorsaak het. Die identiteit van die verweerder moet dus ook nog bewys word aangesien dit nie genoeg is dat bewys word dat A óf B die nadeel veroorsaak het nie – as dit al is wat bewys is, faal die aksie teen albei tensy hulle gesamentlike mededaders was deurdat hulle by 'n *common design* betrokke was, of die een om welke rede dan ook (soos middellike aanspreeklikheid) vir die nalatigheid van die ander aanspreeklik is.[101] Uit simpatie teenoor eisers is hierdie reël in twee opsigte bewysregtelik verslap: (i) in geval van verkeersbotsings naby die middelstreep word aanvaar dat albei partye daaraan skuld gehad het behalwe as die teendeel bewys word; (ii) waar twee of meer daders opsetlik of nalatig gehandel het en nadeel aan die eiser veroorsaak het, maar daar net getuienis is dat die nadeel deur een van hulle veroorsaak is, rus die bewyslas in effek op elkeen om hulle te verontskuldig.[102] Die feit dat die nadeel, omdat sekere getuienis ontbreek, daarom op diegene val wat reeds bewese delikplegers is, is aanvaarbaar.[103] Die enigste geval waar die streng reël dus nog geld en die eiser dus moet bewys dat die aangesprokene die nadeel veroorsaak het, is waar een van twee daders die nadeel veroorsaak het en een van hulle heeltemal of gedeeltelik blaamloos was, maar dit onbekend is watter een of hoe ver.[104]

Dan is dit natuurlik ook so dat die eiser meerdere persone as verweerders kan voeg waar hy onseker is wie van hulle eintlik aanspreeklik is – ook dit kan die eiser aansienlik help.

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96 *Street on torts* 579.

97 *Ibid.*

98 186. Ingevolge a 1(1) van die Civil Liability (Contribution) Act, 1978 is 'n bydrae ook in die Engelse reg verhaalbaar van enigiemand wat, hetsy gesamentlik of nie, en ongeag of dit op onregmatige daad of enige ander grond berus, vir dieselfde nadeel aanspreeklik is as waarvoor die eiser aanspreeklik gehou is.

99 Prosser 336.

100 *Idem* 337–341.

101 Fleming 200–201.

102 'n Soortgelyke reëling kom tov alternatiewe veroorsaking voor in a 99 *Nieuw BW* (Nederlandse Wetgeving (Oktober 1993; Supplement 95).

103 Fleming 201.

104 *Idem* 202.

3 2 Duitsland

3 2 1 §830 Bürgerliches Gesetzbuch

Wat Duitsland betref, lui §830 *BGB* só:

> "Haben mehrere durch eine gemeinschaftlich begangene unerlaubte Handlung einen Schaden verursacht, so ist jeder für den Schaden verantwortlich. Das gleiche gilt, wenn sich nicht vermitteln läßt, wer von den mehreren Beteiligten den Schaden durch seine Handlung verursacht hat.
>
> Anstifter und Gehilfen stehen Mittätern gleich."

Die grondslag van hierdie reël is dat in gevalle waar meer as een persoon weens sy onregmatige gedraging (doen of versuim) aan die veroorsaking van nadeel *beteiligt* was, elke *Beteiligte* vir die hele nadeel aanspreeklik is afgesien van die mate waarin die nadeel deur sy handeling veroorsaak of medeveroorsaak is. Persone wat hulp verleen by of ander aanstig tot die pleeg van onregmatige dade word net soos gesamentlike daders behandel.

3 2 2 Verskillende vorme van Beteiligung *is moontlik*

Drie vorme van *Beteiligung* is hier ter sprake, naamlik:

(i) Waar twee of meer persone doelbewus saamgewerk het ("in bewußtem und gewolltem Zusammenwirken"[105] [106]) en gemeenskaplik die onregmatige daad gepleeg het waaruit die nadeel ontstaan het. Hulle posisie stem ooreen met wat hierbo in verband met gesamentlike daderskap gestel is.

Elke gesamentlike dader moet die opset hê om deur sy handeling die gevolg teweeg te bring sonder dat die aard of doelmatigheid van elkeen se individuele handeling van belang is. Ook psigiese medewerking, deur byvoorbeeld advies, aanmoediging of voorbereidingstappe is voldoende; geen afspraak is nodig nie en dit maak nie saak of die gesamentlike daders mekaar of die besonderhede van elkeen se handeling ken en of hulle almal toerekeningsvatbaar is nie. Omdat opset by elkeen vereis word, is sodanige gesamentlike daders nie aanspreeklik vir optrede van ander gesamentlike daders wat die grense van hulle opset oorskry nie.[107]

(ii) Waar iemand 'n ander tot die pleeg van 'n onregmatige daad aangestig of daarmee gehelp het. Hierdie tweede vorm word net soos die eerste hanteer. Dit kan voorkom waar dit gaan oor skuld-, skuldlose of risiko-aanspreeklikheid[108] terwyl daar ook voorstelle is dat dit op kontrakbreuk toegepas moet word.[109]

(iii) Waar meerdere persone elkeen deur hul selfstandige, skuldige en onregmatige handelinge tot die skade-intrede bygedra het sonder dat hulle bewustelik saamgewerk het en sonder dat bepaal kan word wie se handeling die nadeel werklik veroorsaak het of wat elkeen se bydrae tot die intrede daarvan was.

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105 Soos ingevolge §25 2 *StGB* in die strafreg tov mededaders vereis word.

106 *J von Staudinger's Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* 12e Aufl (Schäfer) Horn (red) (1986) (hierna Staudinger) §830 Rz 2 3.

107 *Idem* Rz 5 7.

108 *Idem* Rz 43 44.

109 *Idem* Rz 45.

Staudinger noem hierdie 'n geval waar die persone "in einem weiteren Sinn . . . 'beteiligt' waren".[110] Hulle posisie stem ooreen met wat hierbo in verband met mededaders gestel is. Veral hierdie vorm is vir hierdie bespreking van belang.[111]

Die derde vorm van konkurrente daderskap het dusver veral by verkeersongelukke tot die toepassing van §830 I 2 *BGB* gelei waar nie bewys kon word wie van die konkurrente daders uiteindelik vir die intrede van die nadeel verantwoordelik was nie. Die *bewysnood* van die eiser is vroeër deur die howe verlig deur te sê dat in sodanige gevalle *vermoed word* dat alle daders wat die nadeel moontlik kon veroorsaak het, dit inderdaad veroorsaak het en dus ten volle daarvoor aanspreeklik gehou kan word. Om aan aanspreeklikheid te ontkom, moes *die aangesprokene* bewys dat hy nie die nadeel of 'n deel daarvan veroorsaak het nie.[112] §830 I 2 *BGB* is sodoende wyd uitgelê, onder andere op grond van die argument dat dit in belang van die eiser is omdat een van die konkurrente daders moontlik insolvent kan wees.[113] Hierdie stand van die regspraak is oorwegend deur die skrywers goedgekeur hoewel daar ook kritiek was.[114] Die howe het toe 'n nuwe rigting ingeslaan. Die huidige posisie is dat §830 I 2 *BGB* nie gebruik mag word om die eiser weens sy bewysnood of behoefte aan 'n solvente verweerder tegemoet te kom nie.[115] Die gevolg is dat slegs gevalle van werklik alternatiewe veroorsaking[116] [117] onder §830 I 2 *BGB* tuisgebring mag word. Sodra dit bekend is wie die nadeel veroorsaak het, mag §830 I 2 *BGB* nie aangewend word nie.[118] 'n Mens kan dus sê dat die howe teruggekeer het na 'n strenge toepassing van die kousaliteitsvereiste alvorens iemand ingevolge §830 I 2 *BGB* solidêr aanspreeklik gehou sal kan word.

Om nou met 'n eis ingevolge §830 I 2 *BGB* te slaag, moet die eiser ten opsigte van elke *Beteiligte* (hetsy alternatief of kumulatief) bewys dat aan al die vereistes

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110 *Idem* Rz 1.

111 Wat eg vorm betref, gaan daar stemme op (waaronder veral Deutsch "Die dem Geschädigten nachteilige Adäquanz. Zur einschränkenden Auslegung des §830 I 2 BGB durch den BGH" 1981 *NJW* 2731 (hierna Deutsch) wat ook nalatige persone as mededaders ingevolge §830 I 1 *BGB* wil behandel, in plaas daarvan om hulle as *Nebentäter* (afsonderlike konkurrente daders) aan te merk. *Nebentäter* word vir die hele nadeel aanspreeklik gehou, ook waar hulle dade in tyd en ruimte nou aan mekaar verbonde was, indien hulle dieselfde nadeel veroorsaak het; andersins net vir die nadeel wat elkeen veroorsaak het (BGH *NJW* 88, 1719). Probleme wat oorbly, wil diegene wat só redeneer dan langs die omweg van alternatiewe kousaliteit probeer oplos. Die heersende mening vereis egter steeds opset vir mededaderskap ingevolge §830 I 1 *BGB*.

112 Staudinger §830 Rz 23 24. Die ommeswaai van die bewyslas word dus as tegniek gebruik om die eiser se bewysnood te verlig.

113 Hierdie is klaarblyklik 'n beleidsoorweging wat daarop berus dat dit belangriker sou wees dat aan die eiser 'n solvente verweerder voorsien word as wat dit is dat 'n feitelike kousale verband bewys moet word tussen die aangesprokene se gedraging en die intrede van die nadeel.

114 Staudinger §830 Rz 25.

115 *Idem* Rz 27.

116 Waar bewys is dat die nadeel beslis deur een van die daders veroorsaak is, maar dit onbekend is watter een.

117 Bv Quendoz 3.

118 Sien ook Staudinger §830 Rz 27a.

vir aanspreeklikheid op grond van 'n skuldige onregmatige daad (afgesien van sy spesifieke kousale bydrae) voldoen is, en verder dat elkeen van die *Beteiligten* se optrede die intrede van die nadeel kon teweeggebring het.[119] Kan 'n aangesprokene bewys dat hy nie die nadeel veroorsaak het of kon veroorsaak het nie, kan hy nie ingevolge §830 I 2 *BGB* aangespreek word nie.

Die huidige posisie geld tussen alternatiewe daders slegs vir sover die dader se handeling juis saamval met die gebeure oor die veroorsaking waarvan daar twyfel bestaan: kom 'n derde as afsonderlike konkurrente dader[120] saam met die alternatiewe veroorsakers in die prentjie, kan §830 I 2 *BGB* dus wel toegepas word om hom aanspreeklik te stel.[121]

3 2 3 Kritiek teen die rigting van die Duitse howe

Die huidige trant van die regspraak word deels aanvaar en deels deur skrywers gekritiseer, veral weens die nadele wat dit vir die eiser inhou. Veral Deutsch[122] betoog dat die howe nie aan die oogmerk van §830 I 2 *BGB* uitvoering gee nie, naamlik dat dit beter is om iemand wie se kousale bydrae nie presies bewys kan word nie as mededader aanspreeklik te hou as om die eiser bedroë daarvan te laat afkom. Verder ontneem die howe se benadering die aangesproke mededader ook van 'n mede-aanspreeklike teen wie regres uitgeoefen kan word. Die swaartepunt van die besware is egter dat die howe met hulle beperkende benadering van die gees en letter van die bepaling in §830 I 2 *BGB* afwyk, en daarheen behoort terug te keer.[123] Tensy en totdat dit gebeur, bly §830 I 2 *BGB* se toepassingsveld beperk tot gevalle waar dit vasstaan dat die nadeel deur een van die alternatiewe mededaders adekwaat veroorsaak is,[124] maar dit net onseker is deur watter een.[125] Eers as van die huidige streng handhawing van die kousaliteitsvereiste afgesien word, sal verdere beslag gegee kan word aan die aanspreeklikstelling van *Beteiligten in einem weiteren Sinn* op grond van §830 I 2 *BGB*. Intussen moet verwag word dat gekunstelde argumente gebruik sal word om §830 I 2 *BGB* tóg toe te pas waar net die moontlikheid bestaan dat meerdere mense die nadeel veroorsaak het.[126]

'n Normatiewe oorweging is (weliswaar steeds binne die huidige strenge posisie) in ag geneem in 'n geval waar dit vasgestaan het dat die nadeel deur enige een van die mededaders veroorsaak kon gewees het, maar dit onbekend was hoeveel daarvan elkeen veroorsaak het. Daarin is gevra in hoeverre elkeen se handeling tot die verhoging van die gevaar van skade-intrede bygedra het.[127]

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119 *Idem* Rz 40.
120 Hetsy hy uit hoofde van onregmatige daad of kontrak aanspreeklik is.
121 Staudinger §830 Rz 28.
122 1981 *NJW* 2731.
123 Staudinger §830 Rz 29.
124 Die adekwasieleer maak 'n mate van normering moontlik deurdat gevra moet word of die gedraging volgens algemene ervaring die kans op die intrede van die nadeel genoegsaam verhoog het.
125 Staudinger §830 Rz 30.
126 Oor só 'n geval berig Staudinger §830 Rz 32 krities.
127 *BGHZ* 67 14 18; Staudinger §830 Rz 30; ook in BGH *NJW* 90, 2882 was 'n geval van kumulatiewe medeveroorsaking ter sprake sonder dat elkeen se bydrae bepaal kon word.

Daar is vereis dat die verskillende gedraginge volgens die alledaagse lewenservaring in die omstandighede samehangende gebeure moet uitmaak. Verder is vereis dat die gevaar wat deur die gedraginge geskep word gelyksoortig moet wees, maar nie in 'n tyd- en ruimtelike verband met mekaar hoef te staan nie.[128]

'n Vroeëre vereiste dat daar tussen die mededaders die een of ander subjektiewe, sielkundige band in die sin van 'n van-mekaar-weet en saam-met-mekaarhandel moet bestaan het, is reeds laat vaar.[129] Intussen verdedig byvoorbeeld Schäfer[130] die inkorting van die kring van *Beteiligten* weens die gestrenge huidige posisie op grond daarvan dat dit groter regsekerheid meebring as wat andersins die geval sou wees. Dit lyk dus of die bekende spanningsverhouding tussen regsekerheid en individuele geregtigheid hom ook hier laat geld.

4 VOORLOPIGE GEVOLGTREKKING

Uit die voorgaande is dit duidelik dat daar nie in die onderhawige gevalle op die gewone maniere na daderskap of kousaliteit gevra moet word nie. Die probleem kan eenvoudig nie so opgelos word nie. Tegelykertyd moet ook nie sonder meer gesê word dat dit gevolglik gevalle is wat nie vir die deliktereg relevant is nie. Die deliktereg moet en kan ook op sodanige gevalle reageer met gepaste regsmiddele (wat in konteks gesien moet word van wat deur ander regs- en ander vakdissiplines gedoen kan word) om die geskonde ewewig in die regswerklikheid te help herstel. Slegs langs daardie geïntegreerde weg kan gehoop word om 'n antwoord te begin bied op die hantering van die nadeel wat in die loop van groepsoptrede in ons land aan die orde van die dag is, sonder om in die proses gewone landsburgers se fundamentele reg om te demonstreer geweld aan te doen. Wat egter nodig is alvorens dit bereik kan word, is dat opnuut gedink sal moet word oor iets soos die hantering van daderskap en kousaliteit. In die verdere bespreking sal oorweeg word watter rigting hieroor aangedui word deur die ontwikkeling wat veral in Nederland plaasgevind het.

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128 *BGH* 55 86. Hierdie geval herinner 'n mens aan die norm wat ingevolge a 166 *NBW* aangewend word.

129 Staudinger §830 Rz 38.

130 In Staudinger §830 Rz 36 37.

AANTEKENINGE

HORIZONTAL EQUITY AS A CONSTITUTIONAL NORM IN INCOME TAX LAW: AN ANALYSIS WITH SPECIFIC REFERENCE TO SECTION 23(b) OF THE INCOME TAX ACT

1 Introduction

Ample proof of the impact of the Constitution of the Republic of South Africa Act 200 of 1993 (the Constitution) on the Income Tax Act 58 of 1962 (the act) is to be found in the Income Tax Act 21 of 1995 (the 1995 act – *GG* 16542 of 1995-07-19). Various provisions of the 1995 act (eg s 2(b), 5(b), 6, 7(1)(a), (c) and (d), 10(1)(e) and (f), 11(1)(a), 12(1)(b) and (c), 22, 26, 27, 34 to 36, 42 and 44(c)) are aimed at the elimination of provisions in the act that are based on gender or marital status discrimination. These amendments implement some of the recommendations in this regard in the *Interim report of the commission of inquiry into certain aspects of the tax structure of South Africa* (1994 – the *Katz report*, 73 par 6 3 19 and 6 3 20). In analysing the implications of the Constitution for the tax system, the Katz commission considered a number of specific rights set out in chapter 3 of the Constitution, namely those rights relating to equality and unfair discrimination (s 8), personal privacy (s 13), freedom of conscience and religion (s 14), access to courts of law (s 22), access to information (s 23), administrative justice (s 24), the right of an accused to be presumed innocent and not to testify during trial (s 25(3)(c)), and the right to acquire and hold rights in property (s 28).

The provisions of the 1995 act aimed at the elimination of discrimination based on gender or marital status will result in an estimated revenue loss of R2 billion (*Budget speech* of 1995-03-15, 14). This illustrates the potential impact on government revenue of amendments aimed at implementing constitutional requirements. This aspect is of particular importance in the case of income tax, as this tax remains the most important contributor to total tax revenue, its expected contribution being 52,6 per cent of total tax revenue during the current financial year. The single most important revenue source is personal income tax, which should contribute approximately 38,7 per cent of total tax revenue during the current financial year (Department of Finance *Budget review* of 1995-03-15 5 10 – 5 11 par 5 5). The suggestions by the Financial and Fiscal Commission regarding the use of a surcharge on the national personal income tax as a provincial source of income (*Draft framework document for intergovernmental fiscal relations in South Africa* 1995-07-19 20 par 5 2 7) may result in income

tax making an even bigger contribution towards the financing of the provision of public goods and services. It is therefore imperative to consider the possible effect of the Constitution on the current system of income tax, not only in view of the impact on taxpayers of provisions not complying with the Constitution, but also in view of the potential impact of any remedial action on government revenue. A proper consideration of potential problems and pre-emptive measures in this regard may succeed in avoiding the dislocation which may result from an adverse finding by the constitutional court regarding the validity of a specific income tax provision.

The constitutional principles relating to equality and unfair discrimination are of particular importance to income tax. The Katz commission's analysis of the relevant principles is limited in the sense that it deals only with tax provisions discriminating on the basis of gender, sex and age. Taxes can, however, be used as a policy instrument, for example, for redistributing income or wealth or for encouraging or discouraging specific activities by means of tax incentives or disincentives. A tax such as income tax can therefore differentiate between taxpayers on grounds other than the listed ones of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language (s 8(2) of the Constitution).

The fundamental question that arises in this regard is whether income tax measures differentiating between taxpayers on grounds other than the listed ones, for example those differentiating between trades or between employees and directors or between various types of transaction, are subject to any constitutional limitations or safeguards. Any enquiry in this regard must therefore deal with the principles regarding equality and unfair discrimination (s 8 of the Constitution) as well as with the principles regarding the justified limitation of fundamental rights (s 33 of the Constitution). The second part of the enquiry is likely to be the crucial one as regards tax law, namely whether a tax principle discriminating or differentiating between taxpayers for administrative or other reasons constitutes a justified limitation of fundamental rights in terms of section 33 of the Constitution. The problems involved in finding an answer to these questions will be illustrated by the consideration of a specific income tax provision of a discriminatory nature not considered by the Katz commission. Any enquiry of this nature must, however, be preceded by an enquiry into the principles underlying the interpretation of the fundamental rights contained in chapter 3 of the Constitution.

2 The interpretation of the fundamental rights

2 1 The transitional nature of the present dispensation

The Constitution is a transitional measure (see the preamble to the Constitution) which is to serve as a

> "historic bridge between the past of a deeply divided society . . . and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex" (the first part of the postscript or epilogue to the Constitution).

It binds all legislative, executive and judicial organs at all levels of government (s 4(2) of the Constitution) and establishes a new order in terms of which it constitutes the supreme law of the Republic. Any law or act inconsistent with its provisions is of no force or effect to the extent of the inconsistency, unless otherwise provided expressly or by necessary implication in the Constitution (s 4(1)). The fundamental rights set out in chapter 3 of the Constitution bind all legislative and executive organs at all levels of government (s 7(1)) and apply to all law in force and all administrative decisions taken and acts performed during the period of operation of the Constitution (s 7(2)). The provisions regarding the fundamental rights are therefore also transitional. The Constitutional Assembly is, however, bound by the constitutional principles set out in schedule 4 to the Constitution in drawing up the final Constitution (preamble and s 71(1), 73(12) and 74(1) read with schedule 4 to the Constitution). The basic point of departure as far as the protection of fundamental rights in the final Constitution is concerned, is that everyone

> "shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions . . . which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution" (constitutional principle II).

Provision must furthermore be made for a democratic system of government committed to achieving equality between men and women and people of all races, the prohibition of racial, gender and all other forms of discrimination and the promotion of racial and gender equality and national unity, the equality of all before the law and an equitable legal process, and for freedom of information so that there can be open and accountable administration at all levels of government (constitutional principles I, III, V and IX resp). The final Constitution is to be the supreme law of the land binding on all organs of state at all levels of government (constitutional principle IV). The final Constitution and all fundamental rights are to be safeguarded and enforced by an appropriately qualified, independent and impartial judiciary (constitutional principle VII). It is therefore likely, in the light of these binding principles, that the Constitutional Assembly will adopt many of the provisions regarding fundamental rights contained in the interim Constitution. An analysis of the present position, especially as far as equality and unfair discrimination are concerned, will therefore not necessarily be rendered obsolete by the advent of the final Constitution.

2 2 Guidelines embodied in the Constitution

The Constitution contains some guidelines to the interpretation of the fundamental rights contained in chapter 3. A court must, in the first place, promote the values which underlie an open and democratic society based on freedom and equality. Where applicable, courts must have regard to public international law applicable to the protection of the rights entrenched in chapter 3 and may have regard to comparable foreign case law (s 35(1)). A court must, furthermore, in the interpretation of any law, have due regard to the spirit, purport and objects of chapter 3 (s 35(3)). The provisions of the schedules to the Constitution, as well as the provision in the postscript or epilogue, form part of the substance of the

Constitution for purposes of interpreting the Constitution and do not have a lesser status than any other provision (s 232(4)). A law, the wording of which *prima facie* exceeds the limits imposed by chapter 3, but which is reasonably capable of a more restricted interpretation which does not exceed such limits, shall not be constitutionally invalid solely for that reason, but must be construed in accordance with the more restricted interpretation (s 35(2)).

2 3 A multiplicity of views

Various commentators have expressed their views on the interpretation of the fundamental rights in chapter 3, including the limitation clause in section 33, or on the general approach to the interpretation of constitutions containing binding charters of fundamental rights (eg Davis, Chaskalson and De Waal "Democracy and constitutionalism: the role of constitutional interpretation" and Erasmus "Limitation and suspension" in Van Wyk *et al* (eds) *Rights and constitutionalism* (1994) 1–130 and 629–663 resp; Davis "Democracy – its influence upon the process of constitutional interpretation" 1994 *SAJHR* 103–121; De Ville "Interpretation of the general limitation clause in the chapter on fundamental rights" 1994 *SAPL* 287–312; Cachalia *et al Fundamental rights in the new Constitution* (1994); Kruger "Positivism: the old warhorse lives on" 1992 *SAPL* 312–320; Kruger and Currin *Interpreting a bill of rights* (1994); Marcus "Interpreting the chapter on fundamental rights" 1994 *SAJHR* 92–102; Rautenbach *General provisions of the South African bill of rights* (1995) 17–34; Albertyn and Kentridge "Introducing the right to equality in the interim Constitution" 1994 *SAJHR* 149–178; Woolman "Riding the push-me pull-you: constructing a test that remedies the conflicting interests which animate the limitation clause" 1994 *SAJHR* 60–91). Various views have also been expressed in this regard in a number of cases (eg the *ANC* case 1994 1 BCLR 145 (Ck); *Botha's* case 1994 3 BCLR 93 (W); the *Bux* case 1994 4 BCLR 10 (N); *Cherry's* case 1995 5 BCLR 570 (SE); *De Klerk's* case 1994 6 BCLR 124 (T); *Khala's* case 1994 2 BCLR 89 (W); *Lombard's* case 1994 3 BCLR 126 (T); *Matiso's* case 1994 3 BCLR 80 (SE); *Majavu's* case 1994 2 BCLR 56 (Ck); *Mandela's* case 1994 4 BCLR 1 (W); *Nortje's* case 1995 2 BCLR 236 (C); *Phato's* case 1994 5 BCLR 99 (E); *Ntenteni's* case 1993 4 SA 546 (C); the *Sunday Times* case 1995 2 BCLR 182 (T); *Qozoleni's* case 1994 1 BCLR 75 (E) (also reported as *Qozeleni* 1994 3 SA 625 (E)); *Shabalala's* case 1994 6 BCLR 85 (T)).

The various views elicited the following response in the *Park-Ross* case 1995 2 BCLR 198 (C) 207I–208B):

> "Since the Constitution became the supreme law of the land . . . a number of academic writers – and also some of our Judges – have sought to express their views on what the correct way is to approach an interpretation of its provisions. Some have commented expansively – and even emotively – on what the values and principles are that the Constitution has sought to introduce for the people of the country, often with an extravagance of expression. Others, while more guarded in their language, have nevertheless succumbed to the temptation to resort to phraseology which helps little in the interpretation process. Labels such as 'liberal', 'broad', 'generous' and 'purposive' are freely attached to it. Some have drawn deeply from the bounteous fountain of foreign case law in countries which have fundamental rights enshrined in their Constitutions."

Little purpose would be served by traversing all the ground covered by the literature and case law dealing with the interpretation of the fundamental rights and the limitation clause in the Constitution. This enquiry is aimed mainly at identifying a general principle which can be used as a guideline for determining whether an income tax provision differentiating between taxpayers on grounds other than those listed in section 8 of the Constitution infringes the Constitution. With this aim in mind, I will therefore outline the main views regarding the interpretation of the Constitution. I will focus mainly on the guidelines enunciated by our courts, and especially those to be found in the recent judgments of the constitutional court in *Zuma's* case 1995 4 BCLR 401 (CC), *Makwanyane's* case 1995 6 BCLR 665 (CC) and *Mhlungu's* case 1995 7 BCLR 793 (CC).

2 4 The sui generis *approach*

The view is often expressed that a constitution is *sui generis* in that it provides a set of societal values to which other law must conform and with which government must comply, with the result that many of the traditional rules of interpreting statutes are rendered inappropriate when interpreting a constitution (eg *Botha's* case *supra* 121E–G; *Lombard's* case *supra* 130G–I; *Khala's* case *supra* 92C; *Mandela's* case *supra* 6I–7A; *Nortje's* case *supra* 247D–H; *Park-Ross supra* 208F–G). A bill of rights calls for a generous, purposive, liberal construction which avoids the "austerity of tabulated legalism" and aims at giving to individuals the full measure of the fundamental rights and freedoms referred to (eg *Khala's* case *supra* 92C–93G; the *ANC* case *supra* 158D–160F; the *Bux* case *supra* 14G–J; *Matinkinca's* case 1994 1 BCLR 17 (Ck) 25B–J; *Majavu's* case *supra* 74A–75D; *Ntenteni's* case *supra* 549G–556A; the *Sunday Times* case *supra* 185H–186F; *Zantsi's* case 1994 6 BCLR 136 (Ck) 155G–156A). The views of Lord Wilberforce (*Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 328H) and Lord Diplock (*AG of the Gambia v Momodou Jobe* [1984] AC 698 700) are often cited in this regard.

2 5 Cautionary views on the purposive approach

Reference is sometimes made to the cautionary words of Lord Wilberforce (*Fisher's* case *supra* 329E–F) that a constitution is a legal instrument and that respect must be paid to the language used and to the traditions and usages which have given meaning to that language (eg *Khala's* case *supra* 93G–I; *Park-Ross supra* 209F–H). A court cannot go overboard and ignore the language in which a concept is couched (*Nassar's* case 1994 5 BCLR 60 (Nm) 70C–E) and must guard against using the Constitution "like a ventriloquist's dummy, making it utter what you want to hear" (*De Klerk's* case *supra* 128F–G). It may serve little purpose to characterise the proper approach to constitutional interpretation as liberal, generous, purposive or the like, as these labels do not in themselves assist in the interpretation process and carry the danger of introducing concepts or notions which may not find expression in the Constitution itself (*Qozoleni's* case *supra* 80D–E). It has also been pointed out that a purposive approach to interpretation need not be a liberal or generous approach – it could indeed be restrictive, depending on the purpose of the section to be interpreted. Generosity is helpful but must be subordinate to purpose (*Nortje's* case *supra* 248B–E; *Phato's* case

supra 108E 109B–C; *Shabalala's* case *supra* 100D–H; see also Hogg *Constitutional law of Canada* (1992) 814–5 par 33 7(c) as cited in these cases).

2 6 The traditional approach

The view is expressed in *Saib's* case 1994 2 BCLR 48 (D) 51C–52F 53H–J that the rules for the interpretation of the Constitution do not differ materially from the ordinary rules of interpretation.

2 7 The general trend

Most of the judgments seem to have adopted a purposive approach to the interpretation of the Constitution (eg *Cherry's* case *supra* 582D–I; *De Klerk's* case *supra* 128G–H; *Matiso's* case *supra* 87F–88A; *Park-Ross supra* 214G–H; *Qozoleni's* case *supra* 80E–81H). The purpose of a right cannot be determined in isolation – the Constitution as a whole should be considered when determining the aim of chapter 3 and its constituent provisions individually and the problems and aspirations it sought to address (eg *Majavu's* case *supra* 75E; *Phato's* case *supra* 112E–G; *Gardener's* case 1994 5 BCLR 19 (E) 31C–E). What has to be determined are the values and norms our society cherishes and intends to uphold. Regard must be had to the underlying spirit of the Constitution (*Kalla's* case 1994 4 BCLR 79 (T) 87C–D). The Constitution must be interpreted against the backdrop of our history in the human rights field. A value judgment must be made in the final instance. The court must be guided by values and principles essential to a free and democratic society (*Majavu's* case *supra* 85 E) but must avoid the trap of giving a constitutional right too wide a content, lest artificial contrivances become necessary to avoid the consequence of attaching constitutional protection to conduct which is quite unworthy of it (*Jeeva's* case 1995 2 SA 433 (SE) 454G–I).

2 8 The approach of the constitutional court

2 8 1 *Zuma's* case

The constitutional court appears to have given its approval in *Zuma's* case to an approach which is generous and purposive. In the course of the judgment (411C–E) Kentridge AJ referred with approval to a passage in the Canadian *Big M Drug Mart* case (which was also referred to in *Khala's* case *supra* 93B–D and *Qozoleni's* case *supra* 81C–E) describing a purposive approach. The meaning of a fundamental right or freedom is to be ascertained by an analysis of the purpose of such a guarantee, which is to be sought by reference to the character and larger objects of the charter itself, to the language articulating the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text. Kentridge AJ emphasised that constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them. Due regard must, however, be paid to the language used. Kentridge AJ continued (412F–I):

> "While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning.

> Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.
>
> We must heed Lord Wilberforce's reminder that even a Constitution is a legal instrument, the language of which must be respected. If the language used . . . is ignored in favour of a general resort to 'values' the result is not interpretation but divination. If I may again quote S v Moagi . . . I would say that a Constitution 'embodying fundamental rights, should *as far as its language permits* be given a broad construction' (my emphasis)."

2 8 2 *Makwanyane's* case

The constitutional court followed the same purposive approach in *Makwanyane's* case *supra* 676D–H. Chaskalson P stated that a Constitution is no ordinary statute (678E–F). A provision in the Constitution dealing with a fundamental right cannot be construed in isolation, but should be construed in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of chapter 3 of which it forms part. It had to be construed in a way which secured for individuals the full measure of its protection (676H–677A). The transition to democracy and the creation of development opportunities for all were primary goals of the Constitution (714B).

2 8 3 *Mhlungu's* case

The judgment of the constitutional court in *Mhlungu's* case *supra* is noteworthy in view of the sharp differences of opinion between its members regarding the application of the purposive approach. In a minority judgment Kentridge AJ accepted, as in *Zuma's* case, the appropriateness of a purposive construction of the Constitution (823B–C). He expressed the view, however, that there were limits to the principle that a Constitution should be construed generously and that those limits were to be found in the language of the Constitution *itself* (828D–F). The values which underlie a democratic society based on freedom and equality would not, in his view, be promoted in the long run by doing violence to the language of the Constitution in order to remedy what may seem to be hard cases (831C–G).

Mahomed J who delivered the main majority judgment, stressed the fact that a Constitution was *sui generis* and called for a broad, liberal and purposive approach to its interpretation to give effect to its spirit and tenor (799F–800G).

Sachs J also followed, in essence, a purposive approach (841E–G) while acknowledging that a purposive and mischief-orientated reading always involved a degree of strain on the language (843H). Effect had to be given to the Constitution's spirit. In the words of Sachs J:

> "To treat it with the dispassionate attention one might give to a tax law would be to violate its spirit as set out in unmistakably plain language" (840C–D).

Sachs J expressed the view, however, that the court should not rush to lay down sweeping and inflexible rules governing its mode of analysis (844D–E). The question of interpretation was, in his view, one to which there could never be an absolute and definitive answer (844G–H).

Kriegler J accepted that chapters 2 and 3 of the Constitution called for a purposive and generous approach, but considered such an approach to be inapplicable in the case of a provision with a narrow, technical and brief purpose and scope such as section 241(8) (835E–G; the same distinction was made in *Kalla's* case *supra* 87C–D G–I).

2 9 The value of comparative jurisprudence

Reference must, finally, also be made to the approach of the constitutional court to the role of comparative law. Chaskalson P acknowledged, in *Makwanyane's* case *supra* 687B–D, the importance of comparative "bill of rights" jurisprudence particularly in the early stages of the transition when there was no indigenous jurisprudence in this branch of the law on which to draw. It was important to appreciate, however, that this would not necessarily offer a safe guide to the interpretation of chapter 3. Chaskalson P continued (687F–688B):

> "In dealing with comparative law, we must bear in mind that we are required to construe the ... Constitution, and not an international instrument or the Constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it."

(The same cautionary note regarding the use of foreign case law is also to be found in *Botha's* case *supra* 110F–H; *Nortje's* case *supra* 240I–241G; *Park-Ross supra* 208D–J; *Qozoleni's* case *supra* 80C–D; *Phato's* case *supra* 111D–F; *Shabalala's* case *supra* 117E–H.)

2 10 Some conclusions

The purposive approach requires that the meaning of a fundamental right be ascertained by reference *inter alia* to the character and larger objects of the Constitution itself, as stated above. The functions of the Constitution and of the court would, I submit, therefore be legitimate considerations when interpreting a fundamental right enunciated in the Constitution. The Constitution is, as seen above, to serve as a

> "bridge between the past of a deeply divided society ... and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex" (the postscript to the Constitution).

The reasons for adopting the Constitution or, as stated in *Mhlungu's* case *supra* 840D–E, its fundamental purposes include the need to create a new order for a sovereign and democratic state and to promote national unity (the preamble to the Constitution). Mureinik ("A bridge to where? Introducing the interim bill of rights" 1994 *SAJHR* 32) describes the Constitution as a bridge to a culture of justification where every exercise of power is expected to be justified, a new order where the community is built on persuasion, not coercion. This is to be achieved in a sovereign state (s 1(1)), a goal also envisaged for the final Constitution (constitutional principle I). A court must promote the values which underlie an open and democratic society based on freedom and quality (s 35(1)) and must, in the interpretation of any law, have due regard to the spirit, purport and objects of chapter 3 (s 35(3)). The various fundamental rights are therefore, it

would seem, to be protected not only because of their intrinsic value, but because they are to serve a wider goal, namely the promotion of national unity, reconciliation and peaceful co-existence and the preservation of a unitary, democratic constitutional state. This ultimate goal must also be kept in mind when interpreting the Constitution. The rights of the various interest groups and individuals should therefore be balanced, advanced and protected in terms of the Constitution in such a manner that the interest groups remain committed to the Constitution despite the existence of conflict over aspects of the socio-economic or legal order. The Constitution and the court interpreting the Constitution must therefore contribute towards the resolution of conflict in society (see the views of Ebsen as described by Davis, Chaskalson and De Waal *Rights and constitutionalism* 117–120). Public confidence in the fair, uniform and consistent protection of rights and interests must be maintained and uncertainty in this regard avoided, if possible.

Implicit support for the viewpoint above is, it is submitted, to be found in *Makwanyane's* case *supra*. The very reason for establishing the new legal order and for vesting the power of judicial review of all legislation in the courts, was, in the words of Chaskalson P,

> "to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected" (703H–J).

Mokgoro J stated in her judgment that one of the functions of the constitutional court is "to ensure that vulnerable minorities are not deprived of their constitutional rights" (770H–I). O'Regan J also acknowledged that the entrenchment of a bill of rights is designed, in part, to protect those who are the marginalised, the dispossessed and the outcasts of our society (778G–H). Sachs J also emphasised the balance which must be achieved to ensure the fair and proper treatment of minorities and avoid any abuse of a dominant position (786C–D). The ultimate goal of preserving the democratic, constitutional state by balancing the centrifugal forces within our society can be identified most clearly in Ackermann J's description of the constitutional state compact (731B–D):

> "[I]n a Constitutional state individuals agree . . . to abandon their right to self-help in the protection of their rights only because the State . . . assumes the obligation to protect these rights. If the State fails to discharge this duty adequately, there is a danger that individuals might feel justified in using self-help to protect their rights."

The Constitution strives for a democratically governed society characterised *inter alia* by public confidence in the administration of public affairs generally. Demonstrable fairness and openness promotes public confidence in the administration of public affairs and in the judicial process (eg *Phato's* case *supra* 113E–G; *Jeeva's* case *supra* 441I–442B).

It is generally acknowledged that constitutional adjudication calls for value judgments in which extra-legal considerations may loom large (eg *Makwanyane's* case *supra* 747G–H). It is clear from the Namibian judgment in *Kauesa*

1995 1 SA 51 (Nm) 92F–94B that the primary goal of holding society together may be one of these considerations when balancing conflicting rights.

It is clear, in the light of this primary goal, that minorities entitled to protection in terms of the Constitution should include not only the disadvantaged, dispossessed and marginalised, but should in principle include any group whose continued confidence in the administration of public affairs and in the judicial process and commitment to the Constitution is important in strengthening the social fabric and holding society together, such as members of a specific profession or persons carrying on a specific trade, persons holding a specific office, a specific category of employees, or even persons liable for the payment of a specific tax, for instance personal income tax, regardless of the racial or sexual composition of the group. Individual taxpayers liable for the payment of income tax comprise, for example, a minority of the population. The number of individual taxpayers on register in the 1984/85 year was about 2,7 million, or slightly more than a quarter of the economically active population. Personal income taxes nevertheless comprised about one-third of general government revenue. A major portion of income tax was, however, paid by a small number of individuals. Fewer than 500 000 individuals contributed 75 per cent of personal income tax during the 1986/87 tax year (Swart "The forces shaping tax reform" 1988 *MB* 66). The situation has not changed materially since then. It was noted above that personal income tax is expected to contribute nearly 40 per cent of government revenue during the current tax year, the bulk of which will be contributed by a small number of persons. Figures for the 1992/93 tax year show, for example, that 461 000 of the individuals assessed up to the middle of 1994 contributed more than 75 per cent of personal income tax in respect of 1992/93 (see the answer to question 89 *Hansard* of 1994-08-25 col 323). The number of individuals contributing the bulk of the single most important revenue source constitutes a small minority of the total population. The important role played by this minority in financing the provision of public goods and services and the resulting importance of promoting the confidence of this group in the administration of public affairs is self-evident. Taxation, which has even been described as confiscation without compensation, is a sensitive issue where reactions regarding a perceived unfairness of the tax system can be very emotive:

> "[T]he just man always comes off worse than the unjust . . . [I]n their relations with the state, when there are taxes to be paid the unjust man will pay less on the same income, and when there's anything to be got he'll get a lot, the just man nothing."

These words were written more than two thousand years ago by Plato (*The republic* translated by Lee (1987) bk I 343d–e). The importance of establishing and maintaining a fair and equitable income tax system in order to prevent undue resentment and a backlash manifested in a form of self-help such as the non-payment or evasion of tax or the emigration of skilled persons, is clear. Maintaining and promoting the confidence of taxpayers in the fairness and integrity of the tax system is therefore a legitimate consideration when balancing conflicting rights in the new constitutional order where society is built on persuasion and the exercise of power must be justified.

The question which arises is whether a taxpayer who is adversely affected by a taxation provision differentiating between different transactions or taxpayers on grounds other than race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language, can rely on the constitutional provisions governing equality and unfair discrimination. The enquiry will follow the two-stage approach (eg *Qozoleni's* case *supra* 87C–F) also adopted by the constitutional court (*Zuma's* case *supra* 414C–E and *Makwanyane's* case *supra* 707D–708B), namely to determine whether tax differentiation on the unlisted grounds constitutes a violation of the entrenched rights regarding equality and unfair discrimination, and, if so, whether such discrimination is justified in terms of the limitation clause in section 33 of the Constitution.

3 The ambit of the entrenched rights regarding equality and unfair discrimination

3 1 Introduction

Section 8(1) provides as follows:

> "Every person shall have the right to equality before the law and to equal protection of the law."

Section 8(2) provides as follows regarding unfair discrimination:

> "No person shall be unfairly discriminated against, directly or indirectly and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language."

These provisions do not preclude measures for the adequate protection or advancement of those disadvantaged by unfair discrimination or claims for restitution by those dispossessed of rights in land before the commencement of the Constitution under a law which would have been discriminating under section 8(2) (s 8(3)).

Prima facie proof of discrimination on any of the grounds listed in section 8(2) gives rise to a rebuttable presumption of unfair discrimination (s 8(4)).

3 2 The "listed and analogous grounds" approach

The question arises whether discrimination or differentiation in a taxation provision on a ground other than those listed in section 8(2) can constitute unfair discrimination which is prohibited in terms of section 8(2). Cachalia *et al* (*op cit* 27) argue that the prohibition in section 8(2) is limited to the listed grounds and other grounds which are analogous to them. This approach was adopted in Canada in the *Andrews* case 1989 56 DLR (4th) 1 and *Turpin's* case 1989 1 SCR 1296 in respect of the somewhat similarly worded Canadian equality provision (s 15(1) of the Canadian Charter). It is of interest to note, however, that it was held in at least one Canadian case prior to the *Andrews* case that the equality provision included grounds such as discrimination on the basis of wealth or income (Verchere and Bernier "Rights and freedoms in tax matters" *Proceedings of the Thirty-Eighth Tax Conference* (1986) 39:16). The Canadian approach since the *Andrews* case not only limits claims based on equality rights to claims

on grounds analogous to the listed ones of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability, but also limits the availability of equality rights on such analogous grounds to those who are members of previously disadvantaged groups. Such discrimination can arise either through a direct provision or by means of the disproportionate impact of a provision on a disadvantaged group (see Gibson "The deferential Trojan horse: a decade of charter decisions" 1993 *Can Bar R* 436–437; Albertyn and Kentridge 1994 *SAJHR* 168; see also Davis, Chaskalson and De Waal *Rights and constitutionalism* 32–35). The Canadian approach implies that persons other than members of previously disadvantaged groups are not protected against discrimination on grounds analogous to the listed ones, and that nobody is protected against discrimination on any other grounds.

On what basis can a person who is disadvantaged by a form of discrimination not based on the listed or analogous grounds be excluded, in principle, from the protection of the Constitution? Cachalia *et al* offer no normative basis for such limitation of equality rights, for example where the discrimination complained of involves an arbitrary and irrational exercise of power (see Powell "Book review": *Fundamental rights in the new constitution* by Cachalia *et al* 1995 *SAJHR* 349–350). Is such an approach appropriate in the case of section 8(2) of the Constitution?

3 3 Arguments against the "listed and analogous grounds" approach

Should the protection of section 8(2) be limited to disadvantaged groups and to grounds analogous to the listed ones, the question will immediately arise whether section 8(2) limits section 8(1) in the same way. Albertyn and Kentridge (1994 *SAJHR* 156–157) point out that the structure of the South African equality clause differs from the Canadian one and contend that the better view would be that section 8(2) supplements rather than qualifies section 8(1). Any limitation of the non-discrimination clause to grounds analogous to the listed ones would also disregard the non-derogation clause in section 8(2) in terms of which the listed grounds of discrimination are not to limit the ambit of section 8(2). They (169 171) accordingly conclude that the protection of section 8(2) can be extended to distinctions which are neither listed nor analogous to the listed grounds. The judgment in the *AK Entertainment* case 1994 4 BCLR 31 (E) also provides some support for the view that section 8(2) is not limited to the classifications that are analogous to the listed ones. In rejecting the contention that section 8(1) and 8(2) do not apply to an artificial person such as a close corporation, Melunsky J said the following (38D–F):

> "It is true that section 8(2) provides a list of human characteristics but this does not mean . . . that section 8 includes only those classifications that are analogous to those that are enumerated. The 'enumerated or analogous grounds' approach, which was adopted in *Andrews* . . . may have greater significance where the question of discrimination relates to the content of the law. But it is difficult to appreciate why a corporation should not be entitled to enforce section 8 where an executive or administrative functionary blatantly treats it unequally from all other persons."

There are, in my view, also other arguments against limiting the ambit of section 8(2) to discrimination on grounds analogous to the listed ones and to members of a disadvantaged group as far as unlisted grounds of discrimination are concerned. Section 8(2) must, in accordance with the approach of the constitutional court, be interpreted within its context in chapter 3 and not in isolation. Its purpose is to be ascertained from its wording as well as from other provisions of chapter 3 with which it is associated and the fundamental concerns or spirit and tenor of the Constitution as a whole. The primary goal implicit in the Constitution of maintaining the cohesion of society and ensuring the survival of the constitutional enterprise must, as I submitted above, also be kept in mind.

The rights with which section 8(2) is associated and which may impact on an individual's economic rights or interests include the right of access to information (s 23), the right to administrative justice (s 24), the right freely to engage in economic activity (s 26(1)), labour relations rights (s 27), and the right to acquire, hold and dispose of property (s 28(1)). These provisions are widely worded (eg the provision regarding the right of every person to lawful and procedurally fair administrative action for which reasons have to be furnished and which must be justifiable in relation to those reasons (s 24)), and contain no indication that these rights are to be limited to members of a disadvantaged group or groups. The qualification in section 26(2) of the right to freely engage in economic activity (namely that s 26(1) shall not preclude measures to promote the protection or improvement of, for example, the quality of life, basic conditions of employment or equal opportunity for all) would seem to indicate the opposite; namely that all persons are in principle entitled to the right described in section 26(1), but that this right can be limited by measures to promote the improvement of, for example, the quality of life or equal opportunity for members of disadvantaged groups. The same holds true for the qualification in section 8(3) of the provisions of section 8(2) regarding unfair discrimination – the authorisation of measures for the adequate protection and advancement of persons or categories of persons or groups disadvantaged by unfair discrimination makes sense if persons not belonging to a disadvantaged group can also lay claim to the section 8(2) rights regarding unfair discrimination. Should section 8(2) apply only to members of disadvantaged groups as far as analogous grounds of discrimination are concerned, section 8(3) would authorise, in effect, only remedial measures differentiating or discriminating between different groups or categories of disadvantaged persons as far as those grounds of discrimination are concerned.

A restrictive interpretation of section 8(2) limiting it to members of disadvantaged groups would represent an exception to the general position regarding other fundamental rights referred to above. Other rights such as the right to freedom of movement (s 18), residence (s 19), access to the courts (s 22), freedom of expression (s 15), rights of detained, arrested and accused persons (s 25), the right to a healthy environment (s 29), language and culture rights (s 31) and education rights (s 32), are also clearly intended to be enjoyed by all persons, regardless of whether they are members of disadvantaged groups.

The fundamental question which remains is whether the limitation of section 8(2) to listed or analogous grounds of discrimination and to persons belonging to disadvantaged groups would accord with the fundamental concerns of the Constitution, with the spirit, purport and objects of chapter 3 (s 35(3)), with the objective of creating an order in which all citizens shall be able to enjoy and exercise their fundamental rights and freedoms in a sovereign and democratic constitutional state, and whether it would promote national unity (preamble) and reconciliation and provide a bridge to a future founded *inter alia* on the recognition of human rights and peaceful coexistence (s 232(4) and the postscript or epilogue). Closing the door of the courts, as far as section 8(2) is concerned, to claims based on forms of discrimination not listed or analogous to listed forms, as well as to persons not belonging to a disadvantaged or historically disadvantaged group, would not, in my view, accord with these fundamental concerns and would not be conducive to the success of the constitutional enterprise. Our history, the complexity of our society and its potentially fragile unity, the delicate balancing of conflicting interests and the need for ongoing compromises in this connection, the vital need to hold society together, and differences in the wording and context of the provisions regarding fundamental rights compared to those of Canada, all militate against following the approach of limiting section 8(2). (It is also interesting to note in this regard that Gibson (1993 *Can Bar R* 450) considers that the Canadian approach of denying to all but the disadvantaged Charter protection from forms of discrimination not expressly listed in s 15(1) seems capable of future modification.) Heher J's approach in *Vryenhoek's* case 1995 4 BCLR 437 (W) 441C–D would seem to accord with these concerns:

> "While the common weal will often require the overriding of the interest of an individual or group, the Courts should be astute to interpret the Constitution in such a way that no citizen can justly feel that he has been excluded from its benison."

Other factors must also be borne in mind. The relatively small number of individuals paying personal income tax and the importance of their contribution to total government revenue, was noted above. The tax burden on individuals in the middle income group has increased substantially (see the Katz report 87 par 7 2 1(d)). A greater reliance in the future on the recovery of user charges from persons who are able to pay for the use of public goods and services is likely to have the greatest impact on the minority paying personal income tax. Personal income tax is considered to be high compared to other middle income and even industrial countries (see the *Budget speech* of 1993-03-10). These factors, combined with the substantial redistribution of income effected by income tax, can easily generate taxpayer resentment and undermine confidence in the fairness of the system of income taxation. The fact that taxpayers paying income tax constitute a minority of the population, the importance of their contribution to government revenue, burgeoning demands for public goods and services, the objectives of the reconstruction and development program regarding the provision of public goods and services and the necessity of financing the provision thereof, all underline the crucial importance of maintaining or restoring the confidence of taxpayers in the fairness of the income tax system in a

constitutional order basically founded on persuasion and not coercion. The dangers posed for the survival of the constitutional enterprise by a tax revolt among payers of personal income tax who perceive the tax system to be unfair and discriminatory are self-evident.

3 4 Conclusions

The various considerations set out above lead to the conclusion that the protection afforded by section 8(2) is not limited to the listed or analogous grounds or to members of disadvantaged groups. From this follows my second conclusion, namely that the listed grounds of discrimination mainly fulfil the function of triggering the rebuttable presumption of unfairness in section 8(4).

The conclusion that discrimination on bases other than those listed can be attacked under section 8(2) even where such bases are not analogous to the listed ones, accords with the view of Albertyn and Kentridge (1994 *SAJHR* 170). They contend that the attack will find its target only if it will either counter pervasive disadvantage or strike down an exercise of arbitrary and irrational power.

3 5 Unfair discrimination in income tax

Unfair discrimination between taxpayers on grounds not based on race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language should therefore in principle be subject to attack under section 8(2). The question which remains is whether there is a general principle that can be applied as a norm for determining whether an income tax provision discriminates unfairly between taxpayers. This question necessarily involves a value judgment (Verchere and Bernier *Proceedings* 39:16). It is submitted that the tax precept of horizontal equity, namely that taxpayers in the same financial position pay the same amount of income tax, expresses the basic values of the Constitution regarding equality and fairness and reflects the spirit and tenor of chapter 3 and the fundamental concerns of the Constitution (see also the suggestion by Verchere and Bernier *ibid*). This would also be consistent with what Estey ("Basic problems in taxation" *Proceedings of the Forty-First Tax Conference* (1989) 2:3 2:6) considers to be the dominant purpose of a tax statute, namely to spread the cost of government evenly and fairly across the community. This precept gives expression to the equality principles underlying the doctrine of classification or differentiation quoted with apparent approval in *Matinkinca's* case *supra* 33B–D and *Zantsi's* case *supra* 170B–C. This doctrine forbids discrimination which is effected by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of persons similarly situated in relation to the privileges sought to be conferred or the liabilities to be imposed. The recognition of this norm as an implicit constitutional requirement and its adoption as a general principle of income tax law will also contribute towards instilling and maintaining the necessary confidence in taxpayers regarding the fairness of the income tax system. A failure to recognise this norm as an implicit constitutional requirement will result *inter alia* in the anomalous position of a taxpayer having the right to equality before the law and to equal protection of the law, as well as to lawful and procedurally fair administrative action which is justifiable in relation to the

reasons given, but not having the right to challenge the constitutional validity of an income tax provision which differentiates or discriminates between him and other taxpayers in the same financial position.

The application of horizontal equity as a constitutional requirement in respect of income tax law implies that general principles of income tax law (eg the general part of the definition of "gross income" in s 1 of the act and the general deduction formula in s 11(a) and 23(f) and (g)) should in principle be applied consistently to taxpayers to ensure, as far as possible, that taxpayers in the same financial position pay the same amount of income tax. Provisions which depart from general principles, for example, in order to encourage or discourage specific economic activities or for administrative reasons, are in principle subject to constitutional scrutiny. The taxpayer will, in the first stage of the judicial enquiry, bear the onus of establishing that a specific income tax provision limits or infringes his or her rights to horizontal equity by imposing a bigger tax burden on him or her than on other taxpayers in the same financial position. Once the taxpayer has established this, the onus would then be on the Commissioner for Inland Revenue to establish the justification for that limitation in terms of section 33(1) of the Constitution (eg see *Makwanyane's* case *supra* 708A–B; *Nortje's* case *supra* 248F–G; *Sefadi's* case 1994 2 BCLR 23 (D) 37C–D; *Jeeva's* case *supra* 453D–E). This is likely to be the crucial issue in most tax cases. We must therefore consider the provisions of section 33(1).

4 The application of the general limitation clause

4 1 Introduction

The rights entrenched in chapter 3 may, in terms of section 33(1), be limited by law of general application if such limitation is reasonable, justifiable in an open and democratic society based on freedom and equality, and if it does not negate the essential content of the right in question. With regard to certain rights, section 33(1) requires the limitation to be necessary as well as being reasonable. This additional requirement will be ignored in this enquiry, as it will be relevant in respect of tax provisions only in exceptional circumstances, for example, where the exemption from normal tax of political parties (s 10(1)(cE) of the act) is amended so as to exclude a specific political party or parties in such a manner that it infringes a right relating to free and fair political activity.

The provision that an entrenched right may be limited by law of general application is derived from German law (De Ville 1994 *SAPL* 290–291 298) as is the requirement that the limitation must not negate the essential content of the right in question (De Waal "A comparative analysis of the provisions of German origin in the Interim Bill of Rights" 1995 *SAJHR* 18–19; Woolman 1994 *SAJHR* 71). The origin of the requirement that the limitation must be reasonable and justifiable in an open and democratic society based upon freedom and equality is to be found in the Canadian Charter of Rights and Freedoms (Woolman 1994 *SAJHR* 63; Erasmus *Rights and constitutionalism* 646 par 2 7). Comparative law may therefore be of assistance regarding the content of these requirements, but should be treated with caution in view of the differences between our Constitution and Canadian or German law (eg see *Makwanyane's* case *supra* 711E–F;

see also Woolman 1994 *SAJHR* 68–71 regarding factors militating against adopting American doctrines in this regard).

4 2 Law of general application

This requirement is generally understood as bearing the meaning ascribed to it in German law (De Ville 1994 *SAJHR* 298–299). Limitations of fundamental rights must be embodied in legislation applying generally and not to an individual case. It must be formulated abstractly in such a way as to cover an unlimited number of concrete instances and an unlimited number of addressees (eg see *Majavu's* case *supra* 84I–J).The prescribed legal consequences must not come into effect only once. It will also not avail the legislature to use general language where such language conceals an intention to regulate an individual case or group of cases. Legislation providing for an individual case will, however, be valid if such case is the only one of its type and there are valid grounds for its regulation. Legislation may also be enacted with a view to a specific event and with a limited period of validity, provided that it applies to an indeterminate number of cases. The German requirement is taken to refer only to acts of Parliament and the various state legislatures. De Ville (1994 *SAJHR* 300) argues convincingly that section 33(1) aims at preventing all discrimination in the limitation of fundamental rights by law, regardless of whether it is an act of Parliament, common law or customary law rule or delegated legislation.

4 3 The essential content of a right

A limitation may not negate the essential content of a right. This requirement, which stems from German law, raises various difficult questions (see De Waal 1995 *SAJHR* 28–29; De Ville 1994 *SAPL* 308–310; Rautenbach *op cit* 100–105 par 3 3; Woolman 1994 *SAJHR* 71–74). De Waal (1995 *SAJHR* 25) expresses the view that an analysis of German jurisprudence does not cast sufficient light on the mysterious essence of a right and that the German courts have, as far as possible, avoided grappling with this requirement. De Waal (1995 *SAJHR* 27) and De Ville (1994 *SAPL* 309) both conclude that this requirement offers absolute protection as far as the determinable core of a fundamental right is concerned and that the absolute boundaries of this core may under no circumstances be negated (see also Rautenbach *op cit* 102). The question which remains is whether the absolute content of a right is guaranteed in a normative sense or in a subjective sense. If it is guaranteed in a normative sense, it will mean that the essential content of a fundamental right of an individual may be negated (eg by sentencing that person to life imprisonment) as long as that right still has a certain meaning for the majority of citizens. If a fundamental right is guaranteed in a subjective sense, the question will be whether the right still has a meaning for the individual concerned after its limitation. One possible criterion in this regard is whether adequate possibilities still remain for the individual to realise the constitutionally protected aspects of his or her personality (Rautenbach *op cit* 103). De Ville (1994 *SAPL* 310) submits that the question whether fundamental rights are guaranteed in a normative or a subjective sense, must be answered separately with regard to each fundamental right.

It is clear that this requirement has thus far proved to be of little significance in Germany (De Waal 1995 *SAJHR* 25; Rautenbach *op cit* 104). Our courts are also reluctant to grapple with this concept. *Khala's* case *supra* 97G–98B, *Majavu's* case *supra* 85F–G, *Phato's* case *supra* 130J–131A and *Qozoleni's* case *supra* 89F–G 90C–G throw very little light on the meaning of the essential content of a right. Some judgments ignore this aspect altogether (eg the *Park-Ross* case *supra* 214J–216E; *Zuma's* case *supra* 419F–H). *Nortje's* case *supra* 259G–260F, *Bhulwana's* case 1995 1 SA 509 (C) 511I–512G and *Nocuse's* case 1995 5 BCLR 607 (Tk) 613B–D would seem to provide some support for the view that fundamental rights are guaranteed in a subjective sense. Marais J expressed the view in *Nortje's* case that the test whether the essential content of a right has been negated may be quantitive, qualitative or both, depending on the nature of the right and its *raison d'être*. Sharp criticism regarding the inclusion of this requirement in section 33(1) is, however, expressed by Marais J (257H–258D).

The judgment of the constitutional court in *Makwanyane's* case *supra* supplies very few answers in this regard. After referring to the uncertainty in the literature concerning the meaning of this provision, Chaskalson P (718E–719F) merely stated that rights should not, under the guise of limitation, be taken away altogether. Kentridge AJ (742E–I) apparently adopted the normative approach, stating that a law which preserved fundamental rights for most people at most times would not negate the essential content of those rights. Ackermann J (730C–731A), Didcott J (733E–G), Kriegler J (748E–F), Mokgoro J (768B–E) and Sachs J (781E–F) considered it inadvisable to make a finding regarding the real meaning of this concept (see also Olivier 1995 *DR* 514).

The protection afforded by this provision is therefore unclear. I will ignore this aspect for purposes of this enquiry as the question of the validity of the limitation will usually be determined by the question whether it is reasonable and justifiable in an open and democratic society based on freedom and equality. This is, in effect, the crucial part of the enquiry under section 33(1).

4 4 Reasonable and justifiable in an open and democratic society based on freedom and equality

4 4 1 The Canadian approach

This requirement has been adopted from Canadian law. The test involved in its application was formulated in the Canadian *Oakes* case 26 DLR (4th) 200 227 and refined in the *Edwards Books* case 35 DLR (4th) 1 51. The *Oakes* test related mainly to the objective of the restriction or limitation, and to the means used to achieve that objective (eg Woolman 1994 *SAJHR* 64; Gibson 1993 *Can Bar R* 440–441). The objective must relate to concerns which are pressing and substantial in a free and democratic society and must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. The means chosen to achieve the objective must be reasonable and demonstrably justified. This involves a proportionality test with three components:

(a) The means must not be arbitrary, unfair or based on irrational considerations, but must be rationally connected to the objective.

(b) The means must impair the right or freedom in question as little as reasonably possible.

(c) There must be a proportionality between the effects of the measures and the objective, or, in other words, the costs and injuries imposed by the limitation must not be disproportionate to the alleged benefits. Gibson (*ibid*) states that the Canadian courts have tended to ignore this component, while Woolman (1994 *SAJHR* 65) concludes that the Canadian courts have been unable to formulate generally useful standards for this component of the analysis.

Evidence of the purpose and effect of a restriction may be required. It is also possible for the courts to take judicial notice of the social, political or economic circumstances underlying and allegedly justifying the restriction, if those matters are self-evident (Gibson 1993 *Can Bar R* 440–441). The *Oakes* court suggested that values such as social justice, equality, cultural diversity and a commitment to representative politics might be foundational for a free and democratic society and of sufficient importance to justify an infringement of fundamental rights. Gibson's conclusion regarding the *Oakes* test (1993 *Can Bar R* 440) bears repetition:

> "While Oakes is a convenient shade tree under which deserving measures can avoid being scorched by the Charter, the extent of its protection is not entirely certain."

4 4 2 The approach of our courts

Our courts generally tend towards a restrictive interpretation of the limitation clause in section 33(1) (eg *Matinkinca's* case *supra* 35B; *Majavu's* case *supra* 86G; *Phato's* case *supra* 130I–J; see also Erasmus *Rights and constitutionalism* 642 par 2 4; Woolman 1994 *SAJHR* 78). The Canadian *Oakes* approach has been adopted in a number of cases (eg *Park-Ross supra* 215B–216E 216I–J; *Khala supra* 105H–106F; *Majavu's* case *supra* 85E 86E–F; *Matinkinca's* case *supra* 33F–35A; *Smith's* case 1994 1 BCLR 63 (SE) 73B–I; the *Sunday Times* case *supra* 187B–D). It was acknowledged by the constitutional court in *Zuma's* case *supra* 419H–J that the criteria evolved by the Canadian courts may well be of assistance to our courts in cases where a delicate balancing of individual rights against social interests is required. Kentridge AJ continued:

> "But section 33(1) itself sets out the criteria which we are to apply, and I see no reason, in this case at least, to attempt to fit our analysis into the Canadian pattern."

This view was echoed by Chaskalson P in *Makwanyane's* case *supra* 711E–H. Chaskalson P (708C–G) set out his approach as follows:

> "The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality . . . The fact that different rights have different implications for . . . 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles . . . can only be done on a case by case basis. . . . [T]he requirement of proportionality . . . calls for the balancing of different interests . . . [T]he relevant considerations will include the nature of the right that is limited, . . . its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly

> where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to . . . the underlying values of the Constitution . . ."

The proportionality test and the value judgments underlying the balancing of conflicting interests were also emphasised in *Majavu's* case *supra* 85A–E, *Nortje's* case *supra* 248I–J and *Jeeva's* case *supra* 454I–455G 458H–I (see also Rautenbach *op cit* 107–109 par 3 2 5).

It was noted above that the *Oakes* court suggested that values such as equality and cultural diversity might be of sufficient importance for a free and democratic society to justify an infringement of fundamental rights. Other candidates suggested by Woolman (1994 *SAJHR* 64) include public order, crime prevention, health and the economic welfare of the country. Administrative convenience and the saving of costs should not, however, justify the overriding of constitutional guarantees (*idem* 86; see also Verchere and Bernier 1986 *Proceedings* 39:4–39:5). It seems clear, to quote Woolman (1994 *SAJHR* 82) that "there is just no avoiding the substantive value commitments . . . to determine who is entitled to the interim Constitution's protection". To use Gibson's words (1993 *Can Bar R* 435)

> "it necessitates an examination and priorization of competing social policy goals in order to determine the reasonableness of particular limits".

Cherry's case *supra* 584C–F 585B–E provides an illustration of the policy considerations involved in balancing conflicting interests, *in casu* regarding the system of granting liquor licences and the right to free economic activity.

The stage has at last been reached where I will attempt to illustrate the policy issues involved in balancing conflicting interests with respect to a specific income tax provision.

5 A taxing problem for home industries

5 1 The historical background

Expenditure or losses must *inter alia* be incurred in the production of income in order to be deductible under the general deduction formula of the act (s 11(a) and 23(f) and (g)). The predecessor of this requirement was enacted in substantially the same form for the first time in 1914 (s 14(1)(a) of the Income Tax Act 28 of 1914) and was re-enacted in 1917 (s 17(1)(a) of the Income Tax (Consolidation) Act 41 of 1917), 1925 (s 11(2)(a) of the Income Tax Act 40 of 1925), and 1941 (s 11(2)(a) of the Income Tax Act 31 of 1941). The important aspect of this requirement, for purposes of this enquiry, is the fact that expenses need not of necessity be attached to the trading operations in order to be incurred in the production of income. All expenses, in the words of Watermeyer AJP (the *Port Elizabeth Electric Tramway* case 1936 CPD 241 246),

> "attached to the performance of a business operation bona fide performed for the purpose of earning income are deductible whether such expenses are necessary for its performance or attached to it by chance or are bona fide incurred for the more efficient performance of such operation provided they are so closely connected with it that they may be regarded as part of the cost of performing it".

The other relevant requirement of the general deduction formula, for purposes of this enquiry, was the requirement, up to 1991, that an expense or loss had to be

incurred wholly or exclusively for purposes of trade, as section 23(g) prohibited the deduction of any monies not wholly or exclusively laid out or expended for this purpose. This requirement can also be traced back to 1914 (s 15(2)(a) of the 1914 act, re-enacted as s 21(2)(b) of the 1917 act; s 13(b) of the 1925 act; s 12(g) of the 1941 act). The requirement made no provision, on a strict interpretation, for any apportionment. No portion of an expense was in principle allowable as a deduction if this requirement was not met, for instance where the expense was incurred for a dual purpose, one of them being a non-trading purpose. Remarks to the contrary in ITC 800 (20 SATC 226 230–231), namely that apportionment was possible in such a case, did not accord with the formulation of this requirement. This is also clear from ITC 734 (18 SATC 202 203–204) ITC 847 (22 SATC 77 78–79) and ITC 1385 (46 SATC 111 116). This requirement was however not too strictly applied in practice for a considerable time (Silke "The general deduction formula of the Act" 1953 *The Taxpayer* 208; Hodes "Book review": *Income tax in the South African law* by Van Niekerk 1978 *SALJ* 443). Taxpayers were usually allowed to deduct a portion of the expense (Silke *Tax avoidance and tax reduction* (1958) 274 par 142; Meyerowitz "Practice outside the law" 1969 *The Taxpayer* 181–182).

The act contained a few exceptions to the general rule regarding non-apportionment. One of these was embodied in the prohibition contained in section 23(b) of the deduction of household or private expenses. This provision in effect allowed the deduction, up to 1991, of the rent or cost of repairs or expenses in respect of the part of any dwelling-house or domestic premises occupied for the purposes of trade. This exception providing for the apportionment of expenses in respect of a dwelling-house or domestic premises partly occupied for the purposes of trade, had also formed part of income tax law since 1914 (s 15(2)(b) of the 1914 act; s 21(2)(c) of the 1917 act; s 13(c) of the 1925 act; s 12(b) of the 1941 act). Two judgments delivered in 1986 and 1990, were, however, to be instrumental in bringing about drastic changes in this regard.

5 2 The policy turnabout

Van der Walt's case 1986 4 SA 303 (T) concerned the deductibility, from a university lecturer's income in the form of salary, of expenses incurred *inter alia* in respect of a study at home. Two findings of the court are relevant in this regard:

(a) The expenses in connection with the study were incurred in the production of the taxpayer's income in the form of salary even in the absence of a contractual obligation on the part of the taxpayer to keep a study at home. Section 11(a), as interpreted in the *Port Elizabeth Electric Tramway Co* case (see above) only required, in the court's view, the expenditure to have been incurred *bona fide* for the more efficient performance of his duties as lecturer (308J–309F).

(b) The fact that the study had not been used "wholly or exclusively" for purposes of trade but had also been used for private purposes, was no bar to the deduction under section 23(b) of the expense relating to the study, as section 23(g) did not qualify the proviso to section 23(b) (310D–311H).

This judgment put paid to the practice of the Commissioner in respect of employees of only allowing a deduction under section 23(b) if the employee's expenditure was virtually obligatory in terms of his service contract (Editorial note 1986 *The Taxpayer* 235).

The second judgment, namely that in the *Solaglass* case 1991 2 SA 257 (A), was delivered during 1990. In this judgment the appeal court confirmed that the prohibition in section 23(g) did not provide for any apportionment in respect of an expense incurred for a trading purpose as well as another purpose. Section 23(g) disqualified the amount in total as an expense (280F–G 282D–G 282I–283E) even though the non-trading purpose might have been subservient to the trading purpose (284A–C).

These judgments basically confirmed the legal position described in paragraph 5 1 above. A taxpayer could therefore deduct expenditure relating to that part of a dwelling-house or domestic premises occupied for purposes of trade under section 23(b) even though such part was not used wholly or exclusively for purposes of trade. An employee could also deduct such expenditure even in the absence of a contractual obligation to incur such expense. Expenditure claimed as a deduction under the general deduction formula had, however, to satisfy the section 23(g) test of having been incurred wholly or exclusively for purposes of trade, there being no possibility of apportioning expenditure incurred for a dual purpose.

An amendment effected during 1991 (proviso to s 23(b) as inserted by s 23 of the Income Tax Act 129 of 1991) extended, in effect, the "exclusively for purposes of trade" test to section 23(b). Expenses incurred in connection with a part of a dwelling house or domestic premises occupied for purposes of trade qualify as a deduction in terms of the proviso to section 23(b) only if that part is specifically equipped for purposes of the taxpayer's trade and if it is regularly and exclusively used for that purpose. The reason for this amendment appears to have been the difficulty of establishing whether any premises are used for the purposes of trade and the various disputes in this regard, especially with regard to expenses relating to the maintenance of a study at home (*Explanatory Memorandum on the Income Tax Bill* 1991 WP 2–91 16 cl 23).

The following year saw the replacement of section 23(g) (by s 20(b) of the Income Tax Act 141 of 1992). The revamped provision prohibits the deduction of any monies to the extent to which such monies were not laid out or expended for the purposes of trade. This amendment was of fundamental importance, as it made provision for the apportionment of expenditure only partly incurred for purposes of trade. An expense incurred for a dual purpose could therefore for the first time be claimed proportionately as a deduction under the general deduction formula. The apportionment of an expense incurred partly for trade purposes therefore became the rule, rather than the exception. This amendment was a response to the judgment in the *Solaglass* case (*Explanatory Memorandum on the Income Tax Bill* 1992 WP 2-92 17 subcl (b)).

The judgment in *Van der Walt's* case and the 1991 amendment of section 23(b) resulted in a further amendment of section 23(b) during 1993 (proviso (b) to s 23(b) as added by s 18(1)(a) of the Income Tax Act 113 of 1993).

A taxpayer whose trade constitutes any employment or office is in terms of this proviso not entitled to any deduction under section 23(b) unless the taxpayer's income from such employment or office consists mainly of commission or other variable payments based on the taxpayer's work performance, and the taxpayer's duties are not performed mainly in an office provided by the employer. The fact that the expenditure may have been incurred *bona fide* for the more efficient performance of the taxpayer's duties is not sufficient – the criteria in section 23(b) must be satisfied first. The stated reason for this amendment was that many people claimed expenses in respect of studies not used regularly and exclusively for their trade, but used only occasionally. Measures to prevent such misuse placed a considerable administrative burden on the Commissioner. The allowance of such expenditure on a large scale also led to a loss of revenue which had to be recovered by means of increases in tax rates, or by some other means (*Explanatory Memorandum on the Income Tax Bill* 1993 WP 2–93 36 cl 18(1)(a)).

The requirements of section 23(b) apply to all trades carried on in a dwelling or domestic premises, and not only to the use of a study at home. It seems clear that mainly administrative reasons underlie the amendments effected to section 23(b) during 1991 and 1993.

5 3 The effect

The drastic change of policy between 1991 and 1993 is clear. Apportionment is, as a general rule, available in respect of an expense incurred partly for trade purposes and partly for private purposes. The use of an asset partly for private purposes will therefore not, as a general rule, result in the total amount of the concomitant expense being disqualified as a deduction under section 23(g), as it does not require that the asset in question be used exclusively for purposes of trade. The part of a dwelling house or domestic premises used for trade must, in contrast, be specifically equipped for purposes of trade and must be used regularly and exclusively for those purposes. Any failure to comply with this requirement will disqualify the total amount of the relevant expense as a deduction under section 23(b). The expense cannot, furthermore, be claimed under the general deduction formula, as claims falling under section 23(b) are excluded from section 11(a) and (b) (s 23B(3) of the act). Taxpayers whose trade constitutes any employment or office face the further hurdles embodied in proviso (b) to section 23(b).

The "regular and exclusive use" requirement will undoubtedly affect many home industries, such as the use of a domestic kitchen for purposes of a catering business as well as for preparing family meals, the use of a swimming pool for offering swimming lessons or for courses in physiotherapy as well as for private purposes, and the use of a garage as a commercial workshop as well as for storing private effects. The discriminatory effect of section 23(b) should be clear – for example, a taxpayer who runs a catering business at home and who incurs expenditure in respect of the insurance or maintenance of the domestic kitchen used for such purposes as well as for private purposes, will be unable to deduct that expense under section 23(b). The position may be contrasted with that of a

taxpayer who incurs the same expense in respect of a catering kitchen not situated in a dwelling house or forming part of domestic premises and which is used primarily but not exclusively for the catering business – the expense should then be deductible under the general deduction formula to the extent to which such expense was incurred for the purposes of trade.

Section 23(b) violates the tax precept of horizontal equity. The question which remains is whether the restrictions in section 23(b) can be invalidated in terms of the Constitution. I will, in the final part of this enquiry, concentrate on the first proviso to section 23(b) and ignore the second proviso relating to taxpayers whose trade constitutes any employment or office. Many of the considerations below may, however, also apply in respect of the second proviso.

6 Balancing the conflicting interests

6 1 Introduction

The limitation in section 23(b) meets the first requirement of section 33(1) in that it is embodied in law of general application covering an indeterminate number of concrete instances. The crucial enquiry is whether the limitation of the affected taxpayers' rights to horizontal equity is reasonable and justifiable in an open and democratic society based on freedom and equality. This involves a proportionality test as seen above. I will, for purposes of this enquiry, adopt aspects of the Canadian approach. The analysis will, however, in common with the approach of Chaskalson P in *Makwanyane's* case *supra*, not fit into the Canadian pattern, as I will follow the formulation of section 33(1) and attempt to reflect social and economic policy concerns which are of particular importance in a South African context. I will first consider the justifiability of the limitation.

6 2 The purpose of the limitation in section 23(b)

Recourse may be had, it is submitted, to explanatory memoranda in establishing the purpose or objective of a tax provision which is the subject of constitutional scrutiny. It was noted above that administrative convenience appears to have been the main consideration in proposing the amendments to section 23(b) during 1991 and 1993. The various disputes with taxpayers, especially with regard to expenses relating to the maintenance of a study at home, the difficulty of establishing whether premises are used for purposes of trade, and the considerable administrative burden resulting from measures to prevent misuse, feature prominently in the reasons given for the amendments (see above). This fact immediately implies that the constitutional validity of section 23(b) is highly suspect, as administrative convenience and the saving of costs should not justify the overriding of constitutional guarantees, as seen above. The 1993 Explanatory Memorandum also alludes to the loss of revenue involved in allowing the relevant expenses on a large scale under the general deduction formula, but this appears to be a secondary consideration. I will, however, accept, for purposes of this enquiry, that section 23(b) addresses this concern. That this concern might be justified as a pressing and relevant concern in the South African context, follows from the relatively small number of taxpayers contributing the bulk of personal income tax as well as from the fact that income tax constitutes the

largest single source of government revenue. It is clearly an objective of the government to avoid an erosion of the income tax base (*Budget speech* of 1995-03-15 (hereafter *Budget speech*) 10). The question remains whether this objective is of sufficient concern to justify overriding the fundamental rights of taxpayers regarding equality and unfair discrimination. This objective must therefore be evaluated against other socio-economic policy considerations. A value judgment must in effect be made.

6 3 The conflicting objectives

A low annual economic growth rate of 1 per cent in the decade to 1993 which was exceeded by population growth (*Budget review* 1995-03-15 1 6–1 7 par 2 1 1 and *Budget speech* 2), high unemployment and the need for work creation (*Budget review* 1 2 par 1 1 4), a small taxpayer base as far as income tax is concerned (see above) and problems of tax compliance and the integrity of the tax system (*Budget review* 2 26–2 27 par 2 3 2 3–2 3 2 4), the need to avoid permanent increases in the overall tax burden (*Budget review* 2 3 par 2 1 2), the expansion and improvement of social services to meet the needs of a growing population (*Budget review* 2 1 par 2 1 1), and, overall, the need for a higher growth rate needed for the attainment of the objectives of the reconstruction and development programme (*Budget speech* 4), constitute the main considerations shaping tax policy as far as income tax is concerned. The promotion of economic growth as a means of employment creation and the expansion of the taxpayer base in order to provide for the financing of expanded and improved social services and the lowering of tax rates, is clearly a primary policy objective (*Budget speech* 1 4 16 and 17; *Budget review* 2 1 par 2 1 1). Another important policy objective is the expansion of the taxpayer base by bringing all taxpayers into the tax net and improving the levels of taxpayer compliance. This is indeed the primary purpose of the Tax Amnesty Act 19 of 1995 (see s 1(1)(v) "qualifying person" read with s 2 and 6, and the speech by the Minister of Finance to the extended public committee in the national assembly 1995-06-27 and *National strategy for the development and promotion of small business in South Africa* white paper 1995 (hereafter *National strategy*) 38–39 par 4 12 8).

The creation of an enabling environment for the small business sector has been identified and accepted as an integral part of a national strategy for achieving the objectives set out above (*Katz report* 161 par 10 10 1, *National strategy* 7 par 1 3 and 15 par 3 1 1). This policy recognises the importance of the small business sector in view of the role it can play in accommodating entrepreneurs from disadvantaged communities (*National strategy* 10–11 par 2 1 5 and 2 2 5), its role in job creation (*National strategy* 9–10 par 2 1 1 and 2 2 2), its role in economic and social development (*Katz report* 152 par 10 5 3; *National strategy* 10 par 2 2 1) and its potential role in expanding the taxpayer base (*Katz report* 160 par 10 8 11–10 8 12; *National strategy* 18 par 3 4 4; and answer to question 4 *Hansard* of 1994-08-03 col 69). The identified constraints facing the small business sector that have to be addressed include the depletion of their principal source of equity capital as a result of the taxation of the income of the working proprietor and their resulting greater reliance on short term debt finance (*Katz report* 150 par 10 4 1(a)), the lack of business premises at affordable

rentals and the possible need for start-up rental subsidies (*National strategy* 11 par 2 3 1 and 32 par 4 6 2), and the compliance burden of taxation on smaller enterprises (*Katz report* 151 par 10 4 1(c) and 10 4 2(d); *National strategy* 26 par 4 2 5). Recognition is also given to the planning and physical infrastructure needs of women entrepreneurs, including the need for a flexible planning approach towards home-based enterprises (*National strategy* 32 par 4 6 3).

It should be clear that the limitations in section 23(b) conflict with the objectives regarding small businesses set out above. The policy of denying a taxpayer a deduction in respect of expenses incurred in connection with a portion of a dwelling not exclusively used for purposes of trade, does not assist in addressing the problem of a lack of business premises at affordable rentals or the needs of women entrepreneurs regarding home-based enterprises. It will also tend to exacerbate the problem of the depletion of the principal source of equity capital for small enterprises, a problem that may be especially severe in the case of aspirant entrepreneurs from historically disadvantaged groups. (It is of interest to note in this regard that the decision to allow small enterprises the choice of being taxed on a cashflow basis represents an attempt to ease the magnitude of their working capital requirements – see the *Budget speech* 12 and section 37G of the act as inserted by s 24(1) of the Income Tax Act 21 of 1995.) It may furthermore have a detrimental effect on the competitiveness of the affected home-based enterprises and may actually discourage small entrepreneurs from entering the tax net. The provisos to section 23(b) do not serve any of the objectives regarding small enterprises and may well be counter-productive. It would therefore, in the light of the various policy considerations set out above, seem that the limitation in section 23(b) is not justifiable in spite of the importance of preventing the erosion of the income tax base. It remains to consider the rationality and the reasonableness of the means chosen to prevent the erosion of the income tax base.

6 4 The means

Is the exclusion of a single category of taxpayers from the benefit of the general rule regarding the proportionate deduction of expenses partly but not exclusively incurred for trade rational and fair? In other words, is the imposition of an exclusive use test in respect of the portion of a dwelling or domestic premises used for purposes of trade a rational and fair means of achieving the objective of preventing an undue loss of revenue through claims for deductions under the general deduction formula? There would seem to be no reason in principle why this category of taxpayers should be singled out in this way. That the policy regarding the tax treatment of assets used partly for trading purposes and partly for private purposes is inconsistent, is clear even if regard is had only to the position of employees. The corollary of disallowing any deduction in respect of a portion of a dwelling house used by an employee partly for trading purposes, would for example be the taxation, in principle, of the full amount of a travelling allowance used only partly for business travelling by an employee. Provision is, however, made for a proportionate deduction from such an allowance (s 8(1)(a)–(b) of the act). The loss of revenue involved may be considerable and might even exceed the loss of revenue resulting from the allowance of a proportionate

deduction in respect of expenditure connected to the portion of a dwelling used for purposes of trade. Can the administrative burden involved in policing claims for proportionate deductions, under the general deduction formula, of expenses connected with a dwelling used partly for trading purposes provide a reason for the difference in the tax treatment of such claims and of travelling allowances? The administrative problems involved in policing the provisions regarding travelling allowances in respect of motor vehicles would appear to be potentially greater than in the case of claims for deductions in respect of dwelling houses or domestic premises – it should, in principle, be easier to ascertain whether and to what extent immovable property such as a dwelling house is being utilised for purposes of trade. It would, furthermore, be difficult to make out a case for the limitations in section 23(b) by relying on the administrative problems involved in policing the general deduction formula, if regard is had to the position of a vendor under the Value-added Tax Act 89 of 1991 – administrative problems do not appear to be a bar to the allowance to such vendor of a proportionate input tax credit in respect of goods or services acquired only partly for purposes of making taxable supplies (s 17(1) of the Value-added Tax Act) in spite of the difficulty of determining an appropriate basis of apportionment (Kruger and Bennett *Value-added Tax Manual* 1 7 2–1 7 7 par 7 1 1).

There would therefore appear to be no reason in principle for discriminating, for income tax purposes, between the partial use of a dwelling and the partial use of other assets for trading purposes. It is interesting to note that Williams (*Income Tax in South Africa – law and practice* (1994) 212 par 7 3) holds the view that the 1993 amendment to section 23(b) is discriminatory in its impact, devoid of all principle, and shows an indifference to the economic utility of encouraging the workforce to work after hours in their own home.

Does the means used impair taxpayers' right to horizontal equity as little as possible? It is submitted that other means can be used to limit a loss of revenue, means which would not impair taxpayers' right to equal treatment, but would give effect to such right by addressing other instances where taxpayers are treated unequally. Travelling allowances come to mind in this regard. Taxpayers entitled to a travelling allowance in respect of a motor vehicle used primarily for private purposes and who travel considerable distances in such vehicle annually, may in terms of the present dispensation be entitled to a considerable reduction of the taxable amount of such allowance. That such a taxpayer will be better off, financially, than a taxpayer who has to cover the full cost of an equivalent motor vehicle out of after tax income, is evident. Measures to reduce this inequality would promote horizontal equity and reduce the loss of government revenue. The estimated yield of measures recommended in this regard by the Katz commission (*Katz report* 94 par 8 4 23–8 4 26) is R600 million at current tax rates. Another possible measure which would promote horizontal equity would be the taxation, in the hands of employees, of contributions to medical aid funds made on their behalf by their employers. The estimated gain in yield from such a measure would be R2 billion (*Katz report* 93–94 par 8 4 19–8 4 22). Should it not be possible to use such means for policy reasons, the possibility would have

to be considered of amending the general deduction formula in such a way as to affect all taxpayers in a non-discriminatory way.

6 5 The arbitrary and irrational nature of the provisos to section 23(b)

Ackermann J expressed the view in *Makwanyane's* case *supra* 725I–726C that the criteria embodied in section 33(1) emphasise

> "the importance, in our new constitutional state, of reason and justification when rights are sought to be curtailed. We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where State action must be such that it is capable of being analysed and justified rationally . . . Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order . . . Arbitrariness must also inevitably, by its very nature, lead to the unequal treatment of persons. *Arbitrary action, or decision-making, is incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way.* Without such a rational justifying mechanism, unequal treatment must follow" (my emphasis).

It is clear that the limitations contained in the provisos to section 23(b) are not rational but are arbitrary, unfair and based on irrational considerations. They would therefore not appear to be reasonable and justifiable in terms of section 33(1). The role played by administrative considerations also render them highly suspect.

In the final analysis these limitations violate the right to equality of a disparate group of taxpayers who would not appear to be highly organised politically and who constitute a minority that cannot rely on the lobbying efforts of powerful interest groups such as the motor industry. The words of Chaskalson P in *Makwanyane's* case *supra* 703H–I bear repetition in this regard:

> "The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process."

Section 23(b) in its present form would therefore seem to be very vulnerable to constitutional attack. The fact that a small amount of tax may be involved is immaterial – "[c]ases involving a small amount of tax may be just those that give rise to a substantive constitutional issue that may affect a large number of taxpayers" (Butler "Making Charter arguments in civil tax cases: can the courts help taxpayers? 1993 *Can Tax J* 870). It is interesting to note that the German constitutional court found sales tax legislation that had a discriminatory effect on smaller businesses to be unconstitutional (see Davis, Chaskalson and De Waal *Rights and constitutionalism* 82 fn 485).

7 Conclusion

The use of the tax precept of horizontal equity as a constitutional norm in income tax law accords with the spirit and purport of the Constitution. In practice, however, the issue will be determined by the approach of the constitutional court to the ambit of the provisions of section 8(1) and 8(2) and, ultimately, by the Court's attitude towards economic legislation. The question, briefly, is whether the constitutional court will, first of all, adopt the approach of the Canadian

courts and of Cachalia *et al* of limiting the ambit of the provisions regarding equality and unfair discrimination to the listed and analogous grounds of discrimination, and, secondly, whether the court will adopt the Canadian attitude of deference regarding economic taxation and show the same reluctance to intervene in tax matters. (See eg Davis, Chaskalson and De Waal *Rights and constitutionalism* 33; Butler 1993 *Can Tax J* 869. Estey (*Proceedings* (1989) 2:2) declares in this regard that "taxation is an anathema to most judges who often find other branches of the law a much easier horse on which to mount 'the new philosophy'".) Adopting the "listed and analogous grounds" approach to the ambit of section 8(1) and 8(2) would in many instances exclude economic legislation from judicial scrutiny. This would probably ease the work-load of the constitutional court (see Gibson 1993 *Can Bar R* 450) and allow it to defer to Parliament on these matters. In the final instance, however, this would merely serve to place forms of arbitrary and irrational action beyond judicial scrutiny. Whether this would promote the underlying values of the Constitution or merely amount to an abdication by the Court of its responsibilities, is for the reader to decide.

It should be quite clear that the brief analysis above is not meant to be the last word on this complex subject, but merely represents an attempt to find a principle that can be justified in terms of the Constitution and applied as a practical norm in income tax law.

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BROWN v LEYDS RECALLED: WHAT DOES A CONSTITUTION CONSTITUTE AND WHAT CONSTITUTES A CONSTITUTION?

1 Introduction

One hundred years ago, in November 1895, Mr Robert E Brown, an American fortune-seeker who wished to prospect for gold in the old Zuid-Afrikaansche Republiek, successfully challenged in court the constitutionality of state action seeking to prevent him from doing so and thereby triggered a series of events that had grave repercussions for the tiny, troubled republic, then but four years removed from a war that would end in its defeat and destruction. In 1995 the Republic of South Africa completed its first year of existence as a fully-fledged democracy, an important and uncontroversial cornerstone of which is an insistence on the constitutionality of state action. As South Africans learn to absorb and apply the lessons from their political past and seek to forge a nation upon the foundations of constitutionally protected freedoms and rights, it might be of interest, in this centenary year of Mr Brown's stand against the state, to recall those dramatic events and to reflect briefly upon their importance for constitutional theory.

2 The facts

The events that gave rise to the constitutional crisis began in the sort of dramatic fashion one expects from good Victorian melodrama. It continued to hold its dramatic impact right through to the tension-filled final stand-off between hero and villain. It even has a touch of post-modernism to it, in that who is hero and who is villain depends entirely on the observer's point of view.

In June 1895 a public goldfield was proclaimed in the *Government Gazette* for 19 July 1895 on the farm Witfontein, near Potchefstroom. When the day dawned in excess of a thousand fortune-seekers, many of them armed, descended upon the proclaimed digging, ready to buy licences for prospecting claims from the duty clerk. One such prospective gold-digger was Robert Brown. He applied to the clerk for a licence for 1 200 claims, tendering the amount payable, but was not immediately awarded his licence. The mining commissioner, who then appeared on the scene, explained to the volatile crowd that the proclamation had temporarily been withdrawn on the previous day by a resolution of the Executive Council of the Volksraad, on the basis that unrest at the diggings was feared. Brown refused to accept the validity of the withdrawal and instructed his helpers (some 500 of them) to peg off the 1 200 claims, which they duly did.

The resolution was given effect to by the publication, in an extraordinary *Government Gazette* of 20 July, of a proclamation, provisionally suspending the operation of the earlier proclamation. Two days later Brown served summons on the state secretary, Leyds, informing him of his intention to seek an order of court declaring him entitled to the claims licence, or to damages of £372 000. The government rose to the challenge. It responded four days later with a resolution of the Executive Council (which was accepted as a resolution of the Second Volksraad on the same day and, having been noted with approval by the First Volksraad, was published in the *Government Gazette* on 1 August 1895), approving the action taken by the government as being in the public interest, declaring unlawful all claims pegged off on the farm and denying to any person the right to compensation out of the public treasury arising from the suspension of the proclamation. Argument on the matter was heard in the supreme court in Pretoria in November 1895. Brown was serious: for him appeared Wessels and Curlewis, both later chief justices of the Union of South Africa. For the government appeared the equally formidable Esselen, attorney-general and former judge.

3 The issues

There were three issues before the court: Did the proclamation of 19 June 1895 already take effect on the morning when Brown applied for his licence? If so, could the proclamation have been suspended in the manner in which it was done? If not, did not the resolution approving the government action and indemnifying the state validate, and therefore legalise, the government action?

The court (Kotzé CJ, Ameshoff J and Morice J), in its judgement (handed down fourteen months later, in January 1897, and reported as *Brown v Leyds NO* (1897) 4 OR 17) had little difficulty disposing of the first two issues: The terms of the proclamation made it clear that the proclamation did indeed take effect on

the morning of 19 July. As the public digging was proclaimed in terms of the Gold Law 14 of 1894, the proclamation could have been suspended or withdrawn only by a second proclamation duly published; when the second proclamation was published, the land had already become a public digging (if only for a day) and such a public digging could only have been closed in terms of the Gold Law, which terms had not been complied with. The state action suspending the proclamation was therefore without force of law.

It was the third issue that really fired the intellectual passions. At the heart of the matter was the question whether Volksraad resolutions (*besluiten*) that did not comply with the formal requirements for legislation as prescribed by the Grondwet of 1858, were nevertheless the valid legislative instruments the Volksraad had, in the conduct of a considerable part of its business for many years, always taken them to be. The answer to the question was of considerable importance: Not only would a negative answer embarrass and impoverish (to the tune of £372 000) the government in the instant case, it would also cripple a state which had, to a significant degree, been administered for most of its existence on the basis of mere Volksraad resolutions accepted as binding law, and would, as a matter of principle, deny to the Volksraad the sovereign power it had always assumed it possessed.

The matter was much complicated by the fact that the same issue had received judicial scrutiny on several occasions in the past. The court had exhibited marked ambivalence on the issue, souring relations with a government increasingly defensive in its efforts to maintain political power in the alien and hostile *Realpolitik* of the 1890's. Brown had now forced the government and the judiciary in the OK corrall.

The court in *Brown*, having delayed (some say dithered) for fourteen months, denied to the Volksraad resolution in question the force of law. The full impact of this decision is best understood against the constitutional and political background to the dramatic assertion by the court of the testing right.

4 The background to the issues

4 1 The Grondwet of 1858

The Grondwet of the Zuid-Afrikaansche Republiek came into force in 1858. In accordance with a procedure adopted by a *Krygsraad*, assembled at Rustenburg consequent upon concerted efforts to bring about political stability and strong central authority, a constitution had been drafted by a committee elected at a public meeting held at Rustenburg in February 1858. The draft constitution was submitted to the Volksraad for its approval. This was given, subject to the right of the public to make objections, and at the same session, a general election for the Volksraad was declared.

The Constitution prescribed the manner in which laws in the Republic came into existence. Laws are proposed by the president to the Volksraad, consequent upon the publication of such draft laws in the *Government Gazette* for a period of three months, to enable the public to make representations concerning the laws (except in cases which brook of no delay). Proposed laws are then debated

by the Volksraad, passed and submitted to the president for his acceptance and finally published (a 12, 47, 49 and 66–69 of the 1858 Grondwet, as published in Jeppe and Kotzé *De locale wetten der Zuid Afrikaansche Republiek 1849–1885* (1887); see too the Reglement van Orde for the Volksraad of 1882, rules 71, 72, 77 and 78 as published in the Locale wetten). No mention is made in the Constitution of resolutions, except in articles 219–220 and in the second *Beijlage* to the Grondwet of 1859, where provision is made for the repeal of all previous resolutions not compatible with the Constitution, and for the recognition of al resolutions as laws by courts disposing of pending matters.

4 2 McCorkindale and Doms: defining, and obscuring, the issues

In 1864 the government had entered into a contract with one McCorkindale, one of the terms of which was the transfer, by the state, of 200 farms to McCorkindale. Upon his death, the state claimed from the estate the re-transfer of some 45 of these farms, which claim the executors disputed. The dispute over the farms dragged on endlessly until, eventually, when the executors failed to comply with a final demand (issued in 1884) for the re-transfer of the farms, the Executive Council of the Volksraad passed a resolution directing the registrar of deeds not to register a mortgage on any portion of these farms and the surveyor-general not to approve diagrams of any of the farms. The executors thereupon obtained a rule *nisi* against the state. On the return day the court considered that the Executive Council had effectively prevented public officials from doing their duty, and that it therefore exceeded its powers. It enjoined the state to rather seek a court interdict, mandating the return of the farms, and postponed proceedings. The Volksraad did not, however, take kindly to this advice and confirmed (by resolution) the resolution of the Executive Council.

In drawing the court's attention to the resolution, the state argued that the matter had been decided by legislative means and that the court was therefore *functus officio*. The executors (represented by SG Jorissen, later to become a judge and contribute in no small measure to the build-up to the constitutional crisis) argued that a mere resolution does not have the force of law and that the Volksraad cannot constitute itself a judge in its own cause. Kotzé CJ (with Burgers J concurring) found for the state (the case is reported as *Executors of McCorkindale v Bok NO* (1884) 1 SAR 202). A resolution of the Volksraad does have the force of law, since numerous legislative enactments treat laws and resolutions as equivalent forms by which to express the same law-making power. The contention by the executors that, even if this were so, the Volksraad cannot legislate (by resolution) contrary to the provisions of the Constitution and were it to do so the court could, on the analogy of American constitutional practice, declare the law invalid, was rejected by the court.

Not only does American constitutional law differ from that obtaining in the republic, it is a fact that the Constitution, far from being a "higher" law, is simply a law like any other created by the Volksraad. It is a creature of the Volksraad (and not *vice versa*) and can therefore be altered, even ignored, by the Volksraad, as had in fact often been done since its promulgation. Kotzé CJ was at pains to draw a distinction between the *moral* obligation that rested on the

Volksraad to respect the Constitution, and its *legal* authority to alter the Constitution in its wisdom: the Constitution itself, after all, declares the Volksraad to be *het hoogste gezag des lands* (articles 12 and 29).

With copious reference to John Austin (whose influential *Lectures on jurisprudence, or the philosophy of positive law* had been published in 1863) and with reference also to Blackstone and Grotius, the judge held (see 210–212) that law-making power and sovereignty were convertible terms, that the Volksraad, being the sovereign power, was therefore above the law, since sovereign power limited by law was a contradiction in terms. A judge who presumes to inquire into the validity of a law with reference to compliance or otherwise with the provisions of the Constitution, would place himself above the supreme power in the state, and that cannot be, for "*judicis est jus dicere sed non dare*, and the judge should not stop to inquire whether the policy of the law is in the interest of society or not" (218).

The Volksraad is the source of law: the notion that the people are sovereign is true in a *moral*, but not in a *legal*, sense (210–212). The constitutional provisions for the enactment of laws are purely directory and

> "[a] resolution of the Volksraad, therefore, although not proposed in the ordinary form of a law, is law, if it clearly appear that the legislature has intended it to be observed as law, for the will of the legislator is law" (212).

For this reason, too, the argument that the resolution in question interfered with a matter that was *sub judice*, and was for that reason invalid, has *moral* force only, threatening as it does a pillar of civilised society, an independent judiciary, but it cannot be sustained in law in the face of the sovereign power of the Volksraad. Those who believe that a law which is "contrary to public right and reason, the law of nature, or the law of God" is invalid, have lost sight of the distinction between law and morality (217–218). Austin rules, OK?

Three years later another *uitlander* made life difficult for the patriarchs of the republic, and this time SG Jorissen, elevated to the Bench in the interim, was to have his day. The dispute, as in the earlier case, also originated with an agreement entered into in 1874 by the government (through State President Burgers) with a private individual (one Theodore Doms) allegedly involving the sale of 21 farms to Doms. Doms' subsequent insolvency triggered a series of events that again put the constitutionality of Volksraad resolutions in the spotlight. The trustees of the insolvent estate claimed the transfer of these farms from the state. Again the Volksraad deliberated long and hard and, in 1886 and again in 1887, passed resolutions denying to the estate any right to the farms or any claim for compensation. The trustees challenged the validity of these resolutions in court, on the same grounds as McCorkindale's executors had sought to do three years earlier. Again the court found for the state, but this time there was a minority judgment, by Jorissen J, denying to these resolutions the validity of law (the case is reported as *Trustees in the Insolvent Estate of Theodore Doms v Bok NO* (1887) 2 SAR 189).

Kotzé CJ (for the majority) simply referred to his decision in *McCorkindale*, although he did think it desirable for the republic to adopt the constitutional practice of the United States of America, which made it possible for the court to

test the constitutionality (and therefore validity) of laws passed by the legislature. Jorissen J, however, saw things differently, as indeed he had done as junior counsel for McCorkindale. In a lengthy and learned, but somewhat rambling judgment, he challenged Kotzé CJ, not on the basis of any supposed analogy with American constitutional practice, but on the Chief Justice's own terms.

The Grondwet was not simply another law created by the Volksraad, and therefore a mere instrument in the hands of the Volksraad, to be adhered to or amended at its pleasure. The historical documents on the birth of the Constitution indicated clearly that once the Constitution had been accepted by the Volksraad, that same Volksraad had resolved to declare a general election for members of the Volksraad, to be held in accordance with the provisions of the Constitution. Far from being a creation of the Volksraad, therefore, the Volksraad was in fact a creation of the Constitution (195–196).

This meant, too, that the Volksraad, although granted *sovereign* power by the people through the Constitution, did not possess *absolute* power, since the people, in drafting their Constitution, "chose and laid down in what manner the different powers in the state should exercise their authority" (196). The Volksraad, as the highest – sovereign – legislative power in the state, exercised this power "in virtue of the constitution and thus in accordance with its provisions" (196–197).

It was also unsound to regard a resolution as but a species of law. The Volksraad exercised its power of legislation under the Constitution by means of laws, and its other powers under the Constitution, such as control over governmental proceedings, administrative instructions and internal disciplinary matters, by means of resolutions. Resolutions on these matters had administrative force, binding upon the government, but did not have the status of law, since the formalities for proposing, publishing and proclaiming laws prescribed by the Constitution did not, in the very nature of such resolutions, apply, and could not therefore bind a judge. If a resolution was passed in accordance with the prescribed formalities, it would have the status of valid law, even if called a resolution. The resolutions in question were not passed in the manner prescribed for laws, and did not therefore have the force of law (199–204).

The government had achieved a hollow victory: Not only had Jorissen J arrogated to himself the right to question, and reject as spurious, the results of solemn deliberations on weighty affairs of state policy of the venerable elected representatives of the burghers, even the Chief Justice had found it necessary to express his regret that he had been unable to find that the court had the power to interfere in the business of government. Had not the Cape supreme court, in a case decided in 1864 (but only reported in 1885 – see *Deane and Johnson v Field* 1 Roscoe Reports 165), stated unequivocally that

> "it was [even] possible for the Parliament to make an Act which was illegal by being contrary to natural justice, but which yet would be law, because the authorities and the subject would be bound to give effect to it" (173)?

The judges clearly had an attitude problem.

4 3 The 1890's: double, double, toil and trouble

No further grand constitutional issues surfaced in the 1880's. But in the 1890's, amid the political turmoil that foreshadowed the Anglo-Boer War, such issues once again cast a long and threatening, and eventually destructive, shadow over the relationship between these two state institutions. A law providing for the creation of a so-called Second Volksraad, Law 4 of 1890, contained an insurance policy against judicial interference with affairs of state.

> "The legal force of a law or a resolution published by the State President in the Gazette, may not be disputed, saving the right of the people to make petitions with regard thereto",

warned section 32. The demanding natives and the vulgar goldstruck "uitlanders" and the interfering British were keeping the *volksrepresentanten* quite busy enough without them also having to contend with esoteric legal niceties thrown up by fancy lawyers. The five years that were to pass before *Brown* were not, however, the tranquil years government and judiciary had hoped for.

The judiciary, in fact, did not enjoy the unqualified confidence of the press or the public at large in this period. (For what follows, see the documents printed in 1894 *CLJ* 176; Kahn "The history of the administration of justice in the South African Republic" 1958 *SALJ* 409–410; Van der Merwe "Skuld en skandaal in die hooggeregshof van die ZAR" 1979 *De Jure* 242.) The judges were underpaid and some lacked the stature and ability their position demanded. In 1893 the Chief Justice stood in the presidential election, without, however, resigning his seat. He was soundly defeated, and much criticised for his foray into politics. In the same year the Volksraad considered a petition from the public for the appointment of a commission of inquiry into the ability of the judges to dispense justice impartially and ably. The judges, piqued because the Volksraad contemplated such hugely sensitive issues in public session, instead of providing for proper channels for their due consideration (as the judges had in fact been urging the government to do for some time), closed the court in protest. The Volksraad, happily, responded positively and rejected (but not unanimously) the appointment of such a commission.

In the following year judge De Korte was the target of a concerted press campaign that effectively discredited him for financial improprieties. Again the public petitioned the Volksraad, demanding action to restore the dignity of the bench, and throwing in grievances against another judge, EJP Jorissen (father of SJ Jorissen, who had died) for good measure. The Volksraad dallied. The judges urged the creation of a special court to investigate complaints relating to judicial incompetence. Eventually a special court, along the lines proposed by the judges, was brought into being (by resolution!) and a commission of inquiry appointed to investigate judge De Korte's financial affairs. Now the commission dallied and early in 1895 De Korte was again severely criticised in *The Critic*, this time for a minority judgment in which he had found in favour of a defendant company to whom he happened to be indebted.

The editor, Hess, was sued (on the insistence of De Korte) for libel as contemplated in the Press Law of 1893. In the court *a quo* he was found guilty, but on appeal to a full bench the conviction was set aside (the case is reported as *Hess v The State* (1895) 2 OR 112) on the grounds that the section in the act with

which Hess was charged was so poorly drafted that it in fact created no crime. (Subsequent to this finding the Volksraad commission heard evidence against De Korte, but found no grounds on which to indict him before a special court. Additional evidence of financial misdealings did, however, give rise to a special court hearing of the judge in 1896. Although found not guilty of improper conduct, he was censured for action in a manner demeaning to the dignity of the bench. He resigned a week later.)

Of more immediate interest was Kotzé CJ's *obiter* remarks in *Hess*, made some seven months before *Brown*. Hess had argued, like McCorkindale and Doms before him, that a resolution of the Volksraad (such as the Press Law was) was not a law, as it did not comply with the requirements for law-making set in the Grondwet. Kotzé CJ had by now become convinced that this argument was correct and that he had decided *McCorkindale* wrongly. He nevertheless, for reasons of political expediency, no doubt, preferred to base his decision on the far less convincing, but safer, grounds of poor draftsmanship. He could not, however, resist the opportunity to make substantial *obiter* comments on the issue, presumably to impress upon a critical public (none as vehement as Hess himself) the court's ability to assert its independence and its appreciation of its important role in the maintenance of a civilised life-style for its citizens.

His comments were forthright and concise:

> "The *trias politica* . . . is, even as in other civilised countries, also adopted by our constitution . . . and it is my duty as Judge, above al, to respect and maintain the Grondwet. The sovereign power, residing in the people, has, through the medium of the Grondwet, been entrusted by the people in various measure to the Volksraad, Executive, and Judiciary" (114).

In the Grondwet the people declare the extent and manner in which the several portions of the sovereign power entrusted to the different powers in the state are to be exercised. Sovereign power may therefore indeed be limited, by "fundamental laws" according to Huber and even Austin (oh, how the mighty have fallen!) did not deny that sovereign power could "in some or other way" be regulated by a constitution. And the testing right is a tacit and necessary outcome of popular constitutional government: "It is surely open to a people to protect itself in the constitution against sudden alteration of the laws, more especially of the constitution" (115). Tested against the requirements for a valid law prescribed in the Constitution, the Press Law was not a law.

The government was not amused. Had not the court been warned off in 1890? Was this the thanks they got for protecting the judges from, quite frankly, not unfounded criticism, and had they not recently given them a substantial increase in their remuneration? President Kruger had a frank discussion with the Chief Justice later in that same year (in fact, soon after Brown had issued summons against the state) (see the editorial note "Chief Justice Kotzé" in 1898 *CLJ* 90). He reminded Kotzé of Law 4 of 1890, appealed to the bond of brotherhood between Volksraad and judiciary (in fact, relations between Kotzé and Kruger were otherwise strong: Walker *Lord de Villiers and his times* (1925) 288) and warned him that he would have to suspend the judge if he rejected the validity of

resolutions. Kotzé was deferential but unrepentant – he had the zeal of the convert.

Judge Ameshoff also now got into the act. *Snuif v The State* (1895) 2 OR 294 was decided only three weeks after the court had heard argument in *Brown* (and less than a month prior to the Jameson Raid, which would dominate political events for much of 1896). In this case he went to great lengths to re-confirm the notions that sovereignty was vested in the people, that the Grondwet was an expression of the will of the people, that the people had, in the Grondwet, created for the state three distinct political powers and that the state president, therefore, could not delegate his power to administer the oath of office to a judge in contravention of the Constitution (299–306).

The dye was cast and it augured ill for the government and for the state.

5 The decision

In January 1897 the court in *Brown* decided unanimously that Mr Brown was entitled to the licence he claimed (or, if that were no longer possible, to damages), despite concerted state action to deny to him the licence. In doing so, it reversed its decision in *McCorkindale*. Austin had fallen completely from grace and American constitutional doctrine, so studiously avoided in the earlier decisions, now held centre stage. *Marbury v Madison* rules, OK?

Kotzé CJ had learnt much from Jorissen J in *Doms*. The history of the Grondwet clearly indicated that it was called into being in a manner wholly different from any ordinary law. Furthermore, although the Volksraad has *sovereign* power, it does not imply that it thereby has absolute power. On the contrary,

> "the portion of the sovereign power entrusted to the Volksraad by the people shall be exercised under and in accordance with the terms of the authority or mandate as expressed in the Constitution" (26).

There is nothing contradictory in such a statement: Huber had already pointed out that sovereign or supreme power can be curtailed by fundamental laws. "The obligation," wrote Huber (in *Heedendaegse Rechts-Geleertheyt* 4 7 22), "which arises from the fundamental laws is one of natural law, and renders all acts done contrary thereto null and to no effect" (27). It follows logically that the court has the competence to test a particular legislative enactment with reference to the Constitution. It does not thereby raise itself above the legislature, but remains within its province, by inquiring whether what has been submitted to it is really law (27). If it does pass the test, there is an end to the matter:

> "[N]o Court of Justice is competent to inquire into the internal value, in the sense of the policy, of the law, but only in the sense of the meaning or matter of the law" (31).

The resolution in question, declaring Brown's action in pegging off the claims to be unlawful and denying him a claim against the state, did not pass the test and was therefore invalid, it not being a law. It mattered not that resolutions of the Volksraad had often been treated and acted upon as law, since the court acts only when a case is properly brought before it (and would, by implication, have struck down any resolutions improperly masquerading as law) (33). Nor did the president's trump card, Law 4 of 1890, influence the matter. The Constitution

says that a resolution is not a law, and if a subsequent law says it is, then this latter law is in conflict with the Constitution and must yield to the fundamental law. The state president does not possess a dispensing power, which is "contrary to the notion and existence of a free government by the people under the Constitution" (34–35).

For Ameshoff J (relying heavily on Dutch constitutional doctrine) the issue resolved itself into the question whether the court possessed the testing right. He sought an answer in the natural meaning of the provisions of the Constitution, aided by natural reason. The spirit of the Constitution, he found, is one of delegation, of conferring and entrusting, which belies any notion that the Volksraad, as the avowed "highest authority" in the state, has absolute power: "[t]he sovereign people are the only might-possessing body, the people have the supreme power" (52). As such "the sovereign people hold a guarantee that the Volksraad will remain within the limits of its competency" (53). Therefore, if the Volksraad exceeds its law-making competency, even though a testing right has not expressly been granted to the court, a judge who properly understands his duty will exercise the testing right and deny to the resolution legal validity.

Morice J took the non-confrontational route (described as "much the most intelligible utterance upon the issues raised" by a contemporary commentator: Gordon "The judicial crisis in the Transvaal" 1897 *LQR* 348) and held that the resolution could not be taken as applying to a case such as Brown's, where summons had already been issued and the action had therefore commenced. "It is not the function of the Volksraad to meddle with cases before the Courts" (61). He therefore found it unnecessary to decide whether the resolution had the force of law or not.

6 The impact

The impact of *Brown* was immediate and nothing short of sensational. An anonymous commentator in the *Cape Law Journal* (thought to be JC Smuts, then a member of the Pretoria bar) melodramatically described the effect thus (1898 *CLJ* 107):

> "The Second Volksraad was swept into the limbo of vanities, and the High Court has no *locus standi*. Three-fourths of the Lawbook was unconstitutional. All that could be discerned was the High Court, an illegal institution according to its judgment, floating serenely on the waters of the Deluge, and taking advantage of the general chaos to exert arbitrary power."

Shorn of hyperbole, the simple fact was that the Volksraad did not consult the Grondwet every time it legislated and a great deal of the business of the state was conducted in terms of measures that could readily be construed to be contrary to specific provisions of the Grondwet. Also, large parts of the Grondwet had been revised or redrafted by ordinary laws and by ordinary resolutions and no prescribed method existed for the proper amendment of the Constitution "by the people". Few people really regarded the Grondwet as *fundamentally constitutive* of the state and its institutions.

The Volksraad went into emergency session, many teeth were gnashed and hair torn (especially by the president himself and the state secretary, Leyds) as

the full impact of the decision became clear. The Volksraad response was to pass Law 1 of 1897. This law stated that a judge did not have the so-called testing right, that in future judges were to include in their oath of office an undertaking not to assume the testing right, and that the state president had the right to demand from the present judges an undertaking not to arrogate to themselves such a right and to dismiss judges who did not give such an undertaking.

The judges responded predictably. They adjourned the court *sine die* and all five of them refused to accede to the president's demand. Sir Henry de Villiers came up from Cape Town to mediate (his role in the crisis is described in Walker 291–297) and managed, in March 1897, to secure an agreement from the judges to accede to the president's demand, on the express condition that the president would, "as speedily as possible", introduce legislation to safeguard the Constitution from hasty and "ordinary" amendment and guarantee judicial independence. When no legislation on the matter was introduced in the Volksraad session of 1897, Kotzé felt that Kruger had not complied with the condition and in a letter to him in February 1898 stated that he regarded the understanding as having lapsed. Kruger then summarily dismissed him as Chief Justice and appointed Gregorowski to the position.

No other judges resigned in sympathy with Kotzé. Kotzé sought (and found) support from far and wide – not al of it unconditional – but it was moral and principled support rather than practical help he received. He wrote a sombrely emotional *Appeal to the inhabitants of the South African Republic* (see appendix 1 to Tindall *Memoirs and reminiscences. Sir John Gilbert Kotzé* vol 2 (undated) 265) and even sought to convince London that his dismissal had been in breach of the London Convention of 1881. All to no avail. His dismissal stood – Kruger saw fit, in his inaugural speech as fourth president of the republic in 1898, to call the testing right "the principle of the devil" and to advise Kotzé's confinement to an asylum for the insane until he saw the error of his ways, and Kotzé was resigned to practise at the bar for some years before departing for the then Rhodesia. (On the events subsequent to the *Brown* decision, see *inter alia* Kahn 412–415; Gordon 355–366; Dugard "Chief justice versus president: Does the ghost of Brown v Leyds NO still haunt our judges?" 1981 *De Rebus* 421–422 – the latter provides interesting details on Brown's later (failed) attempts to exercise his right to damages, the *quantum* of which the *Brown* decision had left undecided.)

7 Assessment

Legal opinion at the time was divided on the correctness of the decision in *Brown*. With the benefit of time and the wisdom of modern constitutional theory, it is perhaps possible to declare that Kotzé was right about the principle, but wrong about the detail. He had committed a fundamental legal theoretical error by confusing an *ideal conception* with an *extant instance* thereof. The constitution Kotzé so zealously defended (in a language way ahead of the times he lived in) had little of the fundamental and foundational qualities he ascribed to it. It was, in the words of Gordon, nothing more than a "rough outline [of] the polity of the state" but the real constitution of the state was "discernible in its statutes,

routine of legislative, judicial, and official business, and historical connexion with older States" (343 344). The Constitution simply was not as *constitutional* as he deemed it to be.

One might also seek guidance from Kelsen. The Grondwet of 1858 was the historically first Constitution and, in terms of the transcendental-logical supposition contained within the *Grundnorm*, the legal system functioned in accordance with the conditions and in the manner it prescribed. But this is so only as long as the legal system was *effectively* constituted thereby. Once it can be proved (and a contemporary commentator (JC Smuts?) did just that – 1898 *CLJ* 94) that the validity of the legal order was conditioned by the general acceptance and application (by the people and the organs of state, including the judiciary) of laws framed under different conditions and in a different manner from that prescribed in the historically first constitution, such constitution is no longer constitutive of the legal system because it no longer complied with the condition of validity the *Grundnorm* presupposes.

Brown v Leyds NO was a wonderful exercise in constitutional theory and deserves to be read even after 1993. It showed a "consummate lack of judgment" (Gordon 354) about constitutional practice and perhaps the events I sought to describe are a forceful reminder that theory is *not* practice, but also that good theory is conditioned by practice and sound practice conditioned by good theory.

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NOTARIAL BONDS AND INSOLVENCY

1 Introduction

Even after the introduction of the Security by Means of Movable Property Act 57 of 1993 (date of commencement: 1993-05-07), there are still many questions surrounding notarial bonds (Sonnekus *Sakereg vonnisbundel* (1994) 754–760; Van der Walt (CFC), Pienaar and Louw "Sekerheidstelling deur middel van roerende goed – nog steeds onsekerheid!" 1994 *THRHR* 614–623). (For a discussion of some of the problems that existed before enactment of this act, see Wunsh "What rights of preference are enjoyed by a special notarial bond?" 1960 *THRHR* 112; Scott (TJ) "Aspekte van sekerheidstelling deur middel van roerende sake" 1981 *De Jure* 142; Sacks "Notarial bonds in South African law" 1982 *SALJ* 605; Sonnekus "Sekerheidsregte – 'n nuwe rigting?" 1983 *TSAR* 97 230; Van der Walt (CFC) "Aspekte van die reg insake notariële verbande" 1983 *THRHR* 332; Lubbe and Van der Merwe "Die sekuriteitswaarde van notariële verbande in mededinging met sessie *in securitatem debiti*" 1988 *TSAR* 554; Scott (TJ) "Sekerheidstelling deur middel van roerende goed: die finale woord?" 1989 *De Jure* 119; Sonnekus "Besitlose pand – ideale sekerheidsreg op roerende goed ook

met inagneming van die beginsels van die insolvensiereg?" 1989 *TSAR* 523, "Die notariële verband, 'n bekostigbare figuur teen heimlike sekerheidstelling vir 'n nuwe Suid-Afrika?" 1993 *TSAR* 110.) In this note I shall attempt, without going into detail, to make a clear distinction between the different forms of notarial bonds as well as to give an account of the legal nature and effect of each form during the different eras of the historical development of these bonds. I shall discuss the position of the notarial bondholder before and after insolvency and evaluate the current legal position. To give a clear picture of the legal position regarding notarial bonds, I shall make a basic distinction between the position of notarial bonds registered before the enactment of the Security by Means of Movables Act and bonds registered after that date. I shall further distinguish between the position in Natal (the official name is KwaZulu-Natal, but I shall refer to Natal here for the sake of brevity) and outside Natal, as well as between special and general notarial bonds. The legal nature of the notarial bondholder's right before and after insolvency will be discussed, as well as the position before and after perfection (for the meaning of this term, see discussion below under par 2 2 1 2(a)). The fact that the Security by Means of Movables Act finds application only in the case of notarial bonds of corporeal movables is very important. Regarding incorporeal movables, therefore, the old position, that is before commencement of this act, still obtains, with the exception that the Natal act has been repealed. I shall also refer to the effect of the Security by Means of Movables Act on each situation.

2 Position of bonds registered before 1993

2 1 In Natal

Before the introduction of the Security by Means of Movables Act, the position in Natal differed from that in the rest of South Africa. This resulted from the fact that in Natal the Notarial Bonds (Natal) Act 18 of 1932 made special provision for and determined the legal position of special notarial bondholders. (For a discussion of the Natal act, see Scott 1981 *De Jure* 143–145; Sacks 1982 *SALJ* 609–610; Sonnekus 1983 *TSAR* 250, 1993 *TSAR* 131; Van der Walt, Pienaar and Louw 1994 *THRHR* 620–622.)

2 1 1 Special notarial bond

2 1 1 1 Description

In terms of section 2 of the Natal act movables (corporeal and incorporeal) in Natal that have been specially described and enumerated in a notarial bond are, subject to the landlord's hypothec, deemed to have been delivered to the bondholder as a pledge.

2 1 1 2 Nature of bondholder's right

(a) Before insolvency The Natal act creates a (fictitious) pledge in favour of the bondholder and, although he/she never obtains physical control of the specifically described movables (corporeal and incorporeal), he/she acquires a real security right of pledge on registration of the bond. Movables subject to such a bond are therefore immune to attachment in execution (*Mahomed v Karim* 1948 3 SA 626 (N)). This should also result in these movables not being subject to the

tacit hypothec of the lessor, but section 4 of the Natal act specifically provides that the landlord's tacit hypothec ranks in priority to the notarial bondholder's right. The fact that we are dealing here with a (fictitious) pledge excludes the possibility of third persons acquiring unfettered ownership of such movables (Van der Spuy "Cooper v Die Meester 1992 3 SA 60 (A)" 1992 *De Jure* 495 questions the advisability of this situation; see also Sacks 1982 *SALJ* 623) even if the property has been moved outside Natal (Scott 1981 *De Jure* 142 144 *et seq*; Scott 1989 *De Jure* 124, however, seems to be doubtful of this).

Since one is here dealing with a fictitious pledge, it is unnecessary for the bondholder to perfect his bond.

(b) After insolvency In terms of section 2 of the Insolvency Act 24 of 1936, a notarial bond constituted in terms of section 1 of the Natal act is a special mortgage that enjoys preference as a security. This means that the notarial bondholder in terms of the Natal act can realise his security in terms of section 83 of the Insolvency Act. The Insolvency Act specifically affords this notarial bondholder preference as a secured creditor, that is as a special mortgagee, although this is unnecessary considering the wording of section 1 of the Natal act in terms of which the movables are deemed to have been pledged (see also Sacks 1982 *SALJ* 610; Sonnekus 1993 *TSAR* 131).

Costs The Natal notarial bondholder, as a secured creditor, is liable to pay costs in terms of sections 89 and 106 of the Insolvency Act. In terms of section 89(2) he/she can also restrict this liability (see further Smith *The law of insolvency* (1988) 239; Van der Walt 1983 *THRHR* 337; Van der Walt, Pienaar and Louw 1994 *THRHR* 619).

2 1 1 3 Effect of the Security by Means of Movables Act

This act has repealed the Natal act, but the latter still applies to special notarial bonds registered in terms of it before the commencement of the Security by Means of Movables Act. Since the new act does not make provision for the registration of special notarial bonds over incorporeal movables and has repealed the Natal act, registration of such bonds in terms of the Natal act is therefore no longer possible.

2 1 2 General notarial bond

2 1 2 1 Description

A general notarial bond is a bond generally hypothecating movables, corporeal and incorporeal. The Natal act makes provision for specially described and enumerated movables and therefore does not apply to unspecified movables or movables in general. Registration of general notarial bonds was therefore still possible.

2 1 2 2 Nature of bondholder's right

Since the Natal act does not provide for this type of notarial bond, the general notarial bondholder in Natal is in the same position as general notarial bondholders in the rest of South Africa (see discussion below par 2 2 2).

2 2 Outside Natal

2 2 1 Special notarial bond

2 2 1 1 Description

A special notarial bond is a bond specially hypothecating movables, corporeal and incorporeal. This bond does not enjoy priority over a general notarial bond and priority is determined with reference to the date of registration.

2 2 1 2 Nature of bondholder's right

(a) Before insolvency This bond does not create a real right of security over such movables in favour of the bondholder. They can therefore be attached in the hands of the mortgagor and can also be subjected to the landlord's tacit hypothec. If a valid and enforceable perfection clause is included in the bond, however, the bondholder can acquire a real right of pledge on obtaining control over the bonded articles. (For a very interesting discussion of the possible constructions that can be given to this type of clause, see Sonnekus 1983 *TSAR* 252–253. See also Roos "The perfecting of securities held under a general notarial bond" 1995 *SALJ* 169 who examines the validity of such clauses in the case of general notarial bonds. Although such clauses are, and should be, included in special notarial bonds, and should also be carefully worded, I think the courts will not be as strict in their interpretation as in the case of general notarial bonds in terms of which all the movables of the debtor are encumbered. See further Février-Breed "The end of the common law special notarial bond" 1993 *THRHR* 146 and Sonnekus 1993 *TSAR* 114 on the influence of *Cooper v Die Meester* 1992 3 SA 60 (A) on the courts' interpretation of perfection clauses.) This control can be acquired in terms of the perfection clause if the debtor consents to such control or in terms of a court order for specific performance and attachment. (Van der Walt, Pienaar and Louw 1994 *THRHR* 619 err where they seem to imply that a perfection clause in a bond may make provision for the bondholder to take control of the bonded property without a court order. See further Sonnekus 1983 *TSAR* 253 and Roos 1995 *SALJ* 169: "It seems trite law that an application to court for an order enabling the applicant to perfect securities held in terms of a general notarial bond is competent." A mortgagee acting without such an order commits spoliation.)

"Perfection" is the term that denotes the moment at which a real right of security is constituted. Various stages in the creation of real rights of security can be distinguished, although these stages cannot always be completely separated. In the first stage the principal debt is created, for example, in terms of a loan agreement. The loan agreement is an obligationary agreement in terms of which the parties agree to a loan. In the second stage the parties conclude a security agreement in terms of which they agree that the principal debtor will provide security for repayment of the loan. This agreement is also an obligationary agreement and it determines the nature of the security that will be provided, for example a pledge, a mortgage bond or a notarial bond. Thusfar, however, no real right in favour of the credit grantor has been constituted and a further act is required to constitute a real right. In the case of a pledge a real agreement

together with delivery of the pledged article is required and in the case of a mortgage bond a real agreement together with registration of the bond. Delivery or registration is the means of perfecting the real security right in these cases. The position of notarial bonds other than those contemplated in section 1(1) of the Security by Means of Movables Act, is somewhat different since registration of such bonds does not confer real rights on the bondholders, but merely accords them preferential treatment in the event of insolvency. To create a real right over the bonded articles, the creditor will have to perfect his/her claim. He/she must obtain control of the bonded articles, in which event he/she will be treated as a pledgee. To obtain such control a clause to the effect that, under certain circumstances, the bondholder will be entitled to take control of the bonded articles will have to be included in the bond. Upon realisation of the foreseen circumstances, the bondholder may take control of the articles, if the debtor allows him to do so, or, if he/she refuses, the bondholder may approach the court for an order for specific performance and an attachment order. In terms of this order the creditor can then acquire control and, in doing so, he/she will perfect his/her real right of security. The notarial bondholder is then in the position of a pledgee.

Sonnekus (*Vonnisbundel* 755) states that such a bondholder is in a position "similar" to that of a pledgee, albeit not in an identical position. He gives no reason or explanation for this statement, but with reference to Sacks he (Sonnekus 1993 *TSAR* 114) states that the bondholder is *almost* in the position of a pledgee. Sacks (1982 *SALJ* 620) explains that he is in the position of a pledgee. The latter is the generally accepted opinion on this issue (see Scott 1981 *De Jure* 143 145). The whole idea of attachment is to place the notarial bondholder in control of the movables so that he/she becomes a pledgee and as such a secured creditor.

Van der Walt (1983 *THRHR* 334) unconvincingly questions the correctness of the viewpoint that a notarial bondholder in control of the movables should be regarded as a pledgee. He substantiates his argument with reference to the difference in the way in which an ordinary pledge is constituted and the notarial bondholder's pledge is constituted. He also points to the fact that the notarial bondholder in control is in a stronger position than a pledgee, since he still enjoys a measure of protection as notarial bondholder if he loses control, whereas the pledgee loses his real security right. Van der Walt refers to *Barclays National Bank Ltd v Natal Fire Extinguishers Manufacturing Co (Pty) Ltd* 1982 4 SA 650 (D) 656C–D in support of this argument. Didcott J, however, stated the position clearly:

> "The situation is transformed, on the other hand, by the property's delivery to him at any time after the mortgage, but before sequestration or liquidation. The mortgage is converted into a pledge. The mortgagee becomes a fully secured creditor, with all the privileges of one both on insolvency and in its absence. His security is thus completed or perfected."

It should, however, be borne in mind that the notarial bondholder who has obtained control in the above-mentioned way, becomes a pledgee for all intents and purposes. When he/she loses control, he/she loses his/her right of pledge, but he/she can still rely on his/her position as notarial bondholder. The ordinary pledgee also loses his/her right of pledge, when he/she loses control, but he/she has

no other form of security on which he/she can fall back. It is therefore confusing to state that such a bondholder is in a position similar to that of a pledgee or almost in the position of a pledgee. While he/she is in control, he/she is pledgee.

(b) After insolvency *Before perfection* of the security by means of attachment in terms of a court order, it was generally accepted that this special bondholder, in terms of the common law obtained a preference against the unsecured creditors over such of the bonded articles as are in the possession of the debtor at the date of his sequestration. (See Wunsh 1960 *THRHR* 112 113; Scott and Scott *Wille's Law of mortgage and pledge in South Africa* (1987) 68; Scott 1981 *De Jure* 144 and the cases referred to in fn 22; Sacks 1982 *SALJ* 611; Sonnekus 1983 *TSAR* 235 *et seq*, 1993 *TSAR* 114; Van der Walt, Pienaar and Louw 1994 *THRHR* 618. Sonnekus makes this statement with reference to Van der Merwe *Sakereg* 671, who clearly supports this view. It is interesting to note that Lubbe and Van der Merwe 1988 *TSAR* 554 state that the notarial bondholder enjoys preference on the whole free residue over the concurrent creditors. This seems to be contrary to the generally accepted idea that this bond pertains only to such of the bonded articles as are in control of the debtor at the date of sequestration.) This belief was shattered in *Cooper NO v Die Meester* 1992 3 SA 60 (A), and confirmed in *Sentraalwes (Koöp) Bpk v Die Meester* 1992 3 SA 86 (A)), where the court held that section 102 of the Insolvency Act affords preference only to the general notarial bondholder and that the special notarial bondholder enjoyed no preference and ranked equally with the concurrent creditors. (For a discussion of the possible interpretation of this section before the *Cooper* case, see Wunsh 1960 *THRHR* 112 and Cilliers "Bondholders beware – perfect your bonds before insolvency" 1992 *THRHR* 686. It is not clear from the decision whether a general notarial bond affords the bondholder a preference over the whole of the free residue or just over the proceeds of the movables in the free residue.) This case sparked a flood of criticism (see Van der Spuy 1992 *De Jure* 486; Scott (Susan) "Cooper v Die Meester 1992 3 SA 60 (A)" 1992 *De Jure* 496; Cilliers 1992 *THRHR* 682; Février-Breed 1993 *THRHR* 144; Sonnekus 1993 *TSAR* 112 *et seq*) that directly led to the hasty (Van der Spuy 1992 *De Jure* 496 actually warned against such reaction and its consequences) enactment of the Security by Means of Movables Act.

After perfection of the security by means of attachment, this special bondholder is in the position of pledgee and is treated as a secured creditor.

Costs *Before perfection* the notarial bondholder's position regarding his contribution towards the costs of administration depends on the interpretation of section 106 (see Van der Walt 1983 *THRHR* 336 *et seq*; Van der Walt, Pienaar and Louw 1994 *THRHR* 620. See further De la Rey *Mars: The law of insolvency* (1988) par 21 29) and the position before and after the *Cooper* case. Van der Walt, Pienaar and Louw foresee a problem with the determination of the contribution of the notarial bondholder in control of the movables as well as where he/she is not in control, regardless of whether the bonds were registered before or after commencement of the Security by Means of Movables Act. In the discussion under the above heading, I shall concern myself only with the position pertaining to bonds registered before commencement of the act, but I shall make a

distinction between the position before and after the *Cooper* case. In terms of the generally accepted idea that prevailed before the *Cooper* case, that a special notarial bondholder who is not in control, enjoys preference, such a bondholder was not liable to contribute towards the costs in terms of section 106, since in terms of a strict interpretation of that section he/she was neither a non-preferent nor a secured creditor. However, after the *Cooper* case, section 106 does not apply to the special notarial bondholder of a bond registered before commencement of the Security by Means of Movables Act because this section explicitly refers to "secured creditors" and "non-preferent creditors". In terms of the *Cooper* case, the special notarial bondholder enjoys no preference and is therefore a non-preferent creditor. If section 106 of the Insolvency Act is interpreted strictly, he/she is liable to contribute since, in terms of the *Cooper* case, he/she is a non-preferent creditor.

After perfection the special notarial bondholder is, to my mind, as a pledgee, a secured creditor and sections 89 and 106 find application.

2 2 1 3 Effect of the Security by Means of Movables Act

In terms of section 1(3) the special notarial bondholder of a bond contemplated in section 1(1) of the act, whose bond was registered before commencement of this act, enjoys the same preference in respect of the entire free residue as that enjoyed by the general notarial bondholder (see Van der Spuy 1992 *De Jure* 496 as to how this could also have been achieved by other means). This means that the same problem referred to above on the interpretation of section 106 of the Insolvency Act presents itself. On a strict interpretation of section 106 the special notarial bondholder envisaged above of a bond registered before commencement of the act, is now, just like the general notarial bondholder, not liable to contribute towards the costs in terms of section 106 since he/she is neither a non-preferent nor a secured creditor.

2 2 2 General notarial bond

2 2 2 1 Description

A general notarial bond is a bond generally hypothecating movables, corporeal and incorporeal. This bond does not enjoy priority over a special notarial bond and priority is determined with reference to the date of registration.

2 2 2 2 Nature of bondholder's right

(a) Before insolvency This bond does not create a real right of security in favour of the bondholder. The movables subject to this bond can therefore be attached (*Nedbank v Norton* 1987 3 SA 619 (N) 628C–E) in the hands of the mortgagor and can also be subjected to the landlord's tacit hypothec which then enjoys preference. If a valid and enforceable perfection clause (for a discussion of this type of clause and its validity, see Sonnekus *Vonnisbundel* 755, 1983 *TSAR* 252–253, 1993 *TSAR* 114, and in particular, Roos 1995 *SALJ* 169–179) is included in the bond, however, the bondholder can acquire a real right of pledge

(see discussion above of his/her position as pledgee) on attachment (see discussion above) of the bonded articles in terms of a court order.

(b) After insolvency *Before perfection* of the security by means of attachment, this bondholder enjoys preference in terms of section 102 of the Insolvency Act as regards the free residue over the concurrent creditors. This view was confirmed in the *Cooper* case.

After perfection of the security by means of attachment, the bondholder is a secured creditor, that is, he/she is regarded as a pledgee.

Costs *Before perfection* it appears as if the Insolvency Act does not make special provision for the bondholder's contribution towards the costs (see discussion above under par 2 2 1 2).

After perfection the bondholder is as a pledgee in the position of a secured creditor and his contribution is determined in terms of sections 89 and 106.

2 2 2 3 Effect of the Security by Means of Movables Act

This act does not affect this type of bond.

3 Position of bonds registered after 1993

3 1 Corporeal movables

3 1 1 Special notarial bond

3 1 1 1 Description

A special notarial bond of corporeal movables (s 1(1) of the Security by Means of Movables Act explicitly restricts the operation of this act to *corporeal* movables) registered after 7 May 1993 falls under the provisions of the Security by Means of Movables Act. In terms of section 1(1) of the act such movables, if specified and described in a way that renders them readily recognisable, shall be *deemed to have been pledged as effectually as if they had been pledged and delivered.* The act thus creates a fictitious pledge here and the position corresponds to a large extent to the position previously existing in Natal only. (Van der Spuy 1992 *De Jure* 496 warns against the serious implications of such an approach for *bona fide* third persons acquiring such hypothecated movables. Sonnekus 1993 *TSAR* 134 also criticises this approach.)

3 1 1 2 Nature of bondholder's right

(a) Before insolvency The act clearly creates a (fictitious) pledge on registration of the bond in the bondholder's favour. It is therefore unnecessary to perfect the security since such perfection will afford the bondholder no stronger protection than the act provides for. Van der Walt, Pienaar and Louw (1994 *THRHR* 619) seem uncertain as to the legislature's intention with section 1(1). They regard the method adopted by the legislature as a very clumsy way of creating a new form of real security. They also speculate about the possibility that the special notarial bondholder in terms of this act may still perfect his security.

(b) After insolvency I think the act creates a real security right in the form of a pledge and this notarial bondholder is therefore a secured creditor who can realise his claim as such in terms of section 83 of the Insolvency Act.

Costs Since the legislature in this act creates a fictitious pledge, the notarial bondholder in terms of this act is a secured creditor and his contribution towards costs is determined in terms of sections 89 and 106 of the Insolvency Act.

3 1 1 3 Noteworthy aspects of the Security by Means of Movables Act 57 of 1993

(a) The most conspicuous aspect of section 1(1) is that it is limited to corporeal movables.

(b) Section 1(3) is also interesting. It is clearly intended to rectify the position created by the *Cooper* case in making the provisions of section 102 of the Insolvency Act applicable to special notarial bonds registered before commencement of the act, that is to afford the special notarial bondholder the same protection that the general notarial bondholder enjoys. (Sonnekus 1993 *TSAR* 133 criticises such an approach and indicates that he/she should enjoy better protection. See further Van der Walt, Pienaar and Louw 1994 *THRHR* 616.) However, the wording of the section is such that it applies only to special notarial bonds contemplated in section 1(1) of the act, that is notarial bonds over corporeal movables described and identifiable in the prescribed way (see discussion above under par 2 2 1 3).

(c) Section 2 of this act excludes the movables registered in terms of the act under a special notarial bond from operation of the landlord's tacit hypothec. This is an explicit improvement of such bondholder's position since, as indicated above (see discussion under par 2 2 2 2(a)), before the commencement of the act these movables were subject to the landlord's tacit hypothec once they were attached. The position under this act also differs from the one under the Natal act where, in terms of section 4, the landlord's hypothec ranks in priority to the hypothec of the notarial bondholder.

Sonnekus (*Vonnisbundel* 759) argues that this section in the Security by Means of Movables Act has very little practical relevance since the lessor's hypothec is perfected on attachment. He argues that attachment places the lessor in the position of a pledgee and that as such he will enjoy preference over the notarial bond in terms of section 1(1) of the act.

I have some difficulty with this argument. First, attachment by the lessor does not put him in the position of a pledgee, as there is no agreement (security agreement) to that effect. Attachment here merely serves to perfect the hypothec and to prevent the debtor from removing the movables from the premises. At most, apart from perfecting this hypothec, the lessor can obtain a judicial pledge with its inherent limitations (see Scott and Scott *Mortgage and pledge* 99–101 110). Furthermore, in terms of general principles, if attachment takes place before registration of the notarial bond, the movables so attached will not be subject to the notarial bond. The act actually emphasises this by specifically reiterating it in section 2(2). If attachment takes place after registration of the bond, section 2(1) finds application.

(d) It is strange that section 4 of this act amends section 2 of the Insolvency Act to include a notarial bond registered in terms of section 1(1) of the Security by Means of Movables Act in the definition of a special mortgage, since this bondholder, as (fictitious) pledgee, can rely on the fact that he/she is a secured creditor (the same situation is thus created that existed in Natal, see discussion above under par 2 1 1 2(b)).

(e) Section 5 excludes the provisions of this act from having any effect on securities acquired by the state or state-subsidised organisations and has, rightly, been criticised for strengthening the state's already unacceptably strong position regarding securities. This type of preferential treatment reserved for the state or state-funded institutions is unacceptable (see also Sonnekus 1983 *TSAR* 254 *et seq* 759; Scott 1989 *De Jure* 119 126; Van der Walt, Pienaar and Louw 1994 *THRHR* 617. For a discussion of the different statutory security rights, see Scott 1981 *De Jure* 152 *et seq*).

3 1 2 General notarial bond

3 1 2 1 Description

As I have indicated above, a general notarial bond is a bond generally hypothecating movables, corporeal and incorporeal. Although the act specifically makes provision for a special notarial bond, it does not exclude registration of general notarial bonds. Registration of such bonds is therefore still possible.

3 1 2 2 Nature of bondholder's right

(a) Before insolvency See the discussion above under paragraph 2 2 2 2(a).

(b) After insolvency See the discussion above under paragraph 2 2 2 2(b).

Costs See the discussion above under paragraph 2 2 2 2.

3 1 2 3 Effect of the Security by Means of Movables Act

This act does not affect registration of general notarial bonds of movables.

3 2 Incorporeal movables

As mentioned above, one peculiarity of the Security by Means of Movables Act is that section 1(1) makes provision for registration of a notarial bond over corporeal movables only (see also Van der Walt, Pienaar and Louw 1994 *THRHR* 615–617). Consequently the position of a notarial bondholder of incorporeal movables registered after the act, is as follows:

3 2 1 Special notarial bond

3 2 1 1 Description

This is a notarial bond specially hypothecating incorporeal movables, such as claims. Such a bond does not enjoy priority over a general notarial bond and priority is determined with reference to the date of registration.

3 2 1 2 Nature of bondholder's right

(a) Before insolvency This bond does not create a real right of security in favour of the bondholder. If a valid and enforceable perfection clause is included

in the bond, however, the bondholder can acquire a real right of pledge on attachment of the bonded articles in terms of a court order.

(b) After insolvency *Before perfection* of the security by means of attachment, it was generally accepted that the bondholder, in terms of the common law, obtained a preference against the unsecured creditors over such of the bonded articles as are in the possession of the debtor at the date of his sequestration. As I have shown, the court in *Cooper NO v Die Meester* 1992 3 SA 60 (A) held that the special notarial bondholder enjoyed no preference and ranked equally with the concurrent creditors. To rectify this blatant inequity, the legislature, for understandable reasons, rather hastily enacted the Security by Means of Movables Act. In terms of section 1(1), however, this act is applicable only to corporeal movables and in terms of section 1(3) a special notarial bondholder of a notarial bond *contemplated in subsection (1)* that was registered before commencement of this act, enjoys the same preference in respect of the entire free residue as that enjoyed by the general notarial bondholder. The special notarial bondholder of incorporeal movables is, therefore, still in the position attributed to him/her in the *Cooper* case, that is, in the position that he/she enjoys no preference on insolvency. One can, however, argue that the *Cooper* case should be interpreted strictly so that it does not apply to a special notarial bond of incorporeals, but then the court will still have to determine the position of such bondholder and, I think, the *Cooper* case will then still have very strong persuasive value.

After perfection of the security by means of attachment of the claims, the special bondholder of incorporeal movables such as claims, is in the position of pledgee and should therefore be treated as a secured creditor.

Costs *Before perfection* this notarial bondholder is liable to contribute towards costs in terms of section 106 since he/she is a non-preferent creditor (see discussion above under par 2 2 1 2).

After perfection the special notarial bondholder of incorporeals is a secured creditor and must contribute towards costs in terms of sections 89 and 106 of the Insolvency Act.

3 2 1 3 Effect of the Security by Means of Movables Act

This act excludes incorporeal movables from the operation of the act, and it appears from section 1(3) as if it also excludes a special notarial bondholder of incorporeals from enjoying the preference bestowed on special bondholders of movables registered before commencement of the act since the section reads: "Subject to the provisions of subsection (4) *a notarial bond contemplated in subsection (1)* . . ." (my italics).

3 2 2 General notarial bond

3 2 2 1 Description

This is a general notarial bond hypothecating all incorporeal movables generally. It does not enjoy priority over a special notarial bond and priority is determined with reference to the date of registration.

3 2 2 2 Nature of bondholder's right

(a) Before insolvency This bond does not create a real right of security in favour of the bondholder. If a valid and enforceable perfection clause is included in the bond, however, the bondholder can acquire a real right of pledge on attachment of the bonded articles in terms of a court order (see discussion under par 2 2 2 2(a) above).

(b) After insolvency *Before perfection* of the security by means of attachment, this bondholder enjoys preference in terms of section 102 of the Insolvency Act on the free residue over the concurrent creditors. This view was confirmed in the *Cooper* case.

After perfection of the security by means of attachment, the bondholder is a secured creditor, that is he/she is regarded as a pledgee.

Costs *Before perfection* the bondholder does not have to contribute in terms of section 106 since he/she is neither a non-preferent nor a secured creditor (see discussion under par 2 2 2 2 above). *After perfection* he/she must contribute as secured creditor in terms of sections 89 and 106 of the Insolvency Act.

3 2 2 3 Effect of the Security by Means of Movables Act

This act does not affect the position of the general notarial bondholder of incorporeal movables. The effect of the wording of section 1(3), as I have shown above, is such, however, that it excludes the special notarial bondholder of incorporeals. Consequently the general notarial bondholder of incorporeal movables is in a stronger position than the special notarial bondholder of incorporeals who, in terms of the *Cooper* case, cannot rely on section 102 of the Insolvency Act and is, as a non-preferent creditor, liable to contribute to the costs in terms of section 106 of that act.

4 Conclusion

The law governing security by means of movables in South Africa was and still is in dire need of reform. The South African Law Commission has done valuable work and research (for a brief summary of the report of the Law Commission, see Scott 1989 *De Jure* 120 *et seq*) on this topic and it is unfortunate that the regrettable decision in the *Cooper* case necessitated the hasty introduction of the Security by Means of Movables Act. That the commission acted hurriedly appears from the wording of the act and the inconsistencies pointed out above. Apart from this and other criticism, I wish to raise two very serious points of criticism, namely the theoretically and practically unacceptable situation that an act professing to deal with security by means of movables omits to deal with security by means of claims. In the modern credit world, security by means of claims, be it as a pledge, an out-and-out security cession or a notarial bond (very little attention has been given to this form of security, apart from Lubbe and Van der Merwe 1988 *TSAR* 554 who raise some interesting questions, without addressing them thoroughly), forms by far the most important form of security. This shortcoming in the South African law of real security should be addressed as soon as possible.

In reforming the law of real security and the insolvency law serious attention should be paid to the invaluable contributions of Sonnekus (in particular, 1983 *TSAR* 230 and 1993 *TSAR* 119 *et seq*) in this regard. Special cognisance should be taken of his ideas about the difference between real security rights and preferent rights for purposes of insolvency. His very lucid and sensible explanations on the role and meaning of publicity in the fields of property law and insolvency law should be exploited and his discussions of the experience and developments in Germany and Holland can serve as a basis for reform in South Africa.

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BEYOND BELIEF – RELIGIOUS FREEDOM UNDER THE SOUTH AFRICAN AND AMERICAN CONSTITUTIONS

One of the fundamental rights protected in chapter 3 of the Constitution of South Africa Act 200 of 1993 (the bill of rights) is the right to religious freedom.

Section 14(1) of the Constitution reads as follows:

> "Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning."

South Africa has never been subjected to the kind of religious oppression found during the Communist era in the USSR, for example, when the practice of any form of religious belief was actively forbidden. In Britain, too, dissenters, Roman Catholics and Jews were discriminated against and often actively persecuted for many years. Even today, the Church of England is the official state church in the United Kingdom. However, while there has never been a state church in South Africa (although membership of the Dutch Reformed Church/ Hervormde Kerk was indeed a prerequisite for election to the Parliament of the old Zuid-Afrikaanse Republiek) the Dutch Reformed Church was in effect the unofficial state church from 1948 until fairly recently. The concept of Christian National Education, the strictness of Sabbath Observance legislation and the rules governing gambling, lotteries and censorship all reflected Calvinist rather than universally accepted Christian norms in general. The South African Constitutions of 1961 and 1983 sought to establish a kind of theocracy by including in the preamble to the Constitution a reference to Christian principles and the sovereignty of the Almighty. Recognition of the existence of religious beliefs outside the sphere of the Judao-Christian was conspicuously absent in government circles.

These attitudes have, however, been gradually changing during the past few years. One instance of the liberalising process is to be found in the case of *Hartman v Chairman, Board for Religious Objection* 1987 1 SA 922 (O) in

which the court recognised Buddhism as a religious creed for the purposes of religious objection to compulsory military service.

To return to section 14(1): there has already been some speculation about the effect which such a provision will have on South African society. There is a real fear that South Africa can no longer be described as a "Christian nation" even though the greater majority of South Africans profess to belong to the Christian faith. The debate about whether human rights are consonant with Christianity, whether we could indeed claim to have been a Christian nation (given the ever longer list of un-Christian actions that are coming to light every day) and whether increasing secularisation in public affairs will lead to a decline in moral and ethical standards, rampant pornography, and so on, is set to continue for some time yet. Leaving academic freedom aside for the moment, the immediate question is: what does freedom of conscience, religion, thought, belief and opinion entail? The concepts enumerated here certainly overlap to a substantial degree but are by no means synonymous. "Thought", indeed, is a very wide concept and may be said to embrace all forms of sentient activity. Other terms that are relevant in this context are "faith" and "creed". It should also be borne in mind that section 14 must be read with a number of other provisions in the bill of rights, notably section 15(1), which relates to freedom of speech and expression, section 17 (freedom of association), and even section 31 (language and culture) and section 32(c) (the right to establish an educational institution based on a particular religion). Finally, there is section 8(2), which proscribes unfair discrimination on the grounds of religion, conscience or belief, amongst other things.

Freedom of association is of particular interest because it illustrates the two aspects of religious freedom: on the one hand there is the right of the individual to believe what he or she wants to believe and to adhere to the religious tenets of his or her choice; on the other there is the group or associative side – the right of the individual to worship with whomsoever he or she pleases.

Thusfar the emphasis has been on the right not to be interfered with in the exercise of one's religious freedom. There is another question to be answered, however: whether freedom to believe includes freedom not to believe, just as freedom to associate implies the freedom not to associate. And to take this one step further: does the right not to believe in a supreme being include the right publicly to declare one's beliefs, and to espouse the cause of agnosticism, atheism or even satanism? This is an issue which Christians (and no doubt adherents to other faiths as well) find extremely disturbing. Purely logically, the right to believe must indeed include the right not to believe and even to express this non-belief (except that the very first phrase of the Preamble to the Constitution reads: "In humble submission to Almighty God . . .", thus arguably endorsing a theistic approach). (Theism implies a belief in God, and more specifically in one God, while deism signifies a belief in the existence of a supreme being, but not in revealed religion.)

Section 14(2) does to a certain extent acknowledge the right not to believe or at any rate not to be coerced into professing any form of religious belief. It reads as follows:

> "Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an

> appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary."

What is this going to mean in practice? The phrase "on an equitable basis" could, it is submitted, give rise to problems of interpretation. Will this mean that morning prayers at government schools will have to take account of the religious diversity within the school in question so that the readings will be taken from the Old Testament, the New Testament and the Koran, for example, in proportion to the number of Jewish, Christian and Muslim children attending the school? If it does, must the school authorities give advance notice of which religion is to feature next, to enable pupils not wishing to be present to absent themselves? And what does "free and voluntary" mean in the context of school prayers? Is it the pupil's prerogative to decide whether to participate in or attend religious observances other than those of his family, or is the decision the parents'? There are widely diverging views even within the Christian community; if all possible shades of religious opinion are to be accommodated, a great deal of tension may be foreseen. The issue has already arisen in practice in regard to the recently reported objection lodged by a parent who wished her child, who was a pupil at a non-parochial private school, not to be subjected to religious teaching of any description, not even of a general and non-denominational nature. This then raises the question whether the freedom of religion clause will have horizontal as well as vertical operation, and whether church schools will have the right to insist that pupils conform to the religious teachings of the schools in question.

Although our situation is by no means identical to that in the United States of America, there are enough parallels to render a comparison fruitful. (Both countries have a history of Bible- and rifle-toting pioneers who sought to escape from what they saw as regimes that inhibited their autonomy.) The American guarantee of religious freedom is contained in the First Amendment to the Constitution (together with the wider right to freedom of expression). It declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The free exercise provision approximates our clause, but the establishment clause goes much further. Thus one finds two kinds of judgment in the US: "establishment" cases, in which the issue is whether religion – of whatever denomination – is being accorded preferential treatment by the state (and therefore whether coercion or endorsement, even if only psychological, is present) and "interference with free exercise" cases, in which the issue is whether government action is impinging on freedom of religion, whether directly or indirectly. The American courts do not, however, appear to have devoted much attention to the question whether the Constitution in fact has two separate religious clauses, each with its own values and criteria (which may conceivably conflict) or a single religion clause with two facets (presumably reflecting the same value). Interestingly, this issue was touched on by Dickson CJ in what is perhaps the leading Canadian case on religious freedom, *R v Big Mart Ltd* 18 DLR (4th) 321. He said that he felt that recourse to the categories of American jurisprudence was not particularly helpful in the Canadian context, since the Canadian Charter (like the South African Constitution) has no establishment clause. Moreover, although the adoption of two categories in the US is an inevitable consequence of the wording of the First Amendment,

"[t]he cases illustrate, however, that these are not two separate and distinct categories . . . in specific instances 'the two clauses may overlap'" (356).

The interpretation of the establishment clause has given rise to some very acrimonious disputes, as, indeed, has the free exercise clause. It is noteworthy that there has very seldom been a unanimous finding in any of the American cases dealing with religious issues; this in spite of the fact that a list of the judges involved reads like an American judicial Who's Who: Felix Frankfurter, Thurgood Marshall, William H Rehnquist, Sandra Day O'Connor, Antonin Scalia, Hugo L Black, William J Brennan, Anthony Kennedy, Warren Burger, and so on.

The first significant effort of the Supreme Court to interpret the religion clause came in *Everson v Board of Education* 330 US 1 (1947), in which (by a majority of five to four) it upheld public funding of the transportation of pupils to and from both public and church schools. All the judges drew on the history of the clause and emphasised the part played by Thomas Jefferson and James Madison in the recognition of religious liberty. Judge Hugo L Black, delivering the judgment of the court, declared that the establishment of religion clause meant that neither the state nor a federal government may set up a church; pass laws which aid one religion, religion in general or prefer one religion to another; force or influence anyone to go to church or to stay away; punish anyone for entertaining religious belief or disbelief; or levy any tax to support religious activities or institutions. He found that the aid provided for did not breach this last requirement, since it did not support the parochial schools involved, but merely assisted parents to get their children to and from accredited schools. The "wall of separation between church and state" (to use Jefferson's famous expression) had not been breached, in his opinion. The minority agreed with the principles as enunciated above, but not with the interpretation given to them.

The interpretation which has since been given to the establishment clause has resulted in the virtual exclusion of religion from certain public programmes and from educational institutions in particular. In *Engel v Vitale* 370 US 421 (1962) it was held that it is unconstitutional to include prayers at a public school's assembly, even if attendance is voluntary; in *Wallace v Jaffree* 472 US 38 (1985) the Supreme Court went even further, proscribing even a period of silence which students were invited to use for meditation or contemplation.

Lemon v Kurtzman 403 US 602 (1971) dealt with the constitutionality of state assistance to parochial schools. The case is of major jurisprudential significance, not because the court struck down the federal grants supporting the salaries of teachers of secular subjects, but because of the tripartite test for constitutionality laid down by the court. Chief Justice Burger, delivering the judgment of the court, conceded that this is an extremely sensitive area of constitutional law, and added that the language of the religion clauses is at best opaque, making the courts' task an unenviable one. In brief, the test involves three questions: does the measure which is being challenged lack a definite secular purpose? Does it advance religion? Does it entangle government and religion? If the answer to any of these is in the affirmative, it indicates a lack of constitutionality. Both the judgment in *Lemon* and the test for constitutionality have been subjected to

criticism. It has been pointed out that to withhold state aid from church schools could effectively deny poorer families access to schools providing the religious background they would wish for their children, thus indirectly impairing their right to full religious freedom. Further, how does one define "entanglement"? If programmes for supplementing the salaries of teachers of secular subjects are taboo, but funds used for building construction are not, where does that leave direct financial assistance to the pupil concerned? What constitutes "indoctrination" or "proselytising"? Is radical sectarianism not an even greater threat to religious freedom than the milder forms of "establishment"? In the light of the judgment in *Lemon*, why should tax exemptions to religious organisations for property used solely for religious purposes not be seen as violations of the First Amendment (*Walz v Tax Commission* 397 US 664 (1970)), particularly when it is considered that Judge Burger was involved in both cases? (Why should the fact that education was in issue in *Lemon* have been decisive?) Other critics pointed out that a rigid distinction between church and state is the only reasonably certain cure for the ills of the English experience. As for the three-part test, it has not been jettisoned despite the criticism, although it has been ignored on occasion. (See McConnell "Taking religious freedom seriously" in Eastland (ed) *Religious liberty in the Supreme Court* 501:

> "It may well be that it is *Lemon* that is most responsible for the anemic enforcement of the Court's free-exercise doctrine, since a vigorous defence of the free exercise of religion is non-secular, advances religion, and often embroils government in issues of religion.")

The most recent case dealing with the establishment of religion is *Lee v Weisman* 112 Sup Ct 2649 (1992) in which the principle in *Engel* was extended to ban prayers at school graduation ceremonies. A Rabbi had been invited to offer a prayer at such a ceremony; the principal who invited him had given him a pamphlet containing guidelines for the composition of the prayers and asked him to ensure that the invocation and benediction would be nonsectarian. The court held, by a majority of five to four (Chief Justice Rehnquist and Associate Justices Scalia, Byron R White and Clarence Thomas dissenting) that this was unconstitutional. Some of the views expressed by Judge Kennedy, who delivered the majority judgment, are of particular interest. He accepted that the school had tried, in good faith, to ensure that the kind of sectarianism which so often gives rise to religious animosity would be eliminated; however, the issue was not the good faith of the authorities but the legitimacy of undertaking an enterprise such as a formal religious exercise which students are obliged to attend, if not officially, by subtle coercive pressure (both from the public and from the students' peers). One could argue that this approach minimalises or marginalises religion; the judge emphasised, however, that the First Amendment's religion clauses mean that religious beliefs and expression are too precious to be either proscribed or prescribed by the state and that the issues of religious practice and worship are responsibilities which have been committed to the private sphere. Interestingly, Kennedy J distinguished between First Amendment protection of speech and of religion: speech is protected by ensuring that full expression can be given to the individual's views even when the state participates in the debate; in religious debate or expression, on the other hand, the state is not a major

participant, nor should it be. That is why a state-imposed orthodoxy is regarded as something which puts at risk the assurance that religious faith, as expressed, is real.

The dissenting judgment of Scalia J (who is known to be one of the more conservative American judges) is also of interest, not least for its acerbic qualities. For example, he referred to the judgment in *Lemon* as fortunately only a jurisprudential disaster and not a practical one, and also pointed out that the issue of Church and state would not be such a difficult one if religion were indeed some purely private avocation that can be indulged in entirely in secret, like pornography, in the privacy of one's room.

It may appear at first glance that the "establishment of religion" cases would not have great significance for South Africa, since, as mentioned above, the South African Constitution does start with a formal obeisance to the Almighty. Cases such as those arising in the US could, however, be brought under the non-discrimination clause (s 8(2)) or even under freedom of expression or of association. However, the cases dealing with limitations on the free exercise of religion do perhaps have a more direct bearing on the South African situation. In general, the American courts have been willing to accommodate applicants wishing to be exempted from laws having an effect on their religious freedom. In the first of the "modern" cases of this nature, *Cantwell v Connecticut* 310 US 296 (1940), it was held that the conviction of Jehovah's Witnesses who were peacefully preaching their faith on a public street was unconstitutional; likewise, that a requirement that a government appointee must declare his belief in God violated the First Amendment (*Torcaso v Watkins* 367 US 488 (1961)). Government was held not to be entitled to refuse to pay unemployment compensation to a Seventh Day Adventist who lost her job because she was unwilling to work on a Saturday (*Sherbert v Verner* 474 US 398 (1963)) or to a Jehovah's Witness who left his job because of his religious beliefs (*Thomas v Review Board* 450 US 707 (1981)). In *Wisconsin v Yoder* 406 US 205 (1972) Chief Justice Burger held that Amish parents could not be compelled to keep their children in school beyond the elementary level if they object to doing so on religious grounds, although the question was asked (by Justice William Douglas in a dissenting judgment) whether the interests of the Amish children would necessarily be served by such a decision, since it deprives them of the right to be masters of their own destiny by denying them access to any but the most rudimentary education.

In a number of cases, however, the Supreme Court refused to grant exemption from the ordinary laws on the grounds of free exercise of religion: in *Goldman v Weinberger* 475 US 503 (1986) an orthodox Jew serving in the Air Force had been prohibited from wearing a yarmulke while on duty in a medical clinic in which he served. Judge Rehnquist (the present Chief Justice) simply deferred to the professional judgment of the military, holding that the subordination of personal preferences was the essence of military service. As Michael J Sandel ("Freedom of conscience or freedom of choice?" in Eastland *op cit* 495) points out, the court did not require the Air Force to show that to make an exception for Goldman would impair its disciplinary objective or acknowledge that it was a

religious duty and not merely a personal preference that was at stake. When a fundamental right is sought to be abridged, the court must ask, first of all, whether there is a compelling state interest present which overrides the individual right, and secondly, whether the means used to limit the right destroy the right as little as possible.

Sandel also seriously doubts whether it is possible for government to take a neutral stance among competing moral and religious views. The argument is that neutrality is best for both government and the state, and that it is an instrument for promoting the fundamental value, which is freedom of choice in religious matters. However, he feels that to refer to religious freedom as "freedom of choice" is to undervalue freedom of conscience or religion. Thus to argue that government should be neutral towards religion for the same reason that it should be neutral towards other competing conceptions of what constitutes the good life

> "depreciates the claims of those for whom religion is not an expression of autonomy but a matter of conviction unrelated to a choice. Protecting religion as a 'life-style', as one among the values that an independent self may have, may miss the role that religion plays in the lives of those for whom the observance of religious duties is a constitutive end, essential to their good and indispensable to their identity" (493).

If one takes this line, it is clear, for example, that Goldman did not wear a yarmulke because he liked to, but because he felt bound by a higher authority; and that the employee who refused to work on a Saturday, too, was actuated not by a whim but by a sincere belief that she should not work on the Sabbath. The phrase "dictates of one's conscience" is significant: the religious objection is based on a duty; there is no question of choice.

The court also took an unsympathetic view in two cases involving the religious beliefs of native American Indians. In *Lyng v Northwest Indian Cemeteries Protective Association* 485 US 439 (1988) members of certain tribes challenged a decision to build a road through an area in which they practised spiritual devotions. It was conceded that the construction of the road would virtually destroy the tribesmen's ability to practise their religion, and that there was no compelling state interest present, but the court nevertheless simply decided that the government could do what it pleased with its land. The problem (see McConnell "Taking religious freedom seriously" in Eastman *op cit* 501–502) is that all three parts of the *Lemon* test were complied with; as a result, the government evidently was faced with a choice between violating *Lemon* and saving the Indians' religion, or saving *Lemon* and violating their religion: "This dilemma is the predictable result of a legal formula that does not distinguish between advancing *religion* and advancing *religious freedom*."

The case of *Employment Division v Smith* 485 US 660 (1990) was not nearly as straightforward (although it attracted a great deal of negative comment in the press and from academics); here it was held that the government may deny unemployment benefits to persons dismissed for illegal drug use even if the use of the drug is religiously based. The law of the state of Oregon prohibited the intentional possession of a "controlled substance" not medically prescribed. The applicants had been fired from their jobs with a drug rehabilitation organisation for smoking a hallucinogenic drug, peyote, which was used for sacramental

purposes at a ceremony of their church. They were judged ineligible for unemployment benefits because they had been dismissed for "work-related misconduct". The judgment is described by Glendon ("Religion and the court: a new beginning?" in Eastland *op cit* 479) as symptomatic of a simplistic reflexive deference to the elected branches of government which is highly threatening to small, unpopular or unconventional religions. She hastens to add that it is not so much the result of cases such as *Smith* and *Goldman* that she finds disturbing (after all, one could arguably justify the *Smith* decision easily enough in terms of national policy needed to combat an important social problem); the trouble lies with the mechanical approach of the majority of the court whereby free exercise is automatically subordinated to state interest without examining the cogency of the state interest and the burden imposed on free exercise. Scalia J simply stated (in *Smith*) that laws which are generally applicable and (on the face of it, though he did not add this) religion-neutral, need not be justified by a compelling state or governmental interest if they have the effect of burdening a particular religious practice.

The American religious clauses set out to achieve neutrality by prohibiting establishment of religion and guaranteeing free exercise of religion. It is clear from an examination of some of the judgments on religious freedom that have emanated from the US in the past fifty years or so, that this ostensibly simple solution has not produced consistently fair or satisfactory results. McConnell ("Religious freedom at a crossroads" 1992 *Univ of Chicago LR* 115) takes the view that the over-zealous enforcement of the ban on establishment of religion, aimed at achieving neutrality in religious issues, in fact constitutes an "invidious [insidious? – sic] preference for the secular in public affairs" and that the exclusion of religion from public affairs is a form of discrimination which in fact endorses secularism as a kind of countervailing faith. In "Taking religious freedom seriously" (in Eastman *op cit* 497) McConnell pleads for the religious freedom clause to be viewed in historical perspective: it is part of the First Amendment and its adoption was "one of the first effective exertions of political muscle by minority groups in the US". It was

> "not intended as an instrument of secularization, or as a weapon that the non-religious or anti-religious could use to suppress the effusions of the religious. The Religion Clauses were intended to guarantee the rights of those whose religious practices seemed to the majority a little odd" (499).

Although non-believers were protected, they were not the main focus of the clause.

On the other hand, Sullivan ("Religion and liberal democracy" 1992 *Univ of Chicago LR* 195) feels that the more traditional view as adopted by McConnell leads to public affairs being conducted as the strongest religious faiths dictate and thus discriminates against minority views or views that do not represent what she describes as "mainstream Christianity". She feels that public policy is not a matter to be decided on the basis of a particular faith: "Neither Bible nor Talmud may directly settle, for example, public controversy about whether abortion preserves liberty or ends life."

As the above discussion has illustrated, many of the American cases dealing with the establishment issue emanate from the school system: there are further examples, such as state laws forbidding state schools to teach evolution, or requiring schools to teach "creation science" if they do teach evolution; or claims by fundamentalist Christians that their "free exercise rights" are impaired if their children are taught secular or humanist values in school. It is clear that the problem is not confined to morning prayers or religious instruction classes. The place of religious teaching in schools, both direct and indirect, remains a burning issue because it touches on parental rights and on the universal question of public interest. (For the same reason, the most crucial issue in the censorship debate revolves around the influence of pornography on young children.) By contrast, Sabbath observance laws and labour practices that discriminate against employees who refuse to work on certain days for religious reasons no longer enjoy the same prominence they did in the past.

Despite the absence of an establishment clause in our Constitution, it may be predicted that South Africa may have to face the same challenges as the United States as the dividing line between church and state becomes more distinct and greater secularisation follows on increased tolerance of other-mindedness. There is undoubtedly a great deal of truth in Sullivan's statement that "majority practices are myopically seen by their own practitioners as uncontroversial". According to her, the establishment clause bars not only coercion, but also endorsement and even acknowledgment of religion.

One may ask where the South African Constitution stands in relation to these three criteria: there is little doubt that section 14(1) precludes coercion. Arguably, however, neither endorsement nor acknowledgment is excluded. Section 14(2) provides for acknowledgment at the very least, as does 14(3) which reads:

> "Nothing in this chapter shall preclude legislation recognising–
>
> (a) a system of personal and family law adhered to by persons professing a particular religion; and
>
> (b) the validity of marriages under a system of religious law subject to specified procedures."

In fact, both provisions may be said not only to acknowledge but also to endorse religion in the broad sense, though not any specific creed or denomination.

It is difficult to conceive of South Africans agreeing with Sullivan's contention that religion is the one topic that is off limits to government in the course of the performance of government functions. This would mean that a political leader taking the oath of office could not, as Mr FW de Klerk did at his inauguration as Executive Deputy President, include his own personal religious manifesto in his oath.

The question of endorsement and acknowledgment could certainly arise not only in the context of religious teaching or practices in schools, but also in financial issues. For example, would it be constitutional for the state or a local authority to exempt church property from rates and taxes? Any party seeking to challenge such an obvious endorsement of organised religion would rely not only on section 14, but also on section 8(2), which outlaws discrimination. In this regard both the direct and the indirect effect of financial measures must be

scrutinised. It is not difficult to argue that taxpayers are entitled not to subsidise a particular religion. But can one also argue that taxpayers have a right not to subsidise religion as opposed to non-religion? This indirect discrimination is the issue which is likely to increase in importance; overt discrimination against religion in general or any particular religion will be difficult to justify in terms of most modern constitutions.

The most pressing problems likely to arise in the context of religious freedom in South Africa may relate to applications for exemptions from the normal laws of the land on religious grounds (for example, from parents who wish to educate their children themselves for religious reasons); however, they are more likely to concern limitations on the free exercise of religious freedom in terms of section 33 (and possibly even s 34) of the Constitution.

Section 33(1) provides that all the rights entrenched in the bill of rights may be limited by law of general application, provided that the limitation is (i) reasonable; and (ii) justifiable in a democratic society based on freedom and equality. In addition, some rights (including the right to freedom of religion) may be limited only if the limitation is, in addition to being reasonable, also *necessary*. This places religious rights in the "most protected category" (see Mureinik "A bridge to where? Introducing the interim bill of rights" 1994 *SAJHR* 44–45). Law of general application refers to all law, including common law and subordinate legislation, and not only to parliamentary legislation. "Of general application" could prove to be a difficult term to define: it is not necessarily synonymous with "universal application", but goes wider than "individual application". It may arguably refer to communities or groups of persons, therefore. The idea that people can be classified into groups or categories became anathema to many South Africans as a result of apartheid legislation such as the Group Areas Act. It is therefore predictable that restrictive legislation which is applicable to certain groups will be scrutinised very carefully by the courts. In the end, the criterion will probably be that the classification must not rest on discrimination as defined in section 8(2). To take a very obvious example: legislation barring Buddhists from public office would not qualify as "law of general application" – quite apart from the fact that it would fail the reasonableness, necessity and justifiability tests into the bargain!

The reasonableness of the envisaged action is something which will fall to the courts, and more particularly the constitutional court, to decide. At this stage it is not possible to say just how the term will be interpreted, but it seems likely that the limitation will be required to be both subjectively and objectively reasonable. Necessity obviously sets a very high objective standard and it may be foreseen that it will be difficult to persuade a court that a limitation on a religious right is indeed necessary rather than merely reasonable or even justifiable. (Religious rights are, in addition, among those that may not be suspended at all during a declared state of emergency.)

While reasonableness has long been a vexed issue in South African administrative law, the criterion of justifiability is one which is altogether new to South African public law. It is submitted that it means more than rationality but slightly less than objective reasonableness. There must at least be an acceptable logical

connection between the reasons given for the limitation and the measure taken; clearly all relevant factors must be given due weight; and, it may be argued, the limitation must not be disproportionate to the result sought to be achieved in the public interest. Our courts have already turned to the criteria laid down in the Canadian case of *R v Oakes* 26 DLR (4th) 200: when limitations on fundamental rights are sought to be justified, there is a two-stage inquiry. In the first stage it must be determined whether a right has indeed been infringed; the onus to prove infringement rests on the applicant. In the second stage, the onus rests on the party seeking to justify the limitation. The test as applied in *Oakes* identifies the two central issues of weight and means: in brief, the objective sought to be achieved by the limitation must be "pressing and substantial" (cf the American phrase "compelling state interest"); and the limitation itself must meet the requirement of proportionality – in other words, it must be rationally connected to the objective, must impair the right or freedom as little as possible, and there must be a balance between the effects and the objectives of the limitation.

It is significant that freedom of religion, like freedom of expression, features in the hallowed First Amendment to the American Constitution. The link between the two is summed up by David AJ Richards ("Free speech as toleration" in Waluchow (ed) *Free expression* 37):

> "[T]he US doctrines of religious liberty and free speech are pivotal constructive components of the kind of reasonable public argument in terms of which excesses of *political* power must be justified" (emphasis mine).

He explains further (41) that the pattern of intolerance which is familiar in unjust religious persecution occurs in the censorship of speech as well. Thus there is an obvious analogy between the kind of freedom of speech which permits both subversive political advocacy and subversive religious advocacy. Freedom of conscience ranks so high in Richards's mind as a right that should be constitutionally immune from political power, that he describes it as "the right that enables persons . . . to be the sovereign moral critics of values, including political values like the legitimacy of government" (*ibid*).

Would we be prepared to go as far as the Americans in permitting subversive advocacy (whether political or religious) or would we be more inclined to follow the German example, and accept the German model of militant democracy, and draw the line at freedom of expression (or religion) that threatens the fabric of democracy? Should we regard speech which is offensive to the religious sensibilities of a section of the community as an evil to be dealt with by the state or as something the people themselves can counter? In other words, is legislation proscribing religiously disrespectful or offensive speech (or pornography or "hate speech"?) not a form of paternalism which illegitimately transfers the enforcement of the individual's rights to the state? Richards thinks it is; he does not deny that some speech may be corrupt or offensive, but holds that the state is not the proper enforcer of the right to respect or the arbiter of good or bad conscience. This is something which should remain within the domain of public debate. As Thomas Jefferson put it: "It does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg" (from *Notes on the State of Virginia* quoted by Richards 39). But will such a

philosophy work for a fledgling democracy struggling to overcome a legacy of insult and denigration and lack of tolerance for the views of others? Was Jefferson not oversimplifying the issue anyway?

In the end, limitations on religious freedom must be weighed up against competing fundamental rights as well as the rights and interests of the community at large. The acceptance that those whose religious views may be diametrically opposed to our own, have as much right as we do to profess their beliefs and to proselytise if they wish, will not come easy to most South Africans; tolerance is one of the virtues that have been in very short supply throughout our history. As McConnell "Taking religious freedom seriously" (503) explains, it is true that even endorsement (let alone coercion) sends a message to non-adherents that they are outsiders, and this could be seen as an indication of unconstitutionality. True religious tolerance, however, should permit people to be outsiders if they wish, to be different (cf the *Goldman* case *supra*). Religious tolerance does not mean that one must accept the moral or religious rightness of the other point of view:

> "The danger of suppressing the conscientious practice of a religious minority is greater than the advantage to be gained by allowing the majority's moral precepts to be enforced universally . . . [We must] recognise that protecting religious minorities will sometimes mean protecting and perpetuating practices we deem morally repugnant . . . Only if we have very powerful reasons – a compelling justification – independent of any purpose of enforcing moral and religious homogeneity for its own sake can the government intervene" (505).

The test for constitutionality in religious issues suggested by McConnell (506) could be of value in the South African context, if read with the Canadian approach and if due regard is had to the requirement of necessity in our own limitation clause:

(a) A law or policy will be unconstitutional if it increases uniformity either by inhibiting or by forcing a particular view.

(b) A law or policy will be unconstitutional if enforcement interferes with a religious body in matters of *religious* significance.

(c) Violation will be permissible only if it is the least restrictive means of protecting others or ensuring equitable treatment in regard to burdens and benefits.

In my view, the most important lessons to be learnt from the American experience is that we should be aware of the complexity of the issues arising from religious freedom, and that we should try to avoid some of the extremes of that country's jurisprudence. As McConnell warns, the kind of public secularism that seems to have infected that society could lead to a demand for freedom *from* religion rather than for freedom *of* religion. The result is a dull and conforming secularism rather than religious diversity and tolerance.

Perhaps, after all, we could do worse than to heed the words of the prophet Micah (6:8) (with no apology for the theistic slant!):

> "He hath shewed thee, o man, what is good: and what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?"

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FREEDOM OF CONTRACT AND CONSTITUTIONAL RIGHTS: A NOTEWORTHY DECISION BY THE GERMAN CONSTITUTIONAL COURT

1 Introduction

German constitutional law places a high premium on the protection of human dignity. This concept, dealt with in section 1(1) of the German Constitution, has often been described as the fundamental principle (*Grundnorm*) on which the relationship between state and citizen is based. All law, it is further argued, should reflect due respect for the protection of the dignity of the human person (see Stern *Das Staatsrecht der Bundesrepublik Deutschland* Bd III/I (1988) 15 *et seq*). Closely related to the concept of human dignity is the provision protecting the right to the free development of the human personality in section 2(1). This provision is regarded as giving expression to the substantive meaning of human dignity (Maunz, Dürig, Herzog *Grundgesetz Kommentar* Bd 1 (1976) 3) and embodies the idea that the dignity of the human person is indissolubly linked to the widest possible development of the human personality in all spheres of life. In the realm of private law, aspects of a person's personality, such as dignity, reputation and privacy, and freedom of economic activity and contract, have a direct bearing on the concretisation of the constitutional provisions dealing with human dignity and the development of the human personality (Stern 657 658; Von Mangoldt, Klein, Starck *Grundgesetz Kommentar* Bd 1 (1985) 209 *et seq*).

2 Suretyship and constitutional rights

In October 1993 the German constitutional court was called upon to apply these principles in a case concerning a civil court's obligation to scrutinise contracts of suretyship which cause an undue burden to rest on the guarantor (BverfG 89 214). The facts of the case were fairly simple. The applicant, a twenty-one-year old woman, agreed to sign a contract of suretyship in 1982 to secure a loan her father obtained from a bank. It was common cause that at the time of signing the contract the applicant, who had no professional education, was often unemployed and had to rely on a meagre monthly net salary of 1150 DM for working in a fish factory. A few years later the bank terminated the father's credit facilities – outstanding debt amounted to 2,4 million DM – and informed the applicant that she would be held liable under the contract of suretyship for the repayment of an amount of 100,000 DM.

After an unsuccessful attempt in a state court to have her liability annulled, the applicant's case was brought before a state court of appeal (*Oberlandesgericht*). There the court held the view that the bank had a duty properly to inform the applicant about the possible consequences of the contract of suretyship and the extent of her liability. In the present instance the bank representative had failed to comply with this duty and the applicant had therefore to be relieved of her obligations under the contract. On the strength of evidence presented to it the

court concluded that the bank representative had dismissed the risks as trifling. For instance, it was common cause that he had uttered the following words to the applicant: "Please sign here. You won't assume any serious obligation, I merely need it for my records." The federal court (*Bundesgerichtshof*) overturned this decision with the argument that the applicant was of full age and that it could be assumed that such a person should be aware of the liabilities attached to suretyship.

The applicant subsequently lodged a constitutional complaint which was declared admissible by the constitutional court. In this forum the applicant relied on sections 1(1) and 2(1) of the Constitution, arguing that the economic burden flowing from the contract violated her human dignity in that she was forced to accept living conditions reducing her to an object and restraining her financial freedom to such an extent that she could not maintain a dignified existence. With reference to section 2(1) she also argued that freedom of contract should not be allowed to obscure a misuse of power by market-controlling enterprises against subordinate contractual parties.

Central to this approach was the interpretation and application of certain provisions of the German Civil Code (*Bürgerliches Gesetzbuch*), namely sections 138 and 242. Section 138 declares all contracts that are in conflict with the *boni mores* null and void, while section 242 obliges the debtor to perform in good faith. Where civil courts are called upon to concretise general clauses such as these, the constitutional court pointed out that the principles in the fundamental rights section of the Constitution contain decisive guidelines for all areas of the law. These principles find their way into all areas of the law through general clauses such as sections 138 and 242 of the Civil Code. Where civil courts fail to take cognisance of the fundamental rights section of the Constitution to the detriment of a party to a legal process, this will amount to a violation of fundamental rights (229). In compliance with earlier decisions, the constitutional court explained its function in this regard as safeguarding the constitutional norms from violation by other courts and not as examining the interpretation and application of ordinary law.

Turning to the nature of the contract of suretyship, the court discovered that the applicant had undertaken an exceptionally high risk without obtaining a financial interest in the credit. Her financial obligations under the contract were also described as strikingly disproportionate to her income. In such circumstances, the bank should easily have foreseen that the applicant would never be able to free herself from the financial obligations flowing from the contract of suretyship. These facts should have prompted the bank to give due consideration to the reasons for and preconditions of the contract and to inform the applicant properly about the nature and scope of her obligations. The result of the bank's failure in this regard was a contract which negated the principle of contractual equality in that one party (the bank) obtained such a superior position that it could one-sidedly determine the contents of the contract, causing the applicant to overburden herself. The duty of civil courts to interfere correctively in such instances flow, *inter alia*, from the guarantee of a person's private autonomy in section 2(1) of the Constitution. In validating a contract which supplanted

private autonomy with outside control the federal court violated the spirit of section 2(1) of the Constitution and its decision should be overturned. Furthermore, the ethics of private law, as expressed by the provisions of the Civil Code, likewise embody the notions of contractual equality and a balance of interests, and civil courts are thereby obliged to scrutinise contracts which are incompatible with such notions. An infringement of constitutional provisions, such as the guarantee of private autonomy in section 2(1), comes into play when the issue of contractual equality has been ignored or where it has been addressed with inappropriate measures (232–234).

This judgment, reapplied by the constitutional court and followed by the federal court a year later (1994 *NJW* 2749; 1994 *JZ* 905), is regarded as a watershed decision in the law of contract (see Grün "Das Ende der strengen BGH-Haftungsrechtsprechung" 1994 *NJW* 2935). However, certain problems regarding the implementation of the court's reasoning have also been highlighted. Adomeit ("Die gestörte Vertragsparität – ein Trugbild" 1994 *NJW* 2467 2468), for instance, considers the notion of contractual equality as applied by the court unrealistic. The rich diversity in contractual relationships associated with the modern economy contains many examples of contracts between unequal parties and to set contractual equality as a general standard would result in a boundless uncertainty with regard to legal remedies for non-compliance with contractual obligations. Adomeit also accuses the court of utopian and romantic ideals in that the court's terminology is reminiscent of the neo-Marxist Frankfurt School's critique of power relations in capitalist societies. The kind of control over contractual relationships which the court envisaged, is, according to Adomeit, in the final analysis not so different from the state control that nazi-sympathetic scholars propagated in the thirties to oust un-German legal relationships such as those inspired by the Roman law principles of contract.

3 Comment

Perhaps Adomeit's criticism is too harsh. The court itself stated that not every distortion of equality of contract should engage the remedial action of the courts. Legal certainty would forbid a too eager intervention in contractual relationships. Only in cases where the structural subjugation of a contractual party is discernible and the results of the contract excessively burdensome, should the civil law order intervene to remedy the situation (BverfG 89 232). The importance of this decision lies in its confirmation of the court's jurisprudence, stretching over several decades, that constitutional rights apply to all aspects of the law, affecting even horizontal relationships of a private law nature through the application of constitutional rights in the interpretation and application of general private law principles. This practice has now become well-established and is usually referred to as the indirect application of constitutional rights in private law relationships (see also Honsell "Bürgschaft und Mithaftung einkommens- und vermögensloser Familienmitglieder" 1994 *NJW* 565 566). The judgment has once again demonstrated that the duty of the state to oversee a balancing of interests is by no means restricted to the public law sphere (see also Hager "Grundrechte im Privatrecht" 1994 *JZ* 373). In addition, it has strengthened the post-war tendency to supplant *laissez-faire* liberalism in contractual

relationships with a private law order based on a substantive notion of its ethical responsibility to restrain the wayward and exploitative tendencies of market mechanisms (cf Wiedemann "Anmerkung" 1994 *JZ* 411).

Some scholars have indicated that the general language in which the court formulated its judgment justifies the conclusion that the court's message goes beyond contracts of suretyship and affects all private law transactions (Honsell 566; Wiedemann 412). Thus civil courts have been assigned the duty to examine whether legal transactions, of whatever nature, comply with the constitutional court's criteria as far as contents and procedure are concerned, provided that the distinctive nature of each transaction receives due consideration. However, it would be short-sighted not to accept that the court's judgment also has a direct bearing on how economic institutions should in future approach the conclusion of legal transactions with prospective clients or partners. In order not to run the risk of having a contractual party's liability set aside, institutions will have to be more meticulous about obtaining a meaningful choice, based on proper information, from the client and in considering the reasonableness of the terms of the contract. Perhaps the notion of the Constitution's radiation effect (indirect application) on horizontal relationships of a private law nature does not accurately reflect this kind of situation. Aspects of a person's personality and dignity have a protean disposition manifesting itself in a variety of both public and private law relationships. Consequently, where human dignity and related aspects of the human personality are involved in private law conflicts, the constitutional provisions on these matters find direct application (see also Hager 383). It is important to note that the substantive private law meaning of human dignity and the free development of a person's personality should not be confused with their source (the Constitution) which, from a formal point of view, is of a public law nature.

If one takes into account the long development in German law on the relationship between constitutional rights and private law issues, the recent South African decision on the issue in *De Klerk v Du Plessis* 1994 6 BCLR 124 (T) makes strange reading. The defendants, in the course of a civil claim based on damages resulting from the publication of alleged defamatory material in a newspaper, gave notice of their intention to amend their plea by adding a defence based on section 15 of the interim Constitution which guarantees freedom of speech and expression. Apparently this was done to open the way for an argument that section 15 has created the defence of absence of *animus iniuriandi* where newspapers are sued for defamation, which would run counter to existing South African law. In the course of his judgment, Van Dijkhorst J embarked on an exposition of the issue concerning the horizontal application of constitutional provisions. On the basis of a purposive approach (see the critical views of Du Plessis and Corder *Understanding South Africa's transitional bill of rights* (1994) 85 on the purposive approach) to the interpretation of the Constitution, Van Dijkhorst J reached the conclusion that the evil which chapter 3 of the Constitution wants to remedy is the repressive state practices of the past in relation to human rights. This, he seemed to suggest, is the first indication that chapter 3 was intended to deal only with vertical relationships, namely those

between state and citizen. This conclusion Van Dijkhorst J found to be in line with what bills of rights were traditionally intended for. Other examples supportive of this notion are the provisions in foreign constitutions indicating that constitutional guarantees have a vertical effect only. Van Dijkhorst J referred, *inter alia*, to section 1 of the German Constitution which states that the basic rights "shall bind the legislature, the executive and the judiciary as directly enforceable law". However, he accepted that the constitutional guarantees could have an *indirect* horizontal effect.

Thus the conclusion is

> "that fundamental rights and freedoms are protected against state action only. Horizontal protection sometimes occurs to a limited extent but when it is intended over the broad field of human rights it is expressly so stated".

This should also be the approach to the interpretation of chapter 3 of the interim Constitution, for to hold

> "that the bill of rights has horizontal effect, is extremely unattractive. It entails that all private rights, contracts and relationships are henceforth to be tested in the Constitutional Court against broad and vaguely defined principles. Legal uncertainty on an unprecedented scale would be the result" (131).

That this was not intended by the framers of the interim Constitution is, according to Van Dijkhorst J, ascertainable from section 7(1) of the Constitution, which states that chapter 3 binds all legislative and executive organs of state, and from section 33(4), which creates the opportunity for government to enact measures against unfair discrimination by bodies and persons not covered by section 7(1). The provision in section 7(2) subjecting "all law" to the constitutional rights in chapter 3 is interpreted by Van Dijkhorst J as referring to "all public law applicable to the State and its organs" (131).

This judgment contains some disquieting aspects. On the issue of German law alone proper research would have shown that the horizontal application, at least in its indirect form, is hardly disputed any longer, notwithstanding the seemingly contradictory intention of section 1 of the German Constitution. On the very issue of defamation the ostensible conflict between freedom of speech (s 5 of the German Constitution) and private law prescripts protecting the honour and dignity of the individual was resolved as far back as 1958 by the German constitutional court in the well-known *Lüth*-decision (BverfG 7 198). In this instance the court conceded that traditionally constitutional rights were intended to protect individual freedom against infringements by a public authority. However, the objective value system to which constitutional rights purport to give expression is underpinned by the notions of human dignity and the free unfolding of the human personality, principles which are valid for all branches of the law. The constitutional right to freedom of expression, in the words of the court, is one of the most direct revelations of the human personality and where the exercise of this right infringes upon the rights of others, it is the duty of the court to weigh the protection of the constitutional right against the interests of others. This does not entail the elimination of the essentially private law nature of the issue, but rather the giving of a specific content to, and re-interpretation of, the private law relationships in terms of the rights and interests at stake. Over the years this approach has won the support of other decisions by the German courts

(see also Stern 526 *et seq*). In a recent case dealing with posters portraying in satirical fashion the involvement of a well-known German industrialist in environmentally damaging activities, the federal court reaffirmed the guidelines, developed over years, which the courts must take into consideration when weighing up the right to freedom of speech against the private law right to personal dignity. In order to uphold freedom of speech in such circumstances the comment, opinion or information must be aimed at shaping the public opinion around an issue which is in the general interest or of political importance. Private gain or the degrading or abuse of a person must not be motivating factors (1994 *JZ* 413 415). In *Mandela v Falati* 1994 4 BCLR 1 (W) Van Schalkwyk J, deciding that chapter 3 of South Africa's interim Constitution has horizontal application, adopted a similar stance in a dispute concerning a threat to disclose information on the alleged involvement of a deputy minister in criminal atrocities. In such instances the social and political importance of the information outweighs the private interest to have one's honour protected. However, as in the *De Klerk* case, the absence of thorough comparative analysis is striking.

In all fairness, one should mention that in the *De Klerk* case the court was not called upon to decide on the effect which a constitutional right to freedom of speech could have on the existing law with regard to defamation. However, where the issue of horizontal application was an integral part of a court's judgment, as in the *De Klerk* case, comparative case law shedding light on that issue should not be ignored. While one could dismiss counsel's attempt in the *De Klerk* case to force a link between section 15 of the interim Constitution and the issue of *animus iniuriandi* as quibbling, Van Dijkhorst J's statement on the so-called disruptive effect of a horizontal application of the bill of rights is cause for concern. To talk about "legal uncertainty on an unprecedented scale" and a "constitutional invasion of the private law" should a horizontal application be allowed is, with due respect, to utter heedless statements unsubstantiated by comparative examples.

The statement that the reference "to all law" in section 7(2) of the interim Constitution should be understood as "all public law applicable to the state and its organs" and that the common law and customary law (see s 33(2)), which mainly deal with private law matters, are thus excluded from the operation of chapter 3, does not make sense. The state's legislative actions are not restricted to public law matters and private law issues are often dealt with in parliamentary legislation. If Van Dijkhorst J's statement in this regard is taken to its logical conclusion, it would mean that the state can ignore the provisions of chapter 3 when passing legislation on private law matters (see also Van der Vyver "The private sphere in constitutional litigation" 1994 *THRHR* 378 390).

Although a comparative approach to the interpretation and appreciation of constitutional rights in South Africa cannot serve as a panacea, the jurisprudence and scholarly literature built up over many years in other parts of the world can offer valuable guidance in a country where the courts are not used to constitutional litigation. In embarking on such an enterprise the interim Constitution's

invitation to look beyond our borders should be taken seriously. The temptation to turn to a few readily available American or Canadian cases is certainly understandable, but to give in to the temptation is to foreclose the great potential of enriching our fledgling human rights jurisprudence.

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ENKELE GEDAGTES OOR FUNDAMENTELE REGTE EN DIE FAMILIEREG

1 Inleiding

'n Sistematiese en presiese bepaling van die waarskynlike invloed van die handves van fundamentele regte (in hoofstuk 3 van die Grondwet van die Republiek van Suid-Afrika 200 van 1993) op die terrein van die familiereg is in hierdie stadium nog nie werklik moontlik nie: *Eerstens* is daar nie duidelikheid oor die wyse waarop die handves se horisontale werking die familiereg gaan beïnvloed nie (sien bv in die algemeen Van der Vyver "The private sphere in constitutional litigation" 1994 *THRHR* 378; Van Aswegen "The future of South African law of contract" 1994 *THRHR* 450–454). *Tweedens* is daar nog onvoldoende (en onontwikkelde) gesaghebbende aanduidings in die regspraak oor die korrekte uitlegbenadering tot die handves in die algemeen. *Derdens* skep die uiters vae begrensingsnorme waaraan fundamentele regte volgens artikel 33 van die Grondwet onderworpe is, verdere onsekerheid; en *laastens* is die huidige handves in elk geval 'n bloot tussentydse stuk wetgewing wat nog wesenlik verander kan word. In die lig van bovermelde faktore word daar in hierdie bydrae bloot by wyse van voorbeeld na sekere moontlike kwessies verwys.

2 Veranderinge in die familiereg in die pre-handves era

Reeds voor die (tussentydse) handves van fundamentele regte in werking getree het, het die wetgewer die familiereg in bepaalde opsigte gewysig – waarskynlik met die motief om dit vroegtydig beter te laat inpas by die nie-diskriminerende benadering wat onder andere uit artikel 8(2) van die Grondwet blyk (algemene verbod op onbillike diskriminasie oa op grond van geslag). Voorbeelde van sodanige aanpassings is: (a) die invoering van die stelsel van gelykhoofdige bestuur van die gemeenskaplike boedel by die huwelik in gemeenskap van goed wat 'n einde aan die dominante posisie van die man maak (a 15(1) van die Wet op Huweliksgoedere 88 van 1984); (b) die totale afskaffing van die maritale mag ten aansien van alle huwelike wanneer ook al aangegaan (a 29 van die Vierde Algemene Regswysigingswet 132 van 1993); (c) die toekenning van gelyke voogdy-bevoegdheid oor binne-egtelike kinders aan die vader en moeder (Wet op Voogdy 192 van 1993). Hierdeur het die wetgewer in die algemeen voorkom

dat bestaande regsreëls oor hierdie kwessies ingevolge die Grondwet bevraagteken word en as 't ware by voorbaat reeds die "gees, strekking en oogmerke" van die handves (a 35(3) van die Grondwet) in die familiereg laat geld.

Dit is nietemin duidelik dat die laaste woord oor die kwessies waarna hierbo verwys word, nog nie gespreek is nie. Dit is byvoorbeeld moontlik dat aspekte van die *toestemmingsvereiste* tussen gades by gelykhoofdige bestuur (a 15 Wet 88 van 1984; vgl *ook Amalgamated Bank of SA Bpk v Lydenburg Passasiersdienste BK* 1995 3 SA 315 (T)) in die toekoms aan sekere fundamentele regte gemeet sal moet word (bv die reg om vrylik aan die ekonomiese verkeer deel te neem in a 26(1) van die Grondwet). Nog veranderinge uit die tydperk voordat die tussentydse handves in werking getree het wat in die toekoms moontlik aan die handves getoets sal moet word, is die verskillende datums waarop bepaalde aspekte van die nuwe stelsel (bv die herverdelingsdiskresie in die geval van egskeiding by sekere huwelike buite gemeenskap van goed – a 7 van die Wet op Egskeiding 70 van 1979) op verskillende bevolkingsgroepe van toepassing gemaak is (vgl Barnard, Cronjé en Olivier *Die SA persone- en familiereg* (1994) 278). Daar kan moontlik aangevoer word dat daar geen aanvaarbare regverdiging bestaan vir die onderskeid wat hier tussen verskillende huwelike gemaak word nie en dat die differensiasie die verbod op onbillike diskriminasie in artikel 8(2) oortree. Moontlik kan selfs die basiese beginsel dat 'n huwelik sonder 'n geregistreerde huweliksvoorwaardekontrak altyd binne gemeenskap van goed is (bv *Edelstein v Edelstein* 1952 3 SA 1 (A) 10) en dat gades dus noodwendig hul voorhuwelikse en nahuwelikse bates met mekaar deel, oorweeg word in die lig van artikel 25(2) van die Grondwet wat bepaal dat geen "ontneming" van enige regte in eiendom anders as ooreenkomstig 'n wet toegelaat word nie.

3 Geen fundamentele reg op sluiting of instandhouding van normale huwelik nie

'n Verbasende kenmerk van die huidige handves van regte is dat dit nie voorsiening maak vir die erkenning van 'n fundamentele reg op die sluiting of instandhouding van 'n normale huwelik nie (sien in die algemeen Van Wyk 1990 *Stell LR* 186; Visser en Potgieter "Some critical comments on South Africa's Bill of Fundamental Rights" 1994 *THRHR* 494). Daar is in artikel 25(1)(d) van die Grondwet bloot 'n verwysing na die reg van 'n aangehoudene om besoek te ontvang van sy of haar "gade of lewensmaat". En in artikel 14(3) word die moontlikheid geskep dat die wetgewer in die toekoms in effek poligame huwelike (wat volgens 'n stelsel van godsdiensreg gesluit word) kan erken mits dit volgens gespesifiseerde prosedures aangegaan is.

Dit is duidelik dat die Grondwetlike Vergadering hierdie leemte sal moet vul. In byvoorbeeld 'n onlangse beslissing in Zimbabwe (*Rattigan v Chief Immigration Officer, Zimbabwe* 1995 2 SA 182 (ZSC) 188) word met goedkeuring verwys na die volgende *dictum* deur hoofregter Warren in *Loving v Virginia* 388 US 1 (1967) 12: "Marriage is one of the basic rights of man, fundamental to our very existence and survival." Daar kan ook verwys word na artikel 16(3) van die Verenigde Nasies se *Universal Declaration of Human Rights* (1948) wat oor die

"familie" handel: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." (Sien vir verdere vbe De Villiers, Van Vuuren en Wiechers *Human rights* (1992) 5 13 51 114 154 205 217 351 357.) Dat die politieke onderhandelaars (en hulle adviseurs) in Kempton Park hierdie reg nie grondwetlik wou erken nie, spreek boekdele oor hulle siening van wat regtig in die Suid-Afrikaanse samelewing van belang is. (In 'n sin kan die Suid-Afrikaanse handves as *anti* die tradisionele en beproefde gesinswaardes beskou word en mettertyd sal die gemeenskap die rekening vir hierdie uitgangspunt moet betaal.)

In kontras met die handves se totale gebrek aan aandag aan die normale huwelik, vereis die handves uitdruklik dat daar nie onbillik teen mense op grond van hulle seksuele georiënteerdheid gediskrimineer word nie. Hierdie bepaling plaas Suid-Afrika internasionaal op die voorpunt in die juridiese erkenning en beskerming van abnormale seksuele oriëntasies. In praktyk open dit ook die deur vir homoseksuele en lesbiërs om onder andere te eis dat hulle verhoudings as "huwelike" erken word ingevolge 'n nuwe huweliksregstelsel wat die gees, strekking en oogmerke van die handves beter weerspieël as wat die familiereg tans doen (sien par 4 hieronder; Visser en Potgieter *Inleiding tot die familiereg* (1994) 5).

Hopelik sal die Grondwetlike Vergadering hierdie skrynende teenstrydigheid oplos deur ten minste grondwetlike erkenning aan die normale huwelik as bousteen van 'n normale samelewing te verleen. Die erkenning van 'n reg op die instandhouding van 'n huwelik sal natuurlik nie egskeiding verhinder of noodwendig moeiliker maak as wat tans die geval is nie aangesien die bestaande egskeidingsreg waarskynlik as 'n redelike begrensing van 'n moontlike reg op die instandhouding van die huwelik gesien sal kan word. 'n Moontlike voordeel uit die erkenning van so 'n reg kan ook wees dat ander fundamentele regte wat 'n bedreiging vir die normale gesin kan inhou, hierteen opgeweeg en sodoende in 'n mate beperk kan word (bv die reg op vryheid van uitdrukking wat as regverdiging vir die verspreiding van pornografie dien en die reg om vrylik aan die ekonomiese verkeer deel te neem wat ook benut kan word om bordele en sekswinkels te bedryf).

4 Homoseksuele en lesbiese "huwelike"?

Soos hierbo gemeld (vorige par), is dit heel waarskynlik dat die verbod op onbillike diskriminasie teen mense op grond van seksuele georiënteerdheid in artikel 8(2) van die Grondwet, deur aktivistiese groepe aangewend gaan word as gesag vir die betoog dat die bestaande huweliksreg wat slegs voorsiening maak vir huwelike tussen persone van die teenoorgestelde geslag, onbillik teen homoseksuele en lesbiërs diskrimineer (sien in die algemeen Visser en Potgieter *Family law: cases and materials* (1994) 264; vgl *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W) oor die toegangsreg tot 'n kind deur haar lesbiese moeder – vir besprekings van hierdie saak sien Brits 1994 *THRHR* 710; De Vos 1994 *SALJ* 687–694).

In die populêre pers word toenemende publisiteit verleen aan aansprake dat homoseksualiteit en lesbianisme as normaal beskou moet word (sien ook in die

regsliteratuur Cameron "Sexual orientation and the Constitution: a test case for human rights" 1993 *SALJ* 450–472) en daar is selfs 'n regter van die hooggeregshof in Johannesburg wat openlik erken dat hy 'n homoseksuele oriëntasie het. Dit kan alles aanduidend wees van die skepping van 'n klimaat ingevolge waarvan die bestaande familiereg mettertyd aangepas gaan word om ook abnormale verhoudings as "registreerbare verhoudings", en later straks as volwaardige huwelike, erken te kry. Nogtans sal 'n oomblik van nadenke aan die lig bring dat die ongekwalifiseerde erkenning van sodanige "huwelike" of registrasie van sulke verhoudings ingrypende regsimplikasies oor 'n wye front sal meebring en 'n skadu sal werp op die normale huwelik as unieke element in die samelewing. Die hele regstelsel is trouens geskoei op die uitgangspunt dat net die duursame verhouding tussen persone van die teenoorgestelde geslag die status van 'n huwelik kan geniet. (Boonop is daar steeds psigiaters en sielkundiges wat persone met 'n abnormale seksuele oriëntasie behandel om hulle oriëntasie om te keer – en hulle behaal blykbaar steeds sukses in hierdie verband. Die beweerde onomkeerbaarheid van 'n seksuele oriëntasie noodsaak dus nie die juridiese erkenning van homoseksuele "huwelike" nie.)

Dit is gelukkig steeds vir die meeste redelike mense werklikheidsvreemd om homoseksualiteit, lesbianisme en bi-seksualiteit as "normaal" te aanvaar met al die gevolge wat sodanige erkenning van abnormaliteit inhou. Hopelik sal gesonde verstand ook regtens seëvier sodat die grondwetlike verbod op onbillike diskriminasie teen mense op grond van hulle seksuele georiënteerdheid so uitgelê en toegepas sal word dat dit nie die wese van die bestaande huweliksreg aantas nie.

5 Buite-egtelike verhoudings en buite-egtelike ouerskap

Daar sal in die toekoms sekerlik toenemende eise wees vir diegene wat in 'n buite-egtelike saamwoonverhouding betrokke is, dat hulle verhouding – vir sover dit nie reeds gedoen word nie – vir bepaalde doeleindes (bv pensioenbetalings, mediese voordele, ens) as huwelik erken moet word aangesien 'n teenoorgestelde beskouing onbillike diskriminasie sou daarstel. Sodanige aansprake kan moontlik ook baseer word op artikel 17 van die Grondwet wat 'n reg op vrye assosiasie skep. Voorts blyk uit artikel 25(1)(d) dat vir die besondere doel van daardie subartikel (besoek van 'n aangehoudene) 'n "gade" en 'n "lewensmaat" gelyk behandel word.

Alhoewel die algemene beginsel steeds behoort te wees dat persone wat die voordele van 'n huwelik wil geniet, 'n regtens erkende huwelik moet aangaan (bv ter wille van regsekerheid en stabiliteit in die gesin), is dit seker realisties om te verwag dat verdere toegewings aan partye tot 'n saamwoonverbintenis gedoen sal moet word op sterkte van sekere fundamentele regte (daar is trouens al 'n hele aantal voorbeelde waar die reg vir sekere doeleindes reeds buite-egtelike verhoudings met 'n huweliksverhouding gelykstel).

'n Vraag in hierdie verband is of sogenaamde "oop" huwelike regtens erken sal word – met ander woorde, huwelike waar die huwelikspartye reeds by huwelieksluiting ooreenkom dat hulle owerspel mag pleeg. Alhoewel so 'n ooreenkoms volgens die tradisionele siening van die huwelik duidelik *contra*

bonos mores is, kan daar moontlik in die toekoms bevind word dat die "gees, strekking en oogmerke" van die handves dit omtower tot iets *secundum bonos mores*. In so 'n geval sal die aksie weens owerspel teen 'n derde deur die "onskuldige" gade noodwendig in die slag bly.

'n Verdere terrein wat met buite-egtelike verhoudings verband hou en waar hervorming gaan plaasvind of verder gevoer gaan word, is die toegangsreg van die vader tot sy buite-egtelike kind (bv *Van Erk v Holmer* 1992 2 SA 636 (W) en daarteenoor *S v S* 1993 2 SA 200 (W); *B v P* 1991 4 SA 113 (T); *B v S* 1995 3 SA 571 (A); vgl in die algemeen Visser en Potgieter *Family law: cases and materials* 414–439). Daar kan onder meer betoog word dat die betreklik rigiede afwysing van so 'n reg, of die *de lege ferenda* wysigings in hierdie verband wat voorgestel word deur diegene wat met regshervorming gemoeid is, nie slegs onbillik teen sekere ouers en kinders diskrimineer nie maar boonop totaal uit pas is met 'n stelsel waar die handves as gesag kan dien vir eise om die erkenning van homoseksuele "huwelike", toegang tot kinders deur homoseksuele ouers (bv *Van Rooyen v Van Rooyen supra*), of selfs die aanneming van kinders deur persone met sodanige abnormale oriëntasie. 'n Konserwatiewe houding ten opsigte van die toegangsreg van 'n buite-egtelike vader (of selfs 'n reg op toesig en beheer), sal in die nuwe bedeling eenvoudig onvanpas wees.

6 Inheemsregtelike huwelik van swartes

Die volgehoue erkenning van inheemsregtelike huwelike van swartes in die nuwe bedeling (waarvoor daar 'n noodsaaklikheid bestaan aangesien daar volgens koerantberigte sowat 13 miljoen mense by sodanige huweliksverhoudings betrokke is) en die beperking van die inheemse reg tot swart Afrikane, bied van die grootste uitdagings aan die familiereg in die huidige en toekomstige bedelings (sien in die algemeen Bekker "How compatible is African customary law with human rights? Some preliminary observations" 1994 *THRHR* 440–447; Visser en Potgieter *Inleiding tot die familiereg* 5–7 en gesag daar aangehaal). Dit moet duidelik wees dat die inheemse huweliksreg in die algemeen nie versoenbaar is met 'n handves van regte wat grootliks in Westerse regsidees en -waardes gewortel is nie. Voorts skep die voortsetting van 'n afsonderlike regstelsel wat hoofsaaklik op ras gebaseer is, uiteraard verleentheid in die *post*-apartheid Suid-Afrika. Die enigste praktiese oplossing skyn te wees om inheemsregtelike huwelike ondanks die ander bepalings van die handves steeds as geldig te beskou ingevolge die reg op vrye assosiasie (a 17) en hierdie anomalie te wyt aan die unieke omstandighede en kulturele verskeidenheid in Suid-Afrika.

7 Sekere verouderde wetteregtelike en gemeenregtelike bepalings

Daar bestaan nog sekere wetteregtelike bepalings wat besondere beskerming aan getroude vrouens wil verleen en wat skynbaar gebaseer is op die veronderstelling dat die getroude vrou onder die maritale mag van haar man sodanige beskerming nodig het. Voorbeelde is artikel 41 van die Versekeringswet 27 van 1943 (beskikking oor polisse deur getroude vrou) en artikel 17 van die Wet op Onderlinge Hulpverenigings 25 van 1956 (voordele van vrou val buite die gemeenskaplike boedel) (vgl Barnard, Cronjé en Olivier 213–214). Voorts is

daar nog sekere gemeenregtelike bepalings waarvolgens huweliksgedingskoste waarop 'n vrou geregtig is as die huwelik nie ontbind word nie, buite die gemeenskaplike boedel val (bv *Comerma v Comerma* 1938 TPD 220). Dit moet duidelik wees dat daar beswaarlik nog nut vir sodanige bepalings is (maritale mag bestaan immers nie meer nie) en dat die klem wat op die posisie van die vrou gelê word, kwalik te versoen is met die algemene verbod op onbillike diskriminasie ten opsigte van geslag. Daar kan verwag word dat die wetgewer en die howe met verloop van tyd hierdie ou takke uit die reg gaan verwyder (sien ook oor die *actio Pauliana* Visser en Potgieter *Inleiding tot die familiereg* 99 113).

8 Internasionale familiereg

Die tans geldende beginsel is dat die vermoënsregtelike gevolge van 'n huwelik volgens ons internasionale familiereg bepaal word deur die reg van die domisilie van die *man* tydens huwelieksluiting (bv *Sperling v Sperling* 1975 3 SA 707 (A) 713 716 721). Hierdie voorkeur wat aan die regstelsel van die man gegee word, sal uiteraard gemeet moet word aan die verbod op onbillike diskriminasie teen persone op grond van geslag (a 8 van die Grondwet en a 33 oor die begrensing van regte; sien in die algemeen Stoll en Visser "Aspects of the reform of German (and South African) private international family law" 1989 *De Jure* 333–335).

9 Ander moontlike kwessies

Alhoewel dit in hierdie stadium bloot op spekulasie berus, is dit denkbaar dat die handves aspekte van die familiereg ook in die volgende voorbeelde ter aanpassing van bestaande beginsels kan beïnvloed: (a) 'n opweging van die verbod op huwelike tussen aanverwante en die reg op vrye assosiasie (en 'n moontlike reg in die finale handves om 'n huwelik te sluit); (b) 'n verdere vereenvoudiging van die formaliteite om 'n geldige huwelik tot stand te bring; (c) nuwe beginsels in die geval van die insolvensie van gades om beter beskerming te bied aan afsonderlike eiendom van 'n gade in gemeenskap van goed getroud; (d) groter erkenning en gebruik van die verskynsel van gesamentlike toesig oor kinders in die geval van egskeiding (*Venton v Venton* 1993 1 SA 763 (D)); (e) die meer geredelike toestaan van toesig en beheer oor jong kinders aan die vader in die geval van egskeiding; (f) 'n mindere geneigdheid om lewenslange onderhoud aan 'n vrou by egskeiding toe te ken (*Kroon v Kroon* 1986 4 SA 616 (OK) 632; *Singh v Singh* 1983 1 SA 781 (K) 788).

10 Slotgedagte

'n Mens vertrou dat die toekomstige benadering van die wetgewer en die regspraak tot die familiereg voldoende rekening sal hou met die volgende woorde oor die huwelik deur regter Field in *Maynard v Hill* 125 US (1887) 211–212:

> "[Marriage is] an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilisation nor progress . . . It is . . . a social relation, like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself, a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilisation, the purest tie of social life, and the true basis of human

progress . . . In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these uncontrollable by any contract which they can make. When formed, this relation is no more a contract than 'fatherhood' or 'sonship' is a contract."

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Marriage is a juristic act sui generis. *It gives rise to a physical, moral and spiritual community of life – a* consortium omnis vitae. *It obliges the husband and wife to live together for life (more realistically, for as long as the marriage endures) and to confer sexual privileges exclusively upon each other. Conjugal love embraces three components: (i)* eros *(passion): (ii)* philia *(companionship); and (iii)* agape *(self-giving brotherly love) . . . The duties of cohabitation, loyalty, fidelity and mutual assistance and support flow from the marital relationship. To live together as spouses in community of life, to afford each other marital privileges and to be ever faithful, are the inherent commands which lie at the very heart of marriage* (per Gubbay CJ in *Rattigan v Chief-Immigration Officer, Zimbabwe* 1995 2 SA 182 (Z) 188).

VONNISSE

ASPEKTE VAN DIE LASTERREG IN DIE LIG VAN DIE GRONDWET

Gardener v Whitaker 1995 2 SA 672 (OK)

Die eiser, 'n stadsklerk, het 'n lasteraksie teen 'n stadsraadslid ingestel op grond daarvan dat laasgenoemde 'n stelling in die eiser se verslag wat op 'n aksiekomiteevergadering gedien het, as 'n leuen bestempel het. Volgens die eiser was dié bewering lasterlik aangesien dit opsetlik bedoel was om die indruk te skep dat hy oneerlik is en die raadslede wou mislei. Hierteenoor ontken die verweerder dat die verklaring lasterlik was, of dat dit na die eiser verwys het, of dat hy die eiser opsetlik wou belaster. Alternatief beroep hy hom op die verwere waarheid en openbare belang en bevoorregte geleentheid (privilegie).

Volgens regter Froneman ontstaan onder meer die volgende regspunte uit die geskil (675F–H):

> "(1) whether the provisions of the Constitution are to be applied in litigation that was pending at the time of the commencement of the Constitution;
>
> (2) whether the provisions of chap 3 of the Constitution dealing with fundamental rights apply to litigation between private individuals or entities;
>
> (3) if so, whether and to what extent those provisions affect the present common law of defamation and
>
> (4) the effect of the conclusions reached in respect of the first three issues on the present matter."

Vir doeleindes van die onderhawige bespreking word op punt (3) gefokus. Ter wille van volledigheid word nietemin ten aansien van punt (1) vermeld dat volgens die regter artikel 241(8) van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 so vertolk moet word dat hoofstuk 3 van die Grondwet (Fundamentele regte) wel toepassing vind op geskille wat by die inwerkingtreding van die Grondwet nog hangend was (sien 678–680); en ten aansien van punt (2) dat hoofstuk 3 nie net geld ten aansien van litigasie tussen staat en onderdaan (sogenaamde vertikale werking) nie, maar ook op litigasie tussen onderdane onderling toepassing vind (horisontale werking) (sien 680–686). (Ander beslissings wat op die gebied van die lasterreg die horisontale werking van die Grondwet steun, is oa *Mandela v Falati* 1995 1 SA 251 (W) 257–258; *Jurgens v Editor, Sunday Times Newspaper* 1995 2 SA 52 (W) 58; *contra De*

Klerk v Du Plessis 1995 2 SA 40 (T) 45 ev.) Die regter vat sy gevolgtrekking wat laasgenoemde betref, soos volg saam (685B–686B):

> "The basic concern of the Constitution, viz to transform the South African legal system into one concerned with openness, accountability, democratic principles, human rights and reconciliation and reconstruction ... would in particular instances call for explicit application of the provisions of chap 3 of the Constitution between individuals themselves. After all, the 'past of a deeply divided society characterised by strife, conflict, untold suffering and injustice' (words used in the 'unity and reconciliation' section of the Constitution) is not merely a history of repressive State action against individuals, but it is also a history of structural inequality and injustice on racial and other grounds, gradually filtering through to virtually all spheres of society since the arrival of European colonists some three and a half centuries ago, and it will probably take generations to correct the imbalance ...
>
> A word of caution, though, may also be called for. A radical break with *all* the legal traditions of the past is not what the Constitution demands. The Roman-Dutch legal system, interpreted at its best, was 'a rational, enlightened system of law, motivated by considerations of fairness' ... What the Constitution has done is to release the common law from the shackles of institutionalised racial inequality ...
>
> It follows that, in my view, all aspects of the common law, including the present state of the law of defamation, should, in cases that now come before the courts, be scrutinised to decide whether they accord with the demands of the Constitution. To leave those areas of the common law which are in conflict with the Constitution unaffected would, in effect, if not by intent, perpetuate aspects of an undemocratic, discriminatory and unjust past."

Terwyl nie ontken word dat die waardes onderliggend aan die Grondwet 'n bevrugtende uitwerking ook op die lasterreg sou kon hê nie, wil ons ons aansluit by die regter se vermaning tot versigtigheid, naamlik dat die Grondwet nie 'n radikale breuk met alle regstradisies van die verlede eis nie. Veral op die gebied van laster het die regsbeginsels en -tradisies ontwikkel uit 'n harmonieuse samevloei van Romeins-Hollands- en Engelsregtelike beginsels wat grootliks onbesmet gelaat is deur die beleid van rassediskriminasie en tans steeds gelding in analoë stelsels soos dié in Engeland en Australië geniet (vgl Neethling *Persoonlikheidsreg* (1991) 125 vn 3).

Wat die invloed op die lasterreg van die hoofstuk oor fundamentele regte in die Grondwet betref (punt 3 hierbo), wys regter Froneman daarop dat alhoewel die goeie naam (*fama*) nie by name as 'n fundamentele reg in die Grondwet erken word nie (686D), dit wel as deel van die reg op (mens-)waardigheid ("human dignity") in artikel 10 beskerm word (690G–I). Hierdie opvatting geniet algemene steun (sien die gesag *ibid* aangehaal; Van Heerden en Neethling *Unlawful competition* (1995) 14 vn 84; Botha "Privatism, authoritarianism and the Constitution: the case of Neethling and Potgieter" 1995 *THRHR* 496 498; vgl ook *Mandela supra* 258 259; *De Klerk supra* 51). Hierteenoor word die reg op vryheid van spraak wel uitdruklik in artikel 15(1) van die Grondwet verskans. En aangesien volgens die regter die Grondwet geen hiërargie van regte skep nie, dra die regte op die goeie naam en vryheid van spraak gelyke gewig en waarde en staan hulle dus op gelyke vlak teenoor mekaar (689I–691B). Hiermee stem regter Van Schalkwyk in *Mandela supra* 259 egter nie heeltemal saam nie:

> "In a free society all freedoms are important, but they are not all equally important. Political philosophers are agreed about the primacy of the freedom of speech. It is

> the freedom upon which all others depend; it is the freedom without which the others would not long endure. This, of course, does not mean that whenever the right of freedom of speech comes into conflict to the right of human dignity the former must prevail. To allow that to happen would be to abrogate the law of defamation . . ."

Terwyl die politieke terrein – wat in die *Mandela*-saak ter sprake was – moontlik groter ruimte aan vryheid van spraak verg (sien die bespreking hieronder), steun ons die uitgangspunt dat die vermelde fundamentele regte in beginsel op 'n gelyke vlak staan ten einde 'n meer gebalanseerde afweging van belange te bewerkstellig (vgl ook Neethling en Potgieter "Laster: die bewyslas, media-privilegie en die invloed van die nuwe Grondwet" 1994 *THRHR* 518).

Wat die gemenereg betref, is die posisie volgens regter Froneman egter anders. Hier het die reg op die goeie naam in die algemeen die oorhand aangesien (a) vryheid van spraak slegs *indirekte* erkenning deur middel van die regverdigingsgronde waarheid en openbare belang, privilegie en billike kommentaar geniet (686E–F), (b) 'n volle bewyslas op die verweerder geplaas word om die bestaan van 'n regverdigingsgrond aan te toon, en (c) die media weens laster skuldloos aanspreeklik gehou word (487D–E).

(a) Wat die eerste argument betref, is dit nie korrek om die indruk te wek dat 'n reg wat "indirek" in die vorm van 'n regverdigingsgrond uitdrukking vind, ondergeskik is aan die reg wat na bewering aangetas word bloot omdat eersgenoemde reg nie by name, oftewel "direk", vermeld word nie. By die regverdigingsgronde kan dit immers oor niks anders gaan as die uitdrukking en direkte toepassing van die reg op vryheid van spraak nie omdat, regsteoreties gesien, alle regverdigingsgronde op die uitoefening van 'n *reg* deur die verweerder neerkom; dat hy binne die grense van *sy reg* opgetree het (vgl Neethling, Potgieter en Visser *Law of delict* (1994) 67). So gesien, word die reg op vryheid van spraak inderdaad in die tradisionele regverdigingsgronde vergestalt (erken en beskerm) en staan dus ook in die gemenereg in beginsel op gelyke vlak met die reg op die goeie naam. Hierdie gedagte word soos volg deur hoofregter Corbett in *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 2 SA 1 (A) 20 verwoord:

> "I agree, and I firmly believe, that freedom of expression and of the press are potent and indispensable instruments for the creation and maintenance of a democratic society, but it is trite that such freedom is not and cannot be permitted to be, totally unrestrained. The law does not allow the unjustified savaging of an individual's reputation. The right to free expression enjoyed by all persons, including the press, must yield to the individual's right *which is just as important*, not to be unlawfully defamed. I emphasise the word 'unlawfully', for, in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what another says about you, the law has devised a number of defences, such as fair comment, justification (ie truth and public benefit) and privilege, which if successfully invoked render lawful the publication of matter which is *prima facie* defamatory . . . The resultant balance gives due recognition and protection, in my view, to freedom of expression" (ons beklemtoning).

(b) Wat die bewyslas betref, wyk regter Froneman heeltemal af van die appèlhofbeslissing in *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 1 SA 708 (A) 770 waarvolgens die volle bewyslas op die *verweerder* rus om die bestaan van 'n regverdigingsgrond vir sy optrede aan te toon. Volgens die regter

is dit in gevalle soos die onderhawige waar die twee botsende regte op gelyke vlak staan,

> "eminently reasonable in practical terms . . . to require that the plaintiff who seeks to rely on the precedence of one fundamental right over another should bear the *onus* of establishing the basis of such precedence" (691D).

Hy vervolg:

> "In the common law it was up to the defendant to prove the defences which relied upon freedom of expression as their basis. The Constitution has, in my view, changed that. The plaintiff now bears the *onus* of showing that the defendant's speech or statement is, for example, false; not in the public interest; not protected by privilege; unfair comment, and the like."

'n Mens wonder of so 'n uiterste ommeswaai van die bewyslas deur regter Froneman, as gevolg waarvan vryheid van spraak klaarblyklik voorrang bo die goeie naam verleen word, geregverdig kan word in die lig van die standpunt rakende die gelykwaardigheid van die reg op die goeie naam en die reg op vryheid van spraak en die hoë waarde wat aan *beide* hierdie regte verleen behoort te word (sien egter Botha 1995 *THRHR* 498–499). Aan die ander kant sou 'n mens ook kon argumenteer dat die skaal ingevolge die *Neethling*-saak moontlik te swaar ten gunste van die reg op die goeie naam (en ten koste van die reg op vryheid van spraak) geswaai het. 'n Kompromie-benadering waardeur 'n beter balans tussen hierdie twee regte bereik sou kon word, sou wees om die *status ante quo Neethling* te herstel, naamlik dat die eiser die volle bewyslas dra om die skuldoorsaak (laster as *iniuria*) te bewys, maar dat die verweerder 'n *weerleggingslas* het om die vermoede van onregmatigheid (en dié van opset) te weerlê (sien in die algemeen 686H–687A van die onderhawige saak; Neethling *Persoonlikheidsreg* 139 ev; Neethling, Potgieter en Visser 323 ev; vgl nietemin Neethling en Potgieter 1994 *THRHR* 517–518). Sodanige benadering sou waarskynlik daarin slaag om 'n gelyker las op die partye te plaas om hul onderskeie gelykwaardige regte en die grense daarvan in die omstandighede van die geval te bevestig. Boonop sou daardeur beter uitdrukking gegee word aan die gemeenskapsgevoel van regverdigheid en billikheid wat die verweerder, wat uit eie beweging die gewraakte lasterlike woorde die wêreld ingestuur het, ook tot verantwoording wil roep (vgl appèlregter Hoexter in die *Neethling*-saak *supra* 777 mbt die verweer van waarheid en openbare belang). Laastens sou hierdie benadering 'n beter weerspieëling wees van die hoë premie wat die mens – insluitend die Afrika-gemeenskappe (sien Burchell *The law of defamation in South Africa* (1985) 22) – nog altyd op sy goeie naam, reputasie en waardigheid as kosbare persoonlikheidsaspekte plaas. Van Leeuwen (*Het Roomsch-Hollandsch recht* (1664) 4 37) het reeds die goeie naam (naas die lewe en die eer) as die kosbaarste regsgoed bestempel: "Na 't leven is niet kostelyker als de eer, en het goed gevoelen dat een ander van ons heeft" (vgl *South African Associated Newspapers Ltd v Schoeman* 1962 2 SA 613 (A) 616–617; Neethling *Persoonlikheidsreg* 50; Burchell *Defamation* 21 vn 25; sien ook *Payne v Republican Press (Pty) Ltd* 1980 2 PH J44 (D) 110–111 waar 'n persoon se reputasie as "his most prized possession" beskryf word). Hierdie siening strook ook met die uitspraak van regter Chaskalson in die resente beslissing van die konstitusionele hof in verband met die afskaffing van die doodstraf waarin hy die reg op

waardigheid (en die reg op die lewe) as die belangrikste verskanste menseregte uitgelig het:

> "The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chap 3 . . . [W]e are required to value these two rights above all others" (*S v Makwanyane* 1995 3 SA 391 (CC) 451).

(c) Indien aanvaar word dat die strikte aanspreeklikheid van die pers weens laster (*Pakendorf v De Flamingh* 1982 3 SA 146 (A); Neethling *Persoonlikheidsreg* 166) die reg op die goeie naam onbillik teenoor die reg op vryheid van spraak bevoordeel, sou 'n mens een van twee moontlikhede kon oorweeg om 'n beter ewewig tussen die twee regte te bewerkstellig.

Aan die een kant sou strikte aanspreeklikheid deur aanspreeklikheid gegrond op opset (*animus iniuriandi*) vervang kon word (vgl Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 441). In die VSA byvoorbeeld het die pendulum sedert *New York Times Co v Sullivan* 376 US 254 (1964) meer ten gunste van die pers geswaai en word 'n skuldverwyt van "actual malice", analoog aan ons *animus iniuriandi*, vereis vir aanspreeklikheid weens belastering van openbare amptenare en openbare figure. (Hiervolgens moet die eiser bewys dat die lasterlike bewerings vals is en dat die lasteraar geweet het dat hulle vals is.) Aangesien dit egter baie moeilik is om opset by die media tuis te bring – 'n belangrike beleidsoorweging waarom strikte aanspreeklikheid in ons reg ontwikkel het (sien *SAUK v O'Malley* 1977 3 SA 394 (A) 404–405–407; Neethling *Persoonlikheidsreg* 166 vn 347) – het lastereise teen die media deur openbare amptenare en openbare figure in Amerika feitlik doodgeloop: 'n toedrag van sake wat op 'n onhoudbare negering van die fundamentele reg op die goeie naam in Suid-Afrika sou neerkom en daarom nie vir ons reg aanvaar behoort te word nie.

Aan die ander kant sou nalatigheid *de lege ferenda* as basis vir aanspreeklikheid weens laster deur die media in ons reg aanvaar kon word (sien Burchell *The law of defamation in South Africa* (1985) 185 ev 193–194; vgl Neethling *Persoonlikheidsreg* 166–167 vn 347). Na ons mening lyk dit na die beste kompromie tussen strikte aanspreeklikheid wat voorkeur aan die beskerming van die goeie naam verleen, en aanspreeklikheid gegrond op *animus iniuriandi* wat die klem op die handhawing van die reg op vryheid van spraak plaas (vgl ook *Gardener* 688D–E). Soos Burchell *Principles of delict* (1993) 184 dit stel, 'n

> "negligence criterion for . . . mass media defendants would have established a fairer balance between protection of reputation and freedom of expression and would have been easier to apply in practice".

Die posisie in *Hassen v Post Newspapers (Pty) Ltd* 1965 3 SA 265 (W) illustreer die sinvolheid van 'n nalatigheids- eerder as 'n opsetsgrondslag goed. Hier het die verweerder per abuis 'n foto van die eiser gepubliseer as dié van 'n berugte verhoorafwagtende. Regter Colman aanvaar dat *animus iniuriandi* 'n vereiste vir laster is en dat dwaling *animus iniuriandi* in beginsel uitsluit. Hy meen egter dat dwaling slegs as verweersgrond aanvaar kan word as die dwaling redelik was of nie aan nalatigheid te wyte was nie. Hy bevind dat die verweerder *in casu* nalatig was, dat hy hom dus nie op dwaling kon beroep nie en dat hy aanspreeklik is. Indien *animus iniuriandi* inderdaad as aanspreeklikheidsvereiste toegepas sou

gewees het, sou die verweerder nieteenstaande klaarblyklik verwytbare (nalatige) optrede vry uitgegaan het.

Dit wil voorkom of regter Froneman, in reaksie teen die ondemokratiese en diskriminerende aspekte van die apartheidsbedeling en die daarmee gepaardgaande beperkings op vryheid van spraak, agteroorleun om vryheid van spraak ten koste van die beskerming van die reg op die goeie naam te handhaaf. (Dieselfde oorbeklemtoning vind 'n mens in die voorstel van die Konferensie van Redakteurs wat onlangs onder andere aanbeveel het dat die gemenereg, waarby die lasterreg inbegrepe is, uitdruklik ondergeskik gestel moet word aan vryheid van spraak in die nuwe Grondwet (*Beeld* 1995-08-22).) Afgesien van die voorstelle wat reeds hierbo aan die hand gedoen is ten einde 'n (hopelik) meer gebalanseerde ewewig tussen die betrokke twee regte te bewerkstellig, kan ook die volgende algemene beleidsoorwegings vermeld word wat die beskerming van die goeie naam sal laat gedy sonder om mediavryheid onredelik in te perk:

(a) Soos in Australië die geval is (volgens prof F Schauer "Free speech – conditionality and consequences", lesing gelewer te Unisa 1995-08-14), behoort die Suid-Afrikaanse mediawese oorweging daaraan te skenk om jaarliks finansieel vir moontlike lastereise te begroot, welke onkoste van die breë mediagebruikerspubliek deur 'n geringe prysverhoging van hul produk (koerant, tydskrif, of wat die geval ook al mag wees) verhaal kan word. Langs hierdie weg word persvryheid teen 'n geringe geldelike prys gewaarborg sonder dat mense se aansien in die samelewing "straffeloos" geweld aangedoen word.

(b) Naas die toekenning van genoegdoening weens laster, behoort die howe 'n diskresie te hê om 'n persoon se geskonde goeie naam deur middel van ander remedies te herstel. Hier word veral gedink aan die moontlikheid van 'n terugtrekking ("retraction") van die gewraakte laster, 'n apologie deur die verweerder, of om aan die eiser die bevoegdheid te verleen om op die laster te antwoord ("right to reply") (sien vir besonderhede Midgley "Retraction, apology and right to reply" 1995 *THRHR* 288 ev). Midgley (*idem* 296) doen in hierdie verband die volgende statutêre reëling aan die hand:

> "1 In any instance where a delictual claim has been brought in terms of the *actio iniuriarum*, a court may, irrespective of whether an award of damages is made, order a defendant to retract and apologise, or to grant the plaintiff an opportunity to reply, in such terms and on such conditions as it may deem fit.
>
> 2 Notwithstanding the provisions of section 1, a retraction and apology, or an offer thereof, and a defendant's offer to grant the plaintiff an opportunity to reply, may serve as mitigating factors in respect of any award of damages."

Sodanige reëling sou onses insiens nie net die uitwerking hê om die eiser se goeie naam te beskerm sonder om vryheid van spraak onredelik in te boet nie, maar sou in der waarheid, veral wat die reg om te antwoord betref, die reg op vryheid van spraak – weliswaar dié van die eiser – bevorder.

(c) Op politieke terrein word algemeen aanvaar dat vryheid van spraak meer ruimte behoort te geniet. Daarom is die howe geneig om, soos Van der Merwe en Olivier 398 dit stel,

> "meer speelruimte aan die politieke beriggewer of spreker toe te laat en nie geredelik 'n bevinding van onregmatigheid te vel nie, juis omdat die gemeenskap

> hier genoeë neem met 'n ietwat meer onverbloemde aanval as wat gewoonlik aanvaarbaar is".

(Sien bv *Pienaar v Argus Printing and Publishing Co Ltd* 1956 4 SA 310 (W) 318; *Marais v Richard* 1979 1 SA 83 (T) 96; *Waring v Mervis* 1969 4 SA 542 (W) 549; sien verder Neethling *Persoonlikheidsreg* 138 vn 111.) Hierdie standpunt is klaarblyklik ook in die lig van die Grondwet geregverdig. In die *Mandela*-saak *supra* 260 stel regter Van Schalkwyk dit soos volg met betrekking tot die respondent se voorgenome (beweerde) belastering van 'n kabinetsminister (applikant):

> "The public was . . . entitled to be informed about the conduct of its political leaders; particularly so when this related to criminal conduct . . . Although this is a private dispute, it is a matter of grave social and political importance. There may be a few exceptions, but in general no politician should be permitted to silence his or her critics. It is a matter of the most fundamental importance that such criticism should be free, open, robust and even unrestrained. This is so because of the inordinate power and influence which is wielded by politicians, and the seductive influence which these attributes have upon corrupt men and women. The most appalling crimes have been committed by politicians because their baseness and perversity were hidden from public scrutiny."

(Dit beteken natuurlik nie dat lasterlike politieke kommentaar geen grense het nie. Dit word bv as ageerbaar beskou indien onbehoorlike motiewe of oneervolle gedrag aan 'n politieke figuur toegeskryf word (*Minister of Justice v SA Associated Newspapers Ltd* 1979 3 SA 466 (K) 475) tensy sodanige beskuldigings redelike afleidings gebaseer op ware feite is (*Rautenbach v Republikeinse Publikasies (Edms) Bpk* 1971 1 SA 446 (W) 451; vgl Neethling *Persoonlikheidsreg* 155 vn 262).)

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VERSIGTIGHEIDSREËLS EN DIE BEOORDELING VAN DIE GETUIENIS VAN 'N KIND

S v S 1995 1 SASV 50 (Z)

In die onderhawige saak het die hooggeregshof van Zimbabwe die versigtigheidreëls in verband met die beoordeling van die getuienis van 'n kind in oënskou geneem. Die hof het in 'n meerderheidsuitspraak (waarin die appèl teen beide skuldigbevinding en vonnis afgewys is) by monde van appèlregter Ebrahim met 'n verfrissende benadering vorendag gekom ten opsigte van sowel die evaluering van sodanige getuienis as die praktiese hantering van 'n saak waarin 'n (minderjarige) klaagster getuig oor 'n seksuele misdryf.

Die feite is kortliks soos volg: die appellant, 'n onderwyser, is in 'n streekhof aangekla en skuldig bevind dat hy die klaagster (11 jr oud) verkrag het tydens 'n strafsitting wat die klaagster en ander skoolkinders na skool moes bywoon. Die wyse waarop die misdryf blootgelê is, is tereg deur die hooggeregshof as enigsins ongewoon beskryf. Die klaagster het nie die voorval by die eerste redelike geleentheid bekla (sg eerste rapport) nie. Sy het haar moeder slegs meegedeel dat die appellant haar borste, boude en die voorste deel van haar lyf betas het. Die klaagster se versuim om 'n volledige eerste rapport te maak, word deur appèlregter Ebrahim toegeskryf aan die feit dat sy getwyfel het of die appellant se optrede verkeerd was:

> "That she felt a sense of shame over the incident is self-evident, but, in my view, in a child's mind the concept of a respected teacher doing something which other adults will agree was wrong is likely to cause confusion. The incident occurred during a period when the appellant was punishing the complainant . . . To an immature and inexperienced mind what was done to her is likely to have seemed to be merely a particularised form of punishment" (52h–i).

Die klaagster het eers maande na die voorval 'n volledige klagte aan haar moeder gemaak nadat die klaagster se tante tydens 'n tradisionele voorligtingsgeleentheid vasgestel het dat sy nie meer 'n maagd is nie en dié feit deur 'n mediese ondersoek bevestig is.

Die doel met die aanbied van getuienis dat 'n klaagster in geval van seksuele misdryf by die eerste redelike geleentheid gekla het, is om aan te dui dat die klag nie 'n latere versinsel is nie. Die verloop van 'n onredelike lang tydperk tussen die voorval en die klagte sal tot gevolg hê dat die getuienis met betrekking tot die klagte ontoelaatbaar is. Dit is egter nie 'n vereiste vir toelaatbaarheid dat die klagte onmiddellik gemaak moet word nie, maar wel dat dit op die eerste redelike geleentheid moet geskied (sien Schmidt *Bewysreg* (1989) 382). Die vereiste word soos volg omskryf in *R v S* 1948 4 SA 419 (G) 423:

> "But such a complaint must have been made by the complainant to the first person to whom he might have been expected to report and laid at the first reasonable opportunity."

Appèlregter Ebrahim vermeld dat die vereiste dat 'n verkragtingslagoffer die pleging van die misdryf so spoedig moontlik moet bekla, voortvloei uit die aanname dat sy bewus was dat 'n misdryf teenoor haar gepleeg is (52g). Die hof beslis dat die vereiste van kla by die eerste redelike geleentheid, nie 'n regsreël is nie en dat uitsonderings in gepaste gevalle daarop gemaak kan word (56e). Gesien in die konteks van veral die klaagster se jeugdigheid en gevolglike onvolwasse optrede, is die hof bereid om, op grond van die afleiding dat die klaagster die beskuldigde se optrede as 'n vorm van straf beskou het, te aanvaar dat haar optrede nie doelbewus misleidend was nie en doen die hof afstand van die toelaatbaarheidsvereiste van rapportering by die eerste redelike geleentheid (56f–j).

Hierdie benadering word ondersteun. Veral in gevalle waar minderjarige klaers/klaagsters betrokke is, behoort 'n hof in aanmerking te neem dat hul optrede dikwels nie sal voldoen aan die vereistes wat normaalweg vir volwassenes gestel word nie. Daar word aan die hand gedoen dat die huidige posisie ingevolge waarvan vereis word dat by die eerste redelike geleentheid gekla moet

word, onaanvaarbaar is. Hierdie vereiste word gestel om te verhoed dat die klagte 'n latere versinsel is. Die praktiese realiteit is egter dat tydsverloop, in watter mate ook al, in ieder geval sal intree tussen die pleeg van die misdryf en die lê van die klagte en dat 'n leuen tog sekerlik in enige tydsbestek opgemaak en verkwansel kan word. Die vraag ontstaan of 'n verkragtingslagoffer wat byvoorbeeld weens emosionele trauma die voorval nie by die eerste redelike geleentheid kon rapporteer nie, billikerwys vir haar versuim benadeel behoort te word. Alhoewel daar reeds aangedui is dat die reël by klagtes aangaande seksuele misdade nie verder uitgebrei behoort te word nie (sien *R v Ellis* 1936 SWA 10 11), sal 'n ontwikkeling wat 'n diskresie aan die hof verleen om in elke geval met inagneming van al die besondere feite te bepaal of die klagte 'n latere versinsel is of nie, 'n logiese verslapping van die reël wees.

Van verdere belang vir doeleindes van hierdie uitspraak is die vereiste dat 'n klagte aangaande 'n geslagsmisdaad vrywillig gemaak moet wees alvorens dit toelaatbaar sal wees (Schmidt 381). In die regspraak word onderskei tussen dreigemente en intimidasie aan die een kant en ondervraging aan die ander kant. In *S v T* 1936 1 SA 484 (A) het 'n moeder se dreigement van geweld ten einde haar dogter te oorreed om die voorval te verbaliseer, daartoe aanleiding gegee dat die appèlhof die verklaring as ontoelaatbaar bevind het. In *R v C* 1955 4 SA 40 (N) is bevind dat 'n verklaring toelaatbaar is in 'n geval waar 'n kind sonder enige dreigement deur haar moeder ondervra is.

In die onderhawige saak het die klaagster se moeder haar ondervra nadat dit aan die lig gekom het dat sy nie meer 'n maagd was nie. Die moeder moes verder 'n dreigement dat sy by die polisie aangekla sal word, aanwend om die klaagster sover te kry om met die sak patats vorendag te kom. Ten opsigte van hierdie verloop van sake laat appèlregter Ebrahim hom soos volg uit:

> "The fact that thereafter the complainant told her story tends to confirm her naïvety, which in turn lends transparency to the truthfulness of her evidence" (53c).

Ook ten opsigte van hierdie tweede toelaatbaarheidsvereiste pas appèlregter Ebrahim die reeds ontwikkelde riglyne minder streng toe (sien *S v T* 1963 1 SA 484 (A) 497D). Dit ly geen twyfel dat die optrede van die klaagster se moeder in die omstandighede erg intimiderend was nie. Die dreigement om haar aan die polisie te rapporteer indien sy nie die waarheid sou vertel nie, moes in die omstandighede – en sou ook vir meeste kinders van hierdie ouderdomsgroep – vrees inboesem. Die hof se besluit om 'n klagte wat in sulke omstandighede gemaak is as getuienis toe te laat, kan nie ondersteun word nie. Die gevaar dat veral kinders 'n leuen kan fabriseer om die moeilike situasie vry te spring, is goed denkbaar.

Die verdere vereiste vir die toelaatbaarheid van 'n klagte aangaande 'n geslagsmisdaad, te wete dat die klaagster self getuienis moet aflê, word nie in die uitspraak bespreek nie. Daar is egter wel aan die vereiste voldoen aangesien die klaagster self getuig het.

Die eerste grond van appèl is dat die streeklanddros versuim het om die versigtigheidsreël met betrekking tot die getuienis van kinders toe te pas. Met verwysing na onder meer die beslissings in *R v W* 1949 3 SA 772 (A) en *R v J*

1958 3 SA 699 (SR) bevind appèlregter Ebrahim dat geen stawing van die getuienis van 'n kind vereis word nie tensy die getuienis van so 'n aard is dat dit nodig is om getrouheidswaarborge daarvoor in ander bronne te soek (54e-f). Die hof wys egter daarop dat die getuienis van 'n kind versigtig geëvalueer moet word en dat 'n hof die besware wat teen sodanige getuienis ingebring kan word, moet besef. Met verwysing na Spencer en Flin *The evidence of children* (1990) 238 meld die hof die volgende hoofbesware teen die aanvaarding van hierdie tipe getuienis: (a) kindergetuies is onbetroubaar; (b) kinders is selfgesentreerd; (c) hulle is hoogs vatbaar vir suggestie; (d) hulle vind dit moelik om tussen feit en fantasie te onderskei; (e) hulle maak valse bewerings – veral ten opsigte van seksuele aanrandings; en (f) kindergetuies begryp nie wat dit beteken om die waarheid te praat nie. Gedurende sy daaropvolgende behandeling van die vermelde besware aan die hand van die feite van die saak, blyk die volgende belangrike aspekte uit die uitspraak van appèlregter Ebrahim:

(a) Die hof vermeld (en aanvaar) dat navorsing aantoon dat kinders meermale 'n goeie geheue het van sentrale of hoofmomente met 'n afname in effektiwiteit ten opsigte van detail en perifere gebeure. In die verband pas die weergawe van die klaagster wat volledig ten opsigte van die verkragting kon getuig maar onseker was oor die besetting van die aanliggende klaskamer, netjies in hierdie raamwerk. 'n Belangrike aspek waarna die hof hier verwys, is die groot invloed wat die teenwoordigheid van 'n simpatieke ondervraer óf tydens die polisieondersoek óf tydens die hofverrigtinge kan hê op die suksesvolle ontsluiting van die gebeure wat in 'n kindergeheue vasgelê is (55c-d).

(b) Die aspek van selfgesentreerdheid word in die verbygaan deur die hof behandel met 'n verwysing na 'n opmerking van Spencer en Flin dat dit waarskynlik slegs voorskoolse kinders is wat in so 'n mate op hulself toegespits is dat 'n objektiewe benadering tot die waarheid daarmee onversoenbaar is. Hierop bevind die hof:

> "On this basis, there is no reason to suppose that the complainant, at age 11, was constitutionally unable to appreciate the consequence to the appellant of her not telling the truth" (55f).

Op 'n verdere vraag of die kind slegs klem lê op daardie getuienis wat hom/haarself raak in plaas van 'n gebalanseerde oorsig van die geheel, beslis die hof dat dit nie 'n probleem eie aan kinders is nie aangesien alle persone in 'n sekere mate egosentries is.

(c) Die hof verwys na verskeie faktore wat die effek van suggestie op 'n kind kan verhoog (55i–j). Veral die volgende is van belang: die kind kan sy antwoord so inklee om die vraesteller tevrede te stel of hy kan met 'n gesuggereerde/voorgestelde antwoord saamstem omdat hy aanvaar dat die vraesteller, as volwasse persoon, korrek is. In hierdie verband moet die sosiale struktuur waarin 'n kind (normaalweg) opgevoed word, naamlik om met respek teenoor volwassenes op te tree of dat 'n volwassene vanweë sy ouderdom altyd korrek is, by die evaluering van sy getuienis voor oë gehou word. Die hof merk tereg op dat "[t]here are desirable social attributes but they ill-prepare a child for the ordeal of giving evidence in court" (56a).

Daar word aan die hand gedoen dat die hof in hierdie verband waaksaam moet optree om sowel die party wat die getuienis van 'n kindergetuie aanbied as die party wat kruisondervraging onderneem, sover moontlik te laat afsien van die gebruik van vrae wat antwoorde en reaksies suggereer. Alhoewel hierdie tegniek in normale omstandighede tot die kruisondervraer se beskikking is, behoort 'n hof met inagneming van die doel waarvoor dit gevra is, die potensiële gevare daaraan verbonde en die ouderdom van die getuie, sodanige vrae tot die minimum te beperk in gevalle waar kindergetuies gekruisondervra word.

Na evaluering van die getuienis van die klaagster en nog 'n minderjarige getuie, kom appèlregter Ebrahim tot die gevolgtrekking dat geen getuienis *in casu* aangebied is wat deur suggestie ontlok is nie.

> "Children do not fantasise over things that are beyond their own direct or indirect experience" (57b).

(d) Hierdie stelling is die basis waarop die hof die beswaar hanteer dat kindergetuies moeilik tussen feit en fantasie onderskei. Na 'n deurtastende ondersoek en evaluering van die gedetailleerde wyse waarop die klaagster die voorval beskryf, kom die hof tot die gevolgtrekking dat die beskrywing te realisties en presies is om bloot die fantasie van 'n elfjarige dogter te wees.

(e) Met verwysing na die versigtigheidsreëls wat geld by klagtes van seksuele misdrywe meld appèlregter Ebrahim dat die voorkoms van valse inkriminasie waarskynlik laer is as wat algemeen aanvaar word (57i). Schmidt 126 merk op dat

> "'n versigtigheidsreël ontstaan [het] met die breë strekking dat die feitebeoordelaar bewus moet wees van die gevare aan sodanige getuienis verbonde en dat daar die een of ander beveiligende faktor moet wees wat die risiko van 'n wanbevinding verminder".

Die hof interpreteer die versigtigheidsreël *in casu* korrek deur dit te benader uit die hoek van 'n geloofwaardigheidsoordeel in plaas van 'n verswaring van die toepaslike bewyslas. Met verwysing na die feite bevind die hof dat die mediese getuienis wat aantoon dat die klaagster nie meer 'n maagd is nie – alhoewel seksueel onaktief – die feit dat seksuele omgang plaasgevind het, staaf. Verdere feite wat deur die hof in ag geneem word ter stawing van die klaagster se weergawe is die aanvanklike klagte wat deur die klaagster aan haar moeder gemaak is op die dag van die voorval, bevestiging deur 'n klasmaat van omringende feite en die beskuldigde se verweer wat deur die hof beskryf word as

> "[a] highly suspicious last-minute defence erected by the appellant at a stage of the trial when it was virtually impossible to challenge it" (59c).

(f) Met betrekking tot die beswaar dat kindergetuies nie in staat is om die verpligting te verstaan om die waarheid te praat nie, merk appèlregter Ebrahim op dat dit 'n veralgemening is wat nie erkenning verleen aan verskille in ouderdom, intelligensie en morele standaarde van verskillende kinders nie (59f). Die hof beslis dat 'n nuwe en meer doelgerigte benadering gevolg behoort te word in sake waarby kinders betrokke is, en verwys met goedkeuring na die volgende aanbeveling van 'n komitee van die British Home Office (1989):

> "Our courts should be willing to listen to children of all ages and lawyers should be willing to learn what other disciplines can teach them about the features of a child's evidence which suggest it is true or false, and the circumstances in which false complaints are likely to be made" (59g).

Sonder om afbreuk te doen aan die noodsaaklikheid van die stawingsvereiste herinner appèlregter Ebrahim daaraan dat die rede waarom stawing vereis word, nie uit die oog verloor moet word nie. Die vraag moet steeds sentreer om die geloofwaardigheid van die betrokke getuie. Die hof merk op dat 'n toets aan die hand van die tekortkominge vermeld deur Spencer en Flin die enigste wyse is waarop 'n geloofwaardigheidsoordeel oor die getuienis van veral 'n kindergetuie gevel kan word. 'n Belangrike rigtingwyser word soos volg deur die hof gegee:

> "To reach an intelligent conclusion in such an analysis it is necessary to apply, as they [Spencer and Flin] do, a certain amount of psychology and to be aware of recent advances in that discipline. This will undoubtedly mean an increase in the workload of judicial officers and the machinery of justice generally, but ways must be sought of accommodating this, as it is the price to be paid for professionally administering justice in an increasingly complex society" (60b–c).

Bogenoemde besware wat die hof behandel, is niks nuuts nie; dit is gronde waarop kindergetuienis gereeld aangeval word. Van belang is egter die feit dat die hof elke beswaar volledig behandel aan die hand van die feite van die betrokke saak. Daardeur vervaag die algemene en spekulatiewe aard op grond waarvan soms gepoog word om hierdie tipe getuienis aan te val en ontwikkel die besware tot 'n handige maatstaf waarmee die hof die getuienis kan beoordeel en tot 'n gevolgtrekking oor die geloofwaardigheid daarvan kan raak.

Gedurende the loop van sy uitspraak verwys die hof by meer as een geleentheid (55d–e 60d–h) na die onwenslikheid daarvan om in gevalle soos die onderhawige uitsluitlik van manlike hofpersoneel gebruik te maak. Die hof merk op dat deur 'n vroulike landdros en/of staatsaanklaer aan te wend, 'n klaagster moontlik heelwat verleentheid gespaar kan word en dat groter samewerking heel waarskynlik van haar verkry kan word. Hierdie benadering word ondersteun en die logika van die volgende opmerking kan nie betwis word nie:

> "Such embarrassment can only be exacerbated when the evidence must be given before an exclusively male audience because:
>
> (1) the discussion of intimate sexual matters in the presence of members of the opposite sex is normally taboo;
>
> (2) the absence of a female listener means that a female witness who has been sexually abused lacks any substantial sympathetic support. No male person can possibly understand the feelings of a female victim. It is thought probable that even very young complainants feel this almost instinctively; and
>
> (3) it is likely that a woman or girl who has been recently or badly abused will associate, if only subconsciously, all males with her assailant" (60f–h).

Hierdie probleem is in Suid-Afrika grootliks ondervang deur die bepalings van artikel 170A van die Strafproseswet 51 van 1977 (wat op 1993-07-30 in werking getree het). Die artikel maak onder meer daarvoor voorsiening dat 'n hof, in strafregtelike verrigtinge waarin dit blyk dat 'n getuie van onder die ouderdom van 18 jaar aan onredelike geestesspanning of -lyding blootgestel sal word indien hy/sy getuig, 'n bevoegde persoon as tussenganger kan aanstel ten einde so 'n getuie in staat te stel om sy/haar getuienis deur middel van die tussenganger af te lê. Die gebruik het ontwikkel dat die getuie en tussenganger in 'n afsonderlike lokaal plaasneem vanwaar hulle doen en late by wyse van geslotebaantelevisie na die hofsaal herlei word. Vrae in die hof gestel word met behulp van oorfone deur die tussenganger ontvang en in "verstaanbare" taal aan die getuie herlei;

laasgenoemde se reaksie daarop is in die hof hoor- en sigbaar. Die normale praktyk is dat vroulike tussengangers aangestel word in sake waarin kindergetuies oor seksuele misdrywe getuig. Hierdie bepaling het heelwat daartoe bygedra om nie alleen die in-verleentheid-stellende-situasie vir klaers/klaagsters in 'n ope hof te verlig nie, maar het ook die negatiewe effek teëgewerk wat 'n verdere van-aangesig-tot-aangesig-konfrontasie met die beskuldigde dikwels op kindergetuies het.

Die ondersoekende benadering wat appèlregter Ebrahim by die evaluering van kindergetuienis in die onderhawige saak gevolg het, is te verkies bo benaderings wat in die verlede al te dikwels met te veel agterdog deurspek was. Daar kan slegs gehoop word dat die uitspraak hier te lande inslag sal vind.

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HET DIE APPÈLHOF 'N NUWE JUDISIËLE MARITIEME RETENSIEREG GESKEP – MAAR SLEGS VIR DIE ENGELSSPREKENDE?

National Iranian Tanker Co v MV Pericles GC 1995 1 SA 475 (A)

Inleiding (uit 'n Afrikaanse hoek)

Die Wet op die Reëling van Admiraliteitsjurisdiksie 105 van 1983 het op 1 November 1983 in werking getree. Hierdie wet maak voorsiening dat 'n maritieme eis deur middel van 'n aksie *in rem* afgedwing kan word (sien a 3(4)). Sodanige aksie word ingestel onder andere deur die inbeslagneming van 'n skip waaroor die eiser 'n maritieme retensiereg het (sien a 3(4) en (5)). Die wet maak ook voorsiening dat 'n aksie *in rem* ingestel kan word deur die inbeslagneming van 'n geassosieerde skip in plaas van die skip ten opsigte waarvan die maritieme eis ontstaan het (sien a 3(6)).

'n Geassosieerde skip beteken

> "'n ander skip as die skip ten opsigte waarvan die maritieme eis ontstaan het en wat die eiendom is van die persoon wat die eienaar van die betrokke skip was toe die maritieme eis ontstaan het" (sien a 3(7)(a)(i)).

Volgens hierdie bepaling is dit duidelik dat die geassosieerde skip die eiendom moet wees van die persoon ten tyde van die instelling van die aksie. Die skip wat die maritieme eis laat ontstaan het, moet egter die eiendom van dieselfde persoon gewees het ten tyde van die ontstaan van die skuldoorsaak. Die woord "is" maak hierdie betekenis duidelik. Skepe wat op hierdie manier geassosieer is, is, voor die tussentydse Grondwet alle vorme van geslagsdiskriminasie verbied het, gewoonlik susterskepe genoem.

'n Geassosieerde skip beteken ook

> "'n ander skip as die skip ten opsigte waarvan die maritieme eis ontstaan het en wat die eiendom van 'n maatskappy is waarvan die aandele, toe die maritieme eis

> ontstaan het, beheer is deur, of die eiendom was van, 'n persoon wat toe die aandele in die maatskappy wat die eienaar van die betrokke skip is, beheer het of die eienaar daarvan was" (sien a 3(7)(a)(ii)).

Volgens hierdie bepaling is dit weer eens duidelik dat die geassosieerde skip ten tyde van die instel van die aksie aan die sogenaamde groepmaatskappy moet behoort. Die woord "is" maak ook in hierdie geval die betekenis duidelik. Groepmaatskappye is maatskappye waarvan die aandele beheer word deur of die eiendom is van dieselfde persoon. Hierdie verbinding tussen die maatskappye moet bestaan het ten tyde van die ontstaan van die skuldoorsaak.

Inleiding (uit 'n Engelse hoek)

Die Engelse teks van die wet omskryf 'n geassosieerde skip as 'n skip

> "other than the ship in respect of which the maritime claim arose owned by the person who was the owner of the ship concerned at the time when the maritime claim arose".

'n Geassosieerde skip in die geval van groepmaatskappye is 'n skip

> "other than the ship in respect of which the maritime claim arose owned by a company in which the shares, when the maritime claim arose, were controlled or owned by a person who then controlled or owned the shares in the company which owned the ship concerned".

Volgens die Engelse teks is dit nie duidelik wanneer die geassosieerde skip besit moet gewees het nie want slegs die woord "owned" word gebruik sonder 'n aanduiding of dit "is owned" of "was owned" moet wees. 'n Mens kan dus sê dat die uitsluitlik Engelse leser verward behoort te wees en dus 'n probleem het. Hierdie probleem is egter maklik oplosbaar deur 'n tweetalige benadering want die Afrikaanse teks is duidelik en boonop die oorspronklik ondertekende teks. In die literatuur is die teks dan ook selfs uit 'n Engelse oogpunt uitgelê om te beteken dat die geassosieerde skip se assosiasie moet bestaan het ten tyde van die instel van die aksie *in rem*. So verklaar Shaw (*Admiralty jurisdiction and practice in South Africa* (1987) 37):

> "[T]he phrase 'owned by the person' means 'owned by the person at the time of the arrest'. If, therefore, A, at the relevant time (that is, at the time of the arrest) owns a ship, that ship will be an associated ship if A, at the time when the maritime claim arose, was the owner of the ship concerned."

Die 1992-wysiging

In 1992 is die bepalings van die Wet op die Reëling van Admiraliteitsjurisdiksie ten opsigte van geassosieerde skepe gewysig. Hierdie wysiging maak dit nou in beide die Afrikaanse en die Engelse teks duidelik dat die assosiasie van die geassosieerde skip met die "skuldige" skip moet bestaan wanneer die aksie 'n aanvang neem en dat dit die oomblik is waarop die geassosieerde skip die eiendom moet wees van dieselfde persoon in die geval van susterskepe, of van dieselfde groepmaatskappye in die geval van groepskepe. Artikel 3(7)(a)(i) bepaal uitdruklik dat 'n geassosieerde skip 'n ander skip is as die "skuldige" skip en "wat die eiendom is, wanneer die aksie 'n aanvang neem" van die bepaalde persoon of maatskappy soos die geval mag wees. Die Engelse teks se bewoording is ook dat die geassosieerde skip 'n skip moet wees "owned, at the time when the action is commenced" deur die bepaalde persoon of maatskappy.

In *National Iranian Tanker Co v MV Pericles GC* moes die appèlhof beslis oor die terugwerkendheid van die 1992-wysiging. Die hof beslis by monde van hoofregter Corbett dat aangesien die wysiging bestaande regte beïnvloed en nuwe verpligtinge skep, die wysiging nie terugwerkend is nie. Hierdie gevolgtrekking kan vir huidige doeleindes aanvaar word. Die hof het egter in sy beredenering sekere argumente en voorbeelde gebruik wat van nader beskou moet word omdat hulle sekere implikasies het of kan hê wat nie so ooglopend is indien hulle as korrek aanvaar sou word nie.

Die veranderings van die wysigingswet volgens die appèlhof

Die appèlhof begin deur 'n aanhaling van die oorspronklike wet en daarna van die 1992-wysiging te gee. Die hof verklaar dan dat die oorspronklike wet 'n skip 'n geassosieerde skip maak

> "(i) where a person (say 'X') was the owner of both the associated ship and the guilty ship *at the time when the maritime claim arose* (my kursivering); and
>
> (ii) where, at the time when the maritime claim arose, X owned or controlled the shares in a company (A Coy) which owned the associated ship and at the same time X owned or controlled the shares in a company (B Coy) which owned the guilty ship" (480I–J).

Uit beide voorbeelde blyk dat die appèlhof van die standpunt uitgaan dat volgens die oorspronklike wet sowel die skuldige as die geassosieerde skip deur die betrokke persoon of maatskappy besit moet gewees het ten tyde van die ontstaan van die skuldoorsaak. Dit word ook later direk deur die hof as 'n verskil tussen die oorspronklike en gewysigde wet uitgewys:

> "The time when X or the company, as the case may be, is required to own the associated ship is the time when the action is commenced, instead of, as it was under the original definition, the time when the maritime claim arose" (481C).

Bogenoemde twee voorbeelde het die appèlhof nog nie tevrede gestel oor die tydperk wanneer die geassosieerde skip besit moet word nie. Die hof gee later in sy uitspraak dus nog 'n voorbeeld:

> "X owns ship no 1 directly. Prior to the coming into effect of the amending act an event occurs giving rise to a maritime claim in respect of ship no 1. Thereafter, but still prior to the coming into effect of the amending act, X acquires ship no 2. After the amending act comes into effect the claimant commences an action *in rem* by seeking the arrest of ship no 2 as an associated ship. If the act and the original definition apply, ship no 2 cannot be arrested because X did not own it at the time when the maritime claim arose. If, however, the amending act and the new definition apply, ship no 2 can be arrested because X owned ship no 2 at the time the action was commenced. Retrospective effect would thus operate to X's detriment by creating a new burden" (485D–F).

'n Verkeerde standpunt word natuurlik nie korrek deur dit oor-en-oor te stel nie. Soos alreeds hierbo uitgewys, sou kennisname van die Afrikaanse teks die hof die verleentheid gespaar het om drie verkeerde voorbeelde te gee. 'n Mens sou seker kon vra of dit enigsins saak maak of die appèlhof se voorbeelde reg of verkeerd is. Alhoewel die 1992-wysiging die posisie bevestig wat in hierdie bespreking as die korrekte beskou word, het die hof se drie verkeerde voorbeelde tog die potensiaal om praktiese gevolge te hê indien die hof se uitspraak as 'n korrekte weergawe van ons reg aanvaar word.

Drie valse voorbeelde en hulle moontlike gevolge

Volgens die appèlhof se voorbeelde is die kritieke punt waarop 'n geassosieerde skip besit moet word, die oomblik waarop die skuldoorsaak ontstaan. Dit impliseer dat indien die skip daarna verkoop sou word, die assosiasie nog sal voortbestaan. Indien dit so sou wees, beteken dit dat die betrokke geassosieerde skip selfs in die hande van 'n *bona fide* koper die onderwerp van 'n aksie *in rem* kan wees. 'n Mens het dus hier in wese met dieselfde juridiese verskynsel te doen as in die geval van 'n maritieme retensiereg.

'n Maritieme retensiereg ontstaan *ex lege* en volg die skip waar dit ook al gaan en ongeag enige veranderings in eiendomsreg (sien Booysen "Recognition of foreign maritime liens in South African law: a final word by the Appellate Division" 1991 *International and Comparative LQ* 156; *Transol Bunker BV v MV Andrico Unity* 1989 4 SA 325 (A) 331). Die doel van sodanige maritieme retensiereg is juis om 'n aksie *in rem* in te stel teen die skip ten opsigte waarvan die reg bestaan. Indien die appèlhof se voorbeelde korrek sou wees, het die Wet op die Reëling van Admiraliteitsjurisdiksie 105 van 1983 met die instelling van geassosieerde skepe 'n nuwe statutêre maritieme retensiereg geskep. Aangesien die wet dit egter nie werklik gedoen het nie maar dit slegs voortvloei uit die hof se vertolking van die ongetekende Engelse teks, het 'n mens met die skepping van 'n judisiële maritieme retensiereg te doen.

Die wysiging van 1992 en die appèlhof se uitleg daarvan wys egter duidelik dat hierdie judisiële maritieme retensiereg met die wysiging verval het. Is daar dan nog enige belang te heg aan die voorbeelde van die appèlhof?

Die Wet op die Reëling van Admiraliteitsjurisdiksie 105 van 1983 het op 1 November 1983 in werking getree. Die 1992-wysiging het op 7 Augustus 1992 in werking getree. Die appèlhof se skepping het dus vir amper nege jaar bestaan. Indien die 1992-wysiging nie terugwerkend is nie soos wat die hof inderdaad beslis het, beteken dit dat enige assosiasies wat gedurende hierdie tydperk ontstaan het, nog beslis moet word volgens die oorspronklike wet. Volgens die appèlhof se siening is dit wel moontlik dat daar êrens in die wêreld 'n skip rondvaar wat 'n geassosieerde skip is volgens die oorspronklike wet soos deur die appèlhof geïnterpreteer. Hierdie assosiasie of judisiële maritieme retensiereg gaan aan so 'n skip kleef ongeag enige veranderings in eiendomsreg.

'n Mens sou kon argumenteer dat maritieme retensieregte prosessuele regte is (sien *Transol Bunker BV v MV Andrico Unity supra* 350) en dat die appèlhof se judisiële maritieme retensiereg se ontstaansoomblik dus terselfdertyd ook sy einde was. Die probleem is egter dat die hof nie self die geaardheid van 'n maritieme retensiereg aan sy interpretasie van die 1983-wet heg nie. Die hof beskryf ook uitdruklik die 1992-wysigings en die bepalings oor geassosieerde skepe as nie-prosessuele bepalings in die *National Iranian Tanker*-saak hier onder bespreking (485I). Dit beteken dat alle vorme van assosiasies wat plaasgevind het in die tydperk tussen die inwerkingtreding van die oorspronklike wet en die 1992-wysiging volgens die 1983-wet beoordeel moet word. Die groot vraag is dus of die appèlhof se voorbeelde as 'n korrekte weergawe van die reg gedurende hierdie periode aanvaar moet word.

Gevolgtrekking

In die lig van die appèlhof se verontagsaming van die duidelike, ondertekende Afrikaanse weergawe van die Wet op die Reëling van Admiraliteitsjurisdiksie 105 van 1983 moet die appèlhof se voorbeelde as klaarblyklik verkeerd beskou word. Die moontlikheid van 'n soort maritieme retensiereg wat uit sodanige voorbeelde ten opsigte van geassosieerde skepe kan voortvloei, moet eweneens as onaanvaarbaar beskou word.

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THE DISTINCTION BETWEEN AGREEMENTS AND UNILATERAL ADMINISTRATIVE ACTS

Basson t/a Repcomm Community Repeater Services v Postmaster-General 1994 3 SA 224 (SEC)

1 Introduction

This case is an example of the way in which our courts approach the classification of those administrative acts where the preceding application of the private person is a prerequisite for a valid performance of the act or where the private individual's consent to or acceptance of the act is required either expressly or by implication before the act acquires legal force. The courts attempt to categorise all these administrative acts which are apparently multilateral, into two categories, namely those of administrative disposition and contract (*Mossel Bay Municipality v Ebrahim* 1952 1 SA 567 (C); *Sachs v Dönges* 1950 2 SA 265 (A); *Fellner v Minister of the Interior* 1954 4 SA 523 (A); *Truck & Car Co (Pty) Ltd v Matola* 1939 TPD 436; *Bessie v Krugersdorp Municipality* 1912 TPD 84; *De Vroeg v Stadsraad van Randburg* 1970 2 SA 132 (T); *Transvaalse Raad vir die Ontwikkeling van Buite-Stedelike Gebiede v Steyn Uitzicht Beleggings (Edms) Bpk* 1977 3 SA 351 (T) 358; *Administrator (Transvaal) v Industrial & Commercial Timber & Supply Co Ltd* 1932 AD 25 39; *City Council of Johannesburg v Ferreira Estate Co Ltd* 1939 WLD 256 258; *Permanent Estate and Finance Co Ltd v Johannesburg City Council* 1952 4 SA 249 (W) 258; *Tutu v Minister of Internal Affairs* 1982 4 SA 571 (T); *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 3 SA 498 (C) (1971 4 SA 522 (C)); *Ritch v Union Government (Minister of Justice)* 1912 AD 719; *Minister of Lands v Poort Sugar Planters (Pty) Ltd* 1963 3 SA 352 (A); *Administrator, Cape Province v Ruyteplaats Estates (Pty) Ltd* 1952 1 SA 541 (A) 551 561; *Estate Breet v Peri-Urban Areas Health Board* 1955 3 SA 523 (A) 531; *Attorney-General OFS v Cyril Anderson Investments (Pty) Ltd* 1965 4 SA 628 (A) 637; *Oertel v Director of Local Government* 1981 4 SA 491 (T) 505–506; *Peri-Urban Areas Health Board v Estate Breet* 1954 1 SA 451 (T) 454). The courts do not currently

recognise the administrative law agreement as a separate category. This classification is not always a simple task. Thus the courts often disagree on the categorisation of a specific government act (see eg *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs* 1989 4 SA 309 (T); 1991 4 SA 718 (A)).

2 Facts and decision of the court

The applicant was the holder of several radio licences, which were required for him to conduct his business of selling, leasing and maintaining two-way radio systems. The Postmaster-General issued these licences in terms of section 7(1)(a) of the Radio Act 3 of 1952. The applicant had no trouble with his allocated radio frequencies until the Postmaster-General issued a licence to another company. The use of this newly allocated radio frequency caused interference to the applicant's radio system.

The respondent consistently assumed the burden of investigating and rectifying the applicant's problem. At one stage, the Postmaster-General was even prepared to implement a possible solution at his own expense. The applicant, however, did not accept this offer. He later approached the court for an order *inter alia* directing the Postmaster-General to "effect the separation of applicant's community repeater in accordance with the specifications as contained in the regulations of the Radio Act" (227F). The applicant based his claim on an express or implied term of the licence agreement (226G 230B–I). He alleged that the manner in which a licence was issued amounted to the conclusion of an agreement (226G–H). He relied on a document setting out the conditions on which a licence was issued as proof of the existence of such a term (230C–D). The applicant also submitted that the conduct of the respondent in trying to solve the applicant's problem indicated that such a contractual duty existed (230H). The South Eastern Cape Local Division dismissed the applicant's application for an order for specific performance on three grounds. Jansen J found, first, that the parties had not entered into a contract and that the respondent did not therefore expressly or impliedly guarantee an interference-free communication system (230J–233E); secondly, that the order sought by the applicant militated against the existence of a contract (233F–234D); and thirdly, that the applicant could not prove the requirements for a successful reliance on estoppel by representation 9234D–235F). I will discuss the first ground only.

3 Administrative procedure followed when a licence is issued

An analysis of the prescribed procedure is important to determine whether a radio licence is an agreement or an administrative act. Neither the Radio Act 3 of 1952 nor the radio regulations promulgated thereunder prescribe a specific procedure. The procedure is laid down by the administration. The court gave a brief outline of this procedure (228B–E): a person who wishes to obtain a radio licence completes the necessary application form for the licence; he then sends it, together with a full motivation, to the Department of Posts and Telecommunications; the commercial section considers the application and forwards it to the technical section for the allocation of a channel; the file is then sent back to the commercial section for the issuing of the licence. From my discussions with the

Department of Posts and Telecommunications it became clear that a licence is issued only after the prescribed licence fee has been paid.

All receivers of a licence sign a document entitled "Conditions of issue of private radio communication licences" (230C–D). In this application form the applicant agrees *inter alia* to the issue of the licence subject to the provisions of the Radio Act and on such conditions as may be prescribed by the Postmaster-General (230F). This document contains a specific sentence indicating acceptance of the licence on the conditions as set out (230F).

4 The finding that the parties did not enter into a contract

The applicant construed this document and signature as an agreement (230B D–E). He alleged that the document was an offer by the Postmaster-General which the applicant accepted by signing the application form. He furthermore alleged that the respondent was obliged to provide the applicant with a facility to operate a two-way radio system in such a manner that the applicant can provide his clients with an interference-free system or a system at least free from reasonably avoidable interference (230B–C). In return, the applicant undertook to pay the licence fees.

Jansen J correctly found that no such express guarantee existed in the signed document (230F–G). The conduct of the respondent in trying to solve the applicant's problem could, moreover, not be construed as an indication of the existence of such an express guarantee (230H–I). The court found that the alternative allegation of an implied guarantee depended upon the court's finding that the parties had indeed concluded a contract (230J–231A). The court, however, correctly found that a radio licence was not a contract (233E). This conclusion was based on the following three findings:

(a) The Department of Posts and Telecommunications was a department of state (231B–G).

(b) The respondent performed a purely regulatory function resulting in no contractual consequences (232A). The relationship between the applicant and the respondent was "a purely statutory relationship governed solely by the provisions of the Radio Act as read with the regulations and subject to the principles of administrative law" (232B). The judge then quoted from Wiechers *Administrative law* (1985) 79, where the author argues that the various performances rendered by the citizen and administration which are known to administrative law, are altogether foreign to private law. For instance, where a person applies for a trading licence, his performance consists in the obligation to apply. The performance of the administration consists at most in the obligation to give due consideration to the application, because the administration is not compelled to issue the licence.

(c) There were several factors that militated against the existence of a contractual relationship between the parties (232J–231A). The court contrasted the freedom that the parties have when concluding a contract, with the controlled discretion which the Postmaster-General has when issuing licences. The Postmaster-General has a duty to act in the best interests of the public in the exercise of his discretionary licensing power (233A). The exercise of this power is a quasi-judicial function and is subject to the rules of administrative law (233B–C):

> "The inability of the respondent freely to decide with whom he will enter into a contract, the statutory duties imposed upon the respondent and the inability of the respondent freely to determine the terms upon which it issues a licence, all militate against the existence of a contractual relationship between the parties" (233C–D).

Another factor which the court took into account, was that the licensing function of the respondent would be rendered impossible if the court found that the parties entered into a contract every time a licence was issued and if these contracts contained a guarantee of an interference-free system (233E). The large number of applications received and licences ultimately granted, would render it impossible (233D).

The basis for the court's conclusion is therefore the absence of contractual freedom and the fact that the relationship between the parties is a purely statutory relationship. The court's analysis of the nature of the radio licence is, however, superficial and lays far too much stress on contractual freedom as a characteristic of contract.

5 Comment

5 1 Granting of a radio licence not an agreement

5 1 1 Two possible agreements

An analysis of the structure of the administrative procedure of granting concessions (Afrikaans *vergunning*) reveals that an agreement can possibly be construed at two stages during this procedure (*Mustapha v Receiver of Revenue, Lichtenburg* 1958 3 SA 343 (A) 356). The first stage occurs when the application for a concession is followed by the granting of the concession. The private person's application for a concession can be regarded as an offer and the administration's grant of the concession as an acceptance of this offer. The second stage occurs when the granting of the concession is followed by the consent or approval of the private citizen. The administration apparently makes an offer to the private person by granting him the concession. The private person is not obliged to accept the concession, but if he uses the concession, he can be regarded as having tacitly accepted this offer.

5 1 2 Distinction between administrative dispositions and agreements

The nature of a specific legal act of the administration can be determined only after an analysis of the statute regulating the act (Steenbeek *Rechtshandeling en rechtsgevolg in het staats- en administratief recht* 91). The distinction between administrative dispositions and agreements is to be found in two of the five distinguishing characteristics of the agreement, namely consensus and the interdependence of the parties' expressions of will (Floyd *Die owerheidsooreenkoms – 'n administratiefregtelike ondersoek* (LLD thesis Unisa 1994) 50–52; for a discussion of all the characteristics see *idem* 14–35). The characteristic of interdependence means that positive law requires both the parties' expression of will equally before the desired legal consequences can commence (Büchner *Die Bestandskraft verwaltungsrechtlicher Verträge* (1979) 88; Schiedenmair *Der Verwaltungsakt auf Unterwerfung* (Dissertation Würzburg 1967) 8). Positive law must attach equal weight to the expressions of will of both the administration

and the private person. All the parties must act on equal terms and the administration's expression of will must not amount to an authoritative act (Büchner *Die Bestandskraft* 7; Baxter *Administrative law* (1984) 351).

Wiechers (*Administrative law* 3) defines government authority as follows:

> "The authority of government is constituted by the sum total of all the legal powers which enable a government organ to enter into a legal relationship with other legal subjects and which place it in a position to enforce its rulings to add to or to vary the contents of an existing legal relationship, or to suspend or terminate an existing legal relationship."

The administration therefore has government authority if the statute empowers it to regulate the legal relationships of the other party (private person) unilaterally or unilaterally and bindingly to consider and approve the private person's application for performance of the administrative act (Büchner *Die Bestandskraft* 92).

The law does not attach the same weight to a private person's expression of will if his acceptance of the administrative act is a mere formal requirement for the creation of his obligations or if the absence of such acceptance merely empowers the administration to rescind the disposition (Van der Linde "Dient de wetgever regelen te geven met betrekking tot overeenkomsten met de overheid?" in *Handelingen der Nederlandse Juristen-Vereniging* Part 1 (1965) 250–251). The requirement of interdependence is also absent if the following can be gathered from the positive law:

(a) The preceding application merely has the function to distribute the relatively small number of concessions on the basis of *first come, first served.*

(b) The preceding application merely has the function of notifying the administration that the private person requires the administrative act to be performed.

(c) The act of the administration cannot be performed without the consent of the private person because to force the act on the private person would be contrary to the principle of individual freedom (Donner *Nederlands bestuursrecht: Algemene deel* (1987) 197; Van der Linde 237–238; Wiarda "Publiekrechtelijke overeenkomsten" in *Geschriften van de Vereniging voor Administratief Recht* (1943) 181; Kohl *Die Möglichkeit öffentlichrechtlicher Verträge im Verwaltungsrecht* (Dissertation Freiburg 1934) 16).

5 1 3 Nature of a radio licence

The Radio Act 3 of 1952 and its regulations must now be examined to determine whether a radio licence is an agreement or an administrative disposition. The court only analysed the first possibility in regard to an agreement, because this was the only one argued by the applicant.

The first possibility of an agreement The first possibility does not amount to an agreement, for three reasons. First, the document entitled "Conditions of issue of private radio communication licences" is not an offer. The Postmaster-General may issue a radio licence on such conditions as he may in any case specially prescribe or as may be generally prescribed by regulation and against payment of the fees prescribed by regulation (s 7 of the Radio Act 1952). The document contains only some of the conditions generally prescribed by the act

and regulations. It does not contain the conditions which the Postmaster-General may prescribe in a specific case, because these conditions can only be formulated after an application has been received, considered and approved. It is therefore extremely unlikely that the Postmaster-General would have had the intention to make an offer in the document. Secondly, the application is not a legal, but only an administrative requirement. The application, therefore, cannot be construed as an offer or acceptance. Thirdly, the issuing of the licence can be seen only as a counter-offer. The Postmaster-General's power to issue a licence under specific conditions means that the issuing of a licence cannot be an unconditional acceptance of an offer, but a counter-offer (*Minister of Home Affairs v American Ninja IV Partnership* 1993 1 SA 257 (A) 269; see, however, *Fellner v Minister of the Interior supra* 540 (Greenberg AJ)).

The second possibility of an agreement The granting of the licence cannot be regarded as an offer, because the law does not require acceptance of the licence by the private person. Neither the act nor the regulations compel the applicant to pay the licence fee before the radio licence is issued. The applicant is, moreover, free to decide whether he is going to use the licence. The tacit acceptance of the licence by using it, is not a legal requirement before the legal force of the radio licence can commence. The conditions of the radio licence will have legal force from the moment it is issued (*Peri-Urban Areas Health Board v Estate Breet supra* 454; *Estate Breet v Peri-Urban Areas Health Board supra* 531–532; *Cape Town Municipality v Belletuin (Pty) Ltd* 1979 2 SA 861 (A) 883). The granting of a licence is an authoritative act, because the administration can unilaterally enter into a relationship with the private person and partially determine the contents of the relationship by special conditions. An invalid special condition will not acquire legal force if the private person accepts it (*R v Skorpen* 1950 2 SA 383 (N); *Ritch v Union Government (Minister of Justice) supra* 737 743).

5 2 Freedom of contract

The principle of contractual freedom relates to the freedom of the parties to determine with whom they wish to contract, the contents of the legal consequences and whether they wish to contract at all (Asser-Hartkamp *Asser's handleiding tot het beoefening het Nederlands burgerlijk recht: Verbintenissenrecht*. Part 2. *Algemene leer der overeenkomsten* (1993) 31; Bloembergen and Kleyn (eds) *Contractenrecht* ch 1 par 134; Aronstam *Consumer protection, freedom of contract and the law* (1979) 13–14). Many jurists are of the opinion that the distinction between administrative dispositions and agreements lies in the fact that the private person's intention only determines if an administrative act will acquire legal force (the *if*) and never what the contents of the legal consequences will be, whereas the possibility to determine the contents always exists with the agreement (eg Bisek *Der öffentlichrechtliche Vertrag nach dem Musterentwurf eines Verwaltungsverfahrensgesetzes in der Fassung von 1963, in der "Münchener Fassung" von 1966 und dem schleswig-holsteinishcen Landesverwaltungsgesetz* (Dissertation Münster 1970) 14–15; Kottke *System des subordinationsrechtlichen Verwaltungsvertrages* (Dissertation Hamburg 1966) 19–20; Ipsen *Öffentliche Subventionierung Privater* (1956) 70; Bosse *Der*

subordinationsrechtliche Verwaltungsvertrag als Handlungsform öffentlicher Verwaltung unter besonderer Berücksichtigung der Subventionsverhältnisse (1974) 32; Stelkens *et al Verwaltungsverfahrensgesetz* (1990) 1015). A similar view is held in English and South African decisions (*Read v Croydon Corporation* [1938] 4 All ER 631 648; *Pfizer Co v Ministry of Health* [1965] AC 512 536; *Neebe v Registrar of Mining Rights* 1902 TS 65 81; *Transvaalse Raad vir die Ontwikkeling van Buite-Stedelike Gebiede v Steyn Uitzicht Beleggings (Edms) Bpk supra* 355–356 358). Jansen J went even further than these cases and took the view that the other aspects of contractual freedom were either absent or severely restricted. He pointed out that the administration has no real contractual freedom to decide whether it will contract, with whom it will contract and what the contents of the legal consequences will be (233C–D). This view is based on an erroneous perception of contractual freedom as a characteristic of a contract (*Tshandu v Swan* 1946 AD 10; *Kala Singh v Germiston Municipality* 1912 TPD 155; *Truck & Car Co (Pty) Ltd v Matola supra*; *Tshandu v City Council, Johannesburg* 1947 1 SA 494 (W); *Nkadia v Mahlazi* 1982 2 SA 441 (T); *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs* 1991 4 SA 718 (A) 724; *Minister of Home Affairs v American Ninja IV Partnership supra* 269).

This principle originated in the ideal of individual freedom during the eighteenth and nineteenth century and had significant influence on the law and jurisprudence (Asser-Hartkamp 35–36; Eiselen *Die beheer oor standaardbedinge: 'n regsvergelykende ondersoek* (LLM dissertation PU for CHE 1988) 64–65). This principle correctly reflected the economic needs of that period and found its way into the current economic theories (Asser-Hartkamp *Overeenkomsten* 35; Aronstam 1–6; Eiselen 66–71).

Contractual freedom has never been an absolute principle in law (Aronstam 15; Friedmann *Law in a changing society* (1972) 126; Beekhuis *Contract en contractsvrijheid* (1953) 5). This freedom was furthermore curtailed during the later development of capitalism (Graveson "The movement from status to contract" 1940 *MLR* 269–70; Beekhuis 7; Gras *Standaardkontrakten* (1979) 4–5 7–8; Friedmann 120 129–130 146–157). The standard form contract is in general use today (Harker "Imposed terms in standard form contracts" 1981 *SALJ* 15; Friedmann 130–132; Aronstam 16–17). The legislature has also reduced contractual freedom by declaring certain contracts or contractual terms void, by prescribing certain contractual terms and by compelling the parties to enter into contracts (Beekhuis 8–16; Treitel *The law of contract* (1991) 3–4; Martens "Normenvollzug durch Verwaltungsakt und Verwaltungsvertrag" 1964 *AöR* 447; s 3, 6 and 13 of the Credit Agreements Act 75 of 1980; s 15 of the Alienation of Land Act 68 of 1981). A limited measure of contractual freedom is a characteristic of contract as well as of agreements in general (Bosse *Der subordinationsrechtliche Verwaltungsvertrag als Handlungsform öffentlicher Verwaltung unter besonderer Berücksichtigung der Subventionsverhältnisse* (1974) 32–33; Kottke *System des subordinationsrechtlichen Verwaltungsvertrages* (Dissertation Hamburg 1966) 56). An adequate measure of contractual freedom still exists where the law prescribes the contents of the contract and obliges one of the parties to enter into a contract (Treitel 3–4; *Read v Croydon Corporation supra* 648; *Pfizer Co v Ministry of Health supra* 536; *Neebe v Registrar of Mining*

Rights supra 81; *contra* Street *Governmental liability* 110). It is clear from the discussion above that the Postmaster-General had an adequate measure of contractual freedom for a contract to exist. The test for the presence of contractual freedom is therefore not a suitable criterion to distinguish between administrative dispositions and contracts.

5 3 The classification of government contracts: recognition of administrative law agreements

Jansen J stressed the absence of contractual freedom as an indication that the exercise of a statutory discretion does not amount to a contract. The implication of his view is that the administration has in principle the same contractual freedom as private persons. Our courts do indeed adopt this view (*South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd* 1961 2 SA 467 (A); *Wentzel v Gemeenskapsontwikkelingsraad* 1981 3 SA 703 (T) 709; *Mustapha v Receiver of Revenue, Lichtenburg supra*; *Sedgefield Ratepayers and Voters Association v Government of the Republic of South Africa* 1989 2 SA 685 (C) 697; *Hopf v Pretoria City Council* 1947 2 SA 752 (T) 767; *Hare's Brickfields Ltd v Cape Town City Council* 1985 1 SA 769 (C)). This ties in with the traditional approach which our courts adopt when deciding whether administrative law is applicable to government contracts. They regard administrative law as applicable only when contractual competence and the terms of the contract are regulated by statute (*East London Municipality v Legate* 1915 AD 313; *Transvaal Property and Investment Co Ltd v Pretoria Municipality* 1921 TPD 261; *Durban Corporation v Kemp and Patterson* 1940 NPD 467; *Hopf v Pretoria City Council supra*; *Dominion Earthworks (Pty) Ltd v State Tender Board* 1968 4 SA 151 (T) 159; *Monckden v British South Africa Co* 1920 AD 324 330; *Mustapha v Receiver of Revenue, Lichtenburg supra* 347 350 356–359; *Myburgh v Daniëlskuil Munisipaliteit* 1985 3 SA 335 (NC) 341; *Moyo v Administrator of Transvaal* 1988 *ILJ* 372 (W) 384; *Langeni v Minister of Health and Welfare* 1988 4 SA 93 (W) 100; *Administrator, Transvaal v Zenzile* 1991 1 SA 21 (A) 34–36; *Administrator, Transvaal v Traub* 1989 4 SA 731 (A)). The courts have only recently moved out of the narrow confines of the traditional approach by requiring the administration to observe the rules of natural justice when the private person has a legitimate expectation that the administration's decision will be favourable or that the rules of natural justice will be observed (*Administrator, Transvaal v Traub supra* 758 761–762; *Lunt v University of Cape Town* 1989 2 SA 438 (C) 446 449). The discussion above shows that the courts follow a private law approach to government agreements.

This approach is not always satisfactory. The courts sometimes feel uneasy when applying private law to certain government agreements. An example is *A to Z Bazaars (Pty) Ltd v Minister of Agriculture* 1975 3 SA 468 (A) 476. In this case the Appellate Division very hesitantly applied the rules applicable to ordinary commercial contracts to the expropriation agreement. The categorisation of a government act as a commercial contract is not always convincing. This is very often the case with contracts used directly to carry out government policy. In *Minister of Home Affairs v American Ninja IV Partnership supra* 268 the Appellate Division described a subsidy as a commercial transaction (a contract). The

court admitted subsequently that the performance of the private person involved the earning of foreign exchange for the country (273).

There is a growing awareness among South African jurists that the private law approach of our courts to government contracts is erroneous (Baxter *Administrative law* 65 396; Wiechers "Die publieke subjektiewe reg" in Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 281; Harris and Hoexter "Administrative law in contractual disguise" 1987 *SALJ* 557; Floyd 450–456). Government contracts are not similar to the contracts of private persons and should not be approached in the same way. Most (if not all) government agreements are regulated by a mixture of rules taken from private and administrative law (Floyd 362–399 449). There are also many compelling policy reasons why government contracts cannot be treated in the same way as the contracts of private persons (*idem* 362–364). Public interest is always present when the government enters into a contract. The view that there is no difference in principle between the contracts of the government and private persons is therefore a mere fiction.

The courts acknowledge that not all government acts which have consensus as an element, are contracts (*Estate Breet v Peri-Urban Areas Health Board supra* 531 532–533; *Transvaalse Raad vir die Ontwikkeling van Buite-Stedelike Gebiede v Steyn Uitzicht Beleggings (Edms) Bpk supra* 357). The problem is that they do not categorise the act any further. The recognition of a third category, the administrative law contract, would fill this gap.

It should be realised that all government agreements are regulated by a mixture of private and public law and that administrative law agreements do exist in our law. The courts will then have no reservations about applying appropriate rules of both contract and administrative law to such government agreements. The difficulty will then lie in deciding which rules are appropriate.

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PAYMENT BY A BANK ON A COUNTERMANDED CHEQUE AND THE *CONDICTIO SINE CAUSA*

B&H Engineering v First National Bank of SA Ltd 1995 2 SA 279 (A)

1 Introduction

Rarely does the Appellate Division have the opportunity to solve contradictions in law arising from conflicting provincial decisions within a short space of time after they have arisen. Such an opportunity recently presented itself in the matter of *B&H Engineering v First National Bank of SA Ltd* where the question of mistaken payment by a bank on a countermanded cheque and the right of the drawee bank to claim the money thus paid with an enrichment action from the

recipient was in issue. Provincial decisions dealing with this aspect are scant and all express divergent views about the legal position. In *Natal Bank Ltd v Roorda* 1903 TH 298 the court relied on the English decision in *Kelly v Solari* (1841) 9M & W54 (152 ER 24) and allowed the enrichment claim of the bank based on the *condictio indebiti* regardless of possible negligence on the part of the bank, which should preclude reliance on this action (cf *Divisional Council of Aliwal North v De Wet* (1890) 7 SC 232 234; *Union Government v National Bank of SA Ltd* 1921 AD 121 126; *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 4 SA 202 (A) 223H–224C). Then in *Govender v Standard Bank of SA Ltd* 1984 4 SA 392 (C) the court considered the *condictio sine causa* to be the appropriate action, but disallowed the claim because payment on the countermanded cheque had not been *sine causa* and the defendant had not been enriched thereby. On the other hand, in *First National Bank of SA Ltd v B&H Engineering* 1993 2 SA 41 (T), the decision which forms the subject matter of the present appeal, the court concurred with the finding in the *Govender* case as far as the appropriate action is concerned, but held that the action should succeed in the circumstances (for a discussion of the provincial decision see Nagel and Roestoff "Verrykingsaanspraak van bankier na betaling van afgelaste tjek" 1993 *THRHR* 486; Visser "Payment of a stopped cheque" 1993 *JBL* 32).

2 Facts

The relevant facts were common cause between the parties. The appellant (B&H Engineering) and S had entered into a contract in terms of which the appellant would manufacture certain goods for S. The appellant duly complied and the goods were delivered to S. S consequently drew a cheque in the amount of R16 048 in favour of the appellant on the respondent (First National Bank of SA Ltd), with whom it had an account. The appellant accepted the cheque as payment of the contract price. It was conceded that S owed the amount of the cheque to the appellant, but unjustifiably countermanded payment of the cheque before it was presented for payment. Unaware of the countermand, the appellant presented the cheque through a collecting bank and the respondent *bona fide* but negligently paid the amount of the cheque. Since the respondent did not have the authority to make payment on the cheque it could not debit the account of its customer S and accordingly suffered a loss of R16 048. The respondent succeeded in the court *a quo* in recovering this amount with the *condictio sine causa*. The Appellate Division had to decide whether the appellant had been enriched by the receipt of the amount of the cheque and whether such enrichment was unjustified. Although the specific enrichment action in question was not in issue, the court was perhaps obliged to consider this point as well.

3 Appropriate action

Both the court *a quo* and the Appellate Division accepted the conclusion reached by Rose-Innes J in the *Govender* case that the *condictio sine causa (spesialis)* and not the *condictio indebiti* is suited to these circumstances. Grosskopf JA, who delivered the judgment on appeal, dealt succinctly with this point as follows (284G–I):

> "The Bank's claim is based on unjustified enrichment. In *Natal Bank Ltd v Roorda* 1903 TH 298 the Court suggested, in a similar case, that the appropriate common-law

> remedy was the *condictio indebiti* (at 303). This was disapproved in *Govender v Standard Bank of South Africa Ltd* 1984 (4) SA 392 (C) at 398D–E and 400C–D for the following reasons. A *condictio indebiti* lies to recover a payment made in the mistaken belief that there is a debt owing. However, a bank paying a cheque knows that it owes no debt to the payee. Its mistake lies, not in a belief that it owes money to the payee, but in a belief that it has a mandate from the drawer to make payment. In these circumstances the appropriate remedy is not the *condictio indebiti* but the *condictio sine causa*. This analysis of the two *condictiones* was followed in the Court *a quo* (at 44G–H). It also accords with views expressed by academic writers . . . and was accepted as well founded (correctly, in my view) by both parties before us."

The authority referred to by Preiss J, in delivering the judgment of the court *a quo* (44G–I), was Sinclair and Visser "Law of negotiable instruments" 1984 *Annual Survey of South African Law* 384–385, Malan "The rule in *Price v Neil*" 1978 *CILSA* 276, Cowen "A bank's right to recover payments made by mistake: *Price v Neil* revisited" 1983 *CILSA* 10 17–18, and Stassen "Countermanded cheques and enrichment – some clarity, some confusion" 1985 *MB* 15. The tenor of the approach adopted by these writers, which was first proposed by Malan (*supra*) and influenced the views of other writers (see eg Cowen 1983 *CILSA* 10), is that payment on a countermanded cheque is not performance by the bank of the drawer's obligation towards the payee but rather performance of the bank in terms of its obligation towards its customer, the drawer of the cheque. The bank does not have the intention to perform to the payee and, since the *condictio indebiti* is the action with which the payer claims restitution of an undue performance (as a result of a mistake on the part of the payer) from the recipient, this *condictio* is not appropriate in these circumstances (see also Stassen and Oelofse "Terugvordering van foutiewe wisselbetalings: Geen verrykingsaanspreeklikheid sonder verryking nie" 1983 *MB* 144; Malan, Pretorius and De Beer *Malan on bills of exchange, cheques and promissory notes in South African law* (1994) 357–358; Visser "Unjustified enrichment" in *Hutchison* (gen ed) *Wille's principles of South African law* (1991) 639).

There is, however, support amongst the older jurists for the approach adopted in the *Roorda* case that the *condictio indebiti* should apply in these instances (see the old authorities referred to by Malan *et al* 358 fn 135) and some contemporary writers are of the same opinion. Eiselen and Pienaar (*Unjustified enrichment: a casebook* 206–207), for instance, argue that Malan's view is based on inappropriate authority and too narrow a view of the scope of the *condictio indebiti*. They submit that the bank makes payment to the payee mistakenly believing it is obliged to do so even if its subjective intention is to give effect to its client's mandate and this payment, even if it is not intended as performance to the payee, is sufficient to comply with the payment requirement of the *condictio indebiti* (see also Joubert "Verhandelbare dokumente: Die verrykingsaanspraak van die betrokke bank" 1993 *De Jure* 81 *et seq*; Waring "Where the buck stops" 1980 *THRHR* 420 *et seq*). A slightly more extensive approach to the requirements for the *condictio indebiti* could thus justify the conclusion that it does in fact apply to these instances. There is also the notion that the scope of the *condictio sine causa* is not as wide and discretionary as the courts and some writers would seem to suggest (Eiselen and Pienaar 207).

Apart from anything else, the field of application of the *condictio indebiti* could be extended to these instances on the basis of the approach adopted by the Appellate Division in *Kommissaris van Binnelandse Inkomste v Willers* 1994 3 SA 283 (A) 333C–E, that a court is not precluded from accepting liability for enrichment in a particular case merely because liability has not previously been recognised in the same, or even similar, circumstances. A court considering such an extension will be faced with the question whether such an extension is necessary or desirable. A further prerequisite for such an extension is, of course, that the *condictio sine causa* should not be applicable in these circumstances. Since, however, the Appellate Division has approved the approach adopted in the *Govender* case with little difficulty, it is doubtful whether the matter will come up for reconsideration in the future.

Even if it is accepted that the *condictio indebiti* is available in these cases, the bank would still find itself in an unenviable position. If it is to succeed, the bank's mistake must be excusable in the circumstances and, it is submitted, a bank certainly acts inexcusably when it pays on a timeously countermanded cheque. The decision in *Saambou v Essa* 1993 4 SA 62 (N) provides a good illustration of the problems encountered when dealing with this *condictio*. That case dealt with the situation where the bank inadvertently pays the amount of a dishonoured cheque to its customer pursuant to the depositing of the cheque by the customer in its account with the bank. The bank attempted to claim the amount thus paid with the *condictio indebiti* and in the alternative the *condictio sine causa*. However, it abandoned reliance on the former and proceeded on the basis of only the latter action. The court held that the *condictio indebiti* was in fact the appropriate action (68C–D) but concluded in an *obiter dictum* that this *condictio* would have been denied in any case because the bank's conduct was inexcusable (see Pretorius "Mistaken payments by a bank on a countermanded or dishonoured cheque: The *condictio sine causa* and *condictio indebiti*" 1994 *THRHR* 332 for a discussion of this case). The element of excusability which applies to the *condictio indebiti* but not to the *condictio sine causa*, means that, from a bank's point of view, the latter action is to be preferred in these circumstances.

4 Impoverishment

Although this aspect of a claim based on unjustified enrichment was not placed in issue in this decision, it is an opportune moment to examine it briefly. Section 73(a) of the Bills of Exchange Act 34 of 1964 provides that the duty and authority of a banker to pay a cheque are terminated once the cheque has been countermanded. The bank that nevertheless pays the cheque is not permitted to debit the account of the drawer (see eg Visser 1993 *JBL* 33; Nagel and Roestoff 1993 *THRHR* 487–488; Stassen "Die regsaard van die verhouding tussen bank en kliënt" 1980 *MB* 79–80). Since it has then paid out its own funds, it is *prima facie* impoverished to the extent of the value of the cheque. Should the bank contractually indemnify itself against such possible loss so that the drawer's account can still be debited, as was the position in the *Govender* decision, the bank would not be impoverished (see Swart "Foutiewe betaling van 'n afgelaste tjek" 1985 *MB* 3). On the other hand, new proposed legislation precludes banks

from relying on such indemnities (see s 63(1)(a) of the proposed new Bills of Exchange Act and Malan, Oelofse and Pretorius *Proposals for the reform of the Bills of Exchange Act* 1964 SA Law Commission (1989) 675). In the final instance, if banks are prevented from directly indemnifying themselves from such losses, they will proceed to indemnify themselves indirectly by insuring against losses of this nature and doubtlessly the bank's customers will eventually bear the brunt by way of increased bank charges.

5 Enrichment

The main thrust of this appeal dealt with the enrichment requirement and it was ultimately decided on that basis. The crucial question was whether payment by the bank had the effect of discharging the drawer's (contractual) debt with the payee. If it did, the appellant would have received payment of R16 048, but would simultaneously have lost its claim for that amount against S and would thus not have been enriched. On the other hand, if payment did not serve to discharge the debt, then the appellant would have received the money while retaining its claim against S and would consequently have been enriched (285C–F).

Grosskopf JA proceeded with this portion of the judgment by stating the accepted position that although a creditor may insist on payment in cash, it has become common commercial practice for creditors to agree to payment by cheque. Payment in this form is furthermore normally intended to discharge the underlying debt (285F–J). Payment by cheque is nevertheless regarded as conditional payment, the condition being that the cheque be honoured upon presentation (286A–F; see in general Malan, Pretorius and De Beer 319–321). The following statement by the judge hints at the approach the court adopted (286G–I):

> "The fundamental point is that we are dealing with a contractual relationship between the debtor and the creditor. In law the creditor is entitled to payment in cash but he agrees to accept a cheque. Of necessity this entails that there will be some delay (and, indeed, some uncertainty) in the creditor's receipt of the money, and the law regulates the respective rights of the parties to make provision for this. Once the creditor has received his money from the bank, however, the purpose of the agreement to accept a cheque has been achieved. The creditor has been paid. Why should it matter, as between debtor and creditor, what the arrangements were between the bank and the debtor, and whether the bank has complied with these arrangements?"

Perhaps the beginnings of an answer to the rhetorical question postulated in the last sentence are to be found in the relationship that exists between the underlying obligation (here derived from contract) and the cambial obligation (derived from the delivery of the cheque). The former serves as the *causa* for the latter and the two exist in unison, presenting the payee with alternative grounds of action should the cheque be dishonoured (see in general Malan, Pretorius and De Beer 18–21). The cambial obligation cannot exist in a vacuum, and it is submitted that this inescapable link between these two obligations implicates the creditor to a far greater extent in the arrangements between the debtor and his bank regarding payment of the cheque than the court was willing to accept. Once the creditor has accepted a cheque as the mode of payment, he has also accepted the inherent risk that the instrument may be dishonoured. Should he not also bear

the risk of the possibility that the debtor may countermand payment but that payment may nevertheless be mistakenly effected by the bank? The court specifically held that the creditor should not also be burdened with this risk (287E–I). It is submitted that there is no real reason why this should not be the case, for the following reasons: In most instances cheques are countermanded because of some or other contractual dispute between the parties and very often, as a result of this, the payee is either informed by the drawer that the cheque has been countermanded or he reasonably should foresee in the circumstances that the cheque will be countermanded. Furthermore, the payee suffers no real prejudice if it is accepted that he incurs liability for enrichment in these cases because he retains his contractual remedies against the drawer. Furthermore, if he truly is unaware of the fact that he has been enriched and this belief is reasonable in the circumstances, should loss or diminishment of enrichment occur, he will be liable only to the extent of his actual enrichment at the time of *litis contestatio* (cf De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (1987) 201–206). Finally, there are other risks inherent in the use of cheques for the payee. Where the creditor requests payment by cheque, for instance, he bears the attendant risks. If the cheque is misappropriated, for example, the creditor has to bear the resultant loss (see Van der Merwe, Van Huyssteen, Reinecke, Lubbe and Lotz *Contract: general principles* (1993) 363).

The court was also concerned with the detrimental effect it would have on the remedies available to the payee if payment did not serve to extinguish the debt. The payee would be in a worse position than he would have been in had the cheque been dishonoured. In the latter instance he could promptly have sued the drawer for provisional sentence on the cheque (287I–288A). This, it is submitted, is correct, for the countermanding of a cheque has the effect of nullifying any rights that the payee has under it precisely because that is the drawer's intention. The position here differs from the position where the cheque has been dishonoured because in the latter instance the drawer has not cancelled his instruction to the bank. Although this seems unfair as far as the payee is concerned it accords with the relationship that exists between bank and customer and the rights that the customer enjoys in terms thereof (see Stassen 1980 *MB* 79–80). Once again, however, the payee still retains all his contractual remedies against the drawer.

Counsel for the appellant argued that payment of the cheque, even though it had been countermanded, served to discharge the cheque so that the payee no longer had any rights under it. This was fiercely disputed on behalf of the bank but the court held as follows (288G):

> "The fallacy in the Bank's argument, in my view, is that it treats a countermand as amending or altering the cheque as a document. As a matter of language, a document still contains 'an unconditional order . . . to pay' even if its effect has been nullified by some other document or transaction." And further (289C–D): "[N]otice of dishonour is dispensed with where the drawer has countermanded payment (s 48(2)(c)(v)). This is an important provision for present purposes. It clearly indicates that, in the scheme of the Act, countermand of payment does not destroy the character of an instrument as a bill. It merely changes the rights *inter se* of the parties thereto."

Grosskopf JA then concluded in this regard as follows (289D–E):

> "[I]f payment of a cheque is countermanded, presentment for payment is dispensed with. If the cheque remains unpaid, the cheque is dishonoured and the holder is entitled immediately to sue the drawer without giving notice of dishonour. On the other hand, the cheque remains a bill in terms of the Act, with the consequence, it seems to me, that if it is paid according to its tenor, payment is in due course and the cheque is discharged."

On the other hand, one may argue that since countermand terminates both the duty and the authority of a bank to pay a cheque drawn on it, any payment by the bank on the cheque is not connected to the cheque itself and therefore cannot serve to discharge the cheque. Such payment is rather connected to the mistaken belief on the part of the bank that it must pay which is derived from the oversight on the part of the bank regarding the countermand. This view is strengthened by the fact that the bank may not debit the drawer's account. A mandatory who acts in terms of a mandate that has been terminated by the mandator, surely does not discharge the original mandate since it no longer exists. He may not claim compensation in terms of the original mandate; any claim he has against the mandator can only be based on possible *quasi negotiorum gestio*.

The court was also referred to English authority seemingly to the contrary but held that this did not apply to the matter under consideration and further that in the present case the cheque had been discharged when the bank paid it (289F–290J). Grosskopf JA also referred to other sections (288H–289D) in the Bills of Exchange Act which he held supported his conclusion that countermand of payment does not destroy the character of an instrument as a bill and that payment on such a cheque discharges it. It is, however, submitted that none of these sections directly indicates that ultimate payment on a countermanded cheque has the effect of discharging the cheque and that the court dismissed the mentioned authority without proper consideration.

The importance of determining whether payment of the cheque, even though unauthorised, had discharged the cheque and the effect that this would have on extinguishing the debt that the drawer had with the payee, was expressed by the court as follows (291C–F):

> "The receipt of a liquid document is one of the few compensations which a creditor derives from his agreement to accept payment by cheque instead of in cash. It would be contrary to the very essence of such a debt-extinguishing agreement if circumstances could arise in which the payee loses the benefit of his liquid document before his debt has been paid.
>
> Moreover, the payee who receives payment is normally entitled to assume that the cheque has been duly met and that the antecedent debt has been extinguished. It would be inequitable if this assumption were wrong and the debt still unpaid, with the consequence that the bank may at some later stage reclaim the payment. The payee would then be thrown back on the underlying agreement. By that stage time would have passed, evidence might have been lost or discarded and in an extreme case the underlying claim might have become prescribed. This inequity could possibly be lessened by allowing the payee in certain circumstances to raise an estoppel against the bank's claim for restitution. It would indubitably be eliminated were the debt-extinguishing agreement between drawer and payee to be held to have achieved its purpose on fulfilment on the condition: payment by the bank pursuant to the cheque."

It is difficult to see why it would be contrary to the very essence of the debt-extinguishing agreement if the payee should lose the benefit of his liquid document before his debt has been paid. As mentioned above, there are other risks involved in payment by cheque which may detrimentally affect the expectations of the payee. A cheque remains conditional payment and much may occur between the issue of the cheque and ultimate payment on it. The essence of the debt-extinguishing agreement, it is submitted, is not the retention of the benefits of a liquid document, but rather the concurrent subjective intentions of the parties to extinguish the obligation by performance (see Van der Merwe *et al* 363–364). As De Wet and Van Wyk (*Kontraktereg en handelsreg* vol 1 (1992) 263) aptly put it:

> "Behoudens enkele uitsonderings, is voldoening 'n tweesydige regshandeling, wat slegs met die medewerking en wilsooreenstemming van albei partye kan plaasvind."

In the present case the intention on the part of the debtor to discharge the obligation is clearly lacking when he countermands the cheque and thus the obligation cannot be discharged even when the drawee bank mistakenly pays the cheque. The debtor may, it is submitted, change his subjective intention to discharge his obligation to the creditor once the cheque has been delivered. By countermanding the cheque, the drawer revokes his intention to extinguish the underlying debt with the result that the debt cannot be discharged. The creditor may then enforce the usual remedies for breach of contract if in fact the debtor has breached the underlying contract.

Grosskopf JA's further statement that the payee is normally entitled to assume that the cheque has been duly met and the antecedent debt extinguished is not, it is submitted, entirely correct. As previously mentioned, the circumstances will often clearly indicate that the drawer has countermanded payment. Apart from the contractual remedies that the payee may enforce against the drawer, he may, as indicated by the court, invoke estoppel as a defence to the bank's enrichment claim should the requirements be met. The court clearly favoured the payee's point of view, but is there any compelling reason why the payee should be protected in these circumstances? The drawer may have been the innocent party in the circumstances and thus entitled to countermand payment. Why should he run the risk of the bank possibly having an enrichment claim against him because it ignored the countermand? The drawee bank is in the worst position of all, since it has *prima facie* been impoverished and, according to this decision, it has no enrichment claim against the payee. An enrichment claim against its own customer, the drawer, is from the bank's point of view undesirable and has not as yet been recognised in these circumstances. If the *condictio sine causa* is the appropriate action in such cases, the bank should not suffer for its oversight since negligence does not bar this action.

Grosskopf JA's conclusion that the countermanding of the cheque does not frustrate the debt-extinguishing agreement is based on the premise that the antecedent debt is a valid and due one (291G; 295G). The judge stated as follows (295G):

> "Had there been no valid underlying debt, the position would of course have been different. A bank is consequently in the difficult position that it may not know

> which of the drawer or payee has been enriched until it ascertains the facts concerning their circumstances and, in particular, their relationship. These facts may be obscure or disputed. It seems to me that in intractable cases this problem may be resolved by joining the drawer and the payee as defendants in a single action in terms of Rule 10(3) of the Uniform Rules of Court."

It is submitted that the court glossed too superficially over the consequences that this premise gives rise to. In the first instance when will a debt be valid for these purposes? If the contract between the drawer and payee gives rise to several distinct obligations under which the payee must perform and he only performs in terms of certain obligations, is the debt a valid one if the drawer issues a cheque under the impression that the payee has performed in full? In these circumstances the debt is valid in so far as the obligations that have been discharged are concerned, but invalid as far as the obligations under which performance is still due are concerned. Does this mean that the bank will be partially successful with an enrichment claim or will the bank's claim fail because the value of the cheque exceeds the value of the delivered performances? Secondly, when the underlying debt is invalid, one may infer from this *dictum* that the bank will in fact succeed with the *condictio sine causa*. This seems a simple enough solution but, apart from being an *obiter dictum*, it presents a plethora of evidentiary problems for the bank. The bank must delve into the contractual relationship between the drawer and payee and go as far as to prove the validity of the payee's contractual claim against the drawer. The following example illustrates some of the problems that may arise: A concludes a contract with C in terms of which C must lay concrete paving in the driveway of A's residence. C completes the work and A pays the contract price by way of a cheque drawn on B bank. After a week, the paving begins to crack and A informs C that he has cancelled the contract as a result of C's breach in the form of positive malperformance. A countermands payment on the cheque, but B nevertheless pays the cheque and C consequently receives the full contract price. C avers that the paving was properly laid, and cracked because A used it before it had set properly. B is now faced with a difficult situation, since everything depends on the validity of the debt between A and C, and B has no knowledge of the contractual dispute between these two. Even if A and C are joined as defendants, it will be no easy task to extricate the necessary evidence to prove B's potential claim. Add to that the complication that B has at present no certain enrichment claim against either of the two and the bank seems doomed to bear its own loss. If the underlying debt is found to be invalid, a court may grant the *condictio sine causa* against C in these circumstances, but the court's remarks in this regard were *obiter* and the position is therefore uncertain. If on the other hand, the underlying debt is found to be valid, B has no claim against C, though perhaps a remedy based on *quasi negotiorum gestio* against A. Once again, the court's remarks (see 295A–D) in this regard were *obiter* and the position is therefore uncertain. The question may further be asked whether the recognition of enrichment liability in the latter instance would be desirable (cf *Kommissaris van Binnelandse Inkomste v Willers supra* 333D–E) because, if the bank is able to recover the full amount paid, it would have the effect of undoing the principle that the bank may not debit the drawer's account in these circumstances.

By eventually concluding that the appellant had not been enriched and that the bank's claim should consequently not have been allowed in the court *a quo*, the Appellate Division followed the decision in *Govender v Standard Bank of SA Ltd* (see *B&H Engineering* case 294A–B). The court *a quo* reached the contrary conclusion and was largely swayed by the following argument advanced by Cowen 1983 *CILSA* 37:

> "[T]he fact that the drawer of the cheque owed money to the recipient of the payment, does not affect the bank's claim. This is because the bank does not pay as its customer's agent; nor does it purport to be discharging its customer's indebtedness in his name without his authority within the meaning of the rule formulated by *Pothier* and adopted by the Appellate Division in *Froman v Robertson* [1971 1 SA 115 (A) 124G–H]. Accordingly, the debt owed by the customer to the recipient is not discharged and may be enforced by the recipient against the customer. As between the bank and the recipient, the receipt of the payment is *sine causa* and recoverable by the bank."

The relevant portion of Pothier (*Obligations* 111 1 1) provides that payment may be made on behalf of a debtor without his authority or even against his express wishes, provided it is made in his name to discharge his debt and the property is effectually transferred. Since the bank did not act as the drawer's agent and it furthermore did not have the intention to discharge his debt, Preiss J concluded that the debt was not discharged by the payment (47J–48D).

After referring to opinions to the contrary (293C–D), Grosskopf JA disposed of this argument as follows (293D–G):

> "It is common cause on both sides of the controversy that the bank is not the drawer's agent, but a neutral payment functionary. It is consequently correct that the acts and intent of the bank, by themselves, cannot result in the payment of the debt owed to the payee. However, the acts and intent of the bank form only part of the picture. They must be seen in the light of the debt-extinguishing agreement between the debtor and the creditor. It is that agreement which defines the purpose for which the cheque is given, and for which payment is to be received from the bank. If that agreement provides that any payment by the bank, even an unauthorised one, would discharge the debt as between debtor and creditor, such an agreement would be valid *inter partes* . . . It follows that the above passage from *Pothier* is not relevant in the present circumstances. We are not here dealing with a case where the bank pays somebody else's debt. In our case the debtor is paying his own debt through the instrumentality of the bank."

On the basis of this and the other conclusions reached by the court referred to above, the appeal was allowed and the bank's claim thus dismissed. It is submitted that this *dictum* expresses the essence of the court's *ratio decidendi* and is based on the premise that the drawer may not revoke his intention to extinguish the debt by way of performance between delivery of the cheque and ultimate payment by the drawee bank on it. As briefly alluded to above, there is no reason why this should not be the case. It is furthermore submitted that the debt-extinguishing agreement does not provide that even an unauthorised payment by the bank would discharge the debt. This is not implied in this type of agreement and the court offered no authority to justify this conclusion. The debtor does not even undertake not to countermand payment should the need arise. Why then should he agree to the discharge of the debt even if payment is unauthorised? In most instances the bank will give effect to the countermand and there is no doubt that the debt has not been discharged in such a case. The position should be the

same even when the bank pays by mistake. Payment by cheque provides advantages and disadvantages to both drawer and payee. In certain circumstances for instance, the drawer will have to bear the loss if the cheque is misappropriated by a third party, but he has the right to countermand payment should the payee breach the underlying contract in some way. The payee, on the other hand, runs the risk that the cheque may be dishonoured, but has the added benefit of a liquid document on which he may bring an action without having to resort to the underlying contract. Countermanding payment is a way in which the drawer may effectively prevent discharge of the debt where the payee has not honoured his side of the bargain.

The abovementioned premise, as mentioned, does not hold true in these circumstances. Discharge by performance as a bilateral juristic act requires an intention to perform on the side of the debtor and a concurrent intention to extinguish the obligation on the part of the creditor (see eg Van der Merwe *et al* 364; De Wet and Van Wyk 263; Joubert *General principles* 274–275). These subjective intentions must by their very nature and function be present *simultaneously* at the time when payment is made and received, and discharge of the debt takes place. Payment by way of cash poses no problem in this regard because payment and receipt thereof are usually simultaneous. However, when payment is made by cheque, there is a time lapse between delivery of the cheque and payment on it and in this interim period the drawer may revoke his intention to pay by countermanding the cheque. There is no compelling reason why the drawer may not revoke his intention to perform, and where it is due to some breach of the underlying contract by the payee, it is his right to do so. Should he not, as in the present case, be entitled to do so, the payee may always claim performance under the underlying contract. The premise on which the court's findings in this regard are based, is therefore unfounded. The debtor does not pay his debt through the instrumentality of the bank, because his intention at the relevant time is to prevent discharge of the debt. Consequently, since neither the bank nor the drawer has the required intention to discharge the debt when payment is mistakenly made by the bank, it is submitted that the debt cannot be discharged and the payee is enriched upon his receipt of the money.

6 *Sine causa*

Although the court unfortunately found it unnecessary to comment on this requirement for successful reliance on unjustified enrichment, it is nevertheless submitted that payment by the bank in these circumstances is not juridically connected to the underlying contract between the parties. This is because, once again, the bank does not pay as the drawer's agent and has no knowledge of the original purpose for which the cheque was issued. There is thus no legal ground or justification for the transfer of the bank's money to the payee (cf De Vos 353) and the payee is unjustifiably enriched thereby.

7 Conclusion

The court ultimately suggested, as has been alluded to above, the possibility that the bank would have a claim against S based on *quasi negotiorum gestio*. Even if the requirements for this claim were not strictly complied with in the

circumstances, Grosskopf JA argued, the case was so closely analogous and the need for equitable relief so urgent that an action on the grounds of unjustified enrichment should lie (295A–F). Relief in this form has not been recognised in these circumstances before and a bank relying on *quasi negotiorum gestio* would run the risk that its claim may fail for some reason or other. Litigation all the way to the Appellate Division is a costly exercise even for banks.

It is submitted that this decision gives rise to uncertainty because so many possibilities now exist in these circumstances. As indicated above, if the underlying debt between the drawer and payee is valid, the bank does not have an enrichment claim against the payee, but possibly a claim against the drawer based on the principles of *quasi negotiorum gestio*. Whether its claim against the drawer will succeed, is uncertain at present because such a claim has not hitherto been recognised in these circumstances. If the underlying debt between the drawer and payee is invalid, the bank possibly has the *condictio sine causa* at its disposal which it may institute against the payee. Proving the invalidity of the debt will, however, not be an easy task because the bank will have to prove the existence and terms of the underlying contract between the drawer and payee and that the payee breached the contract so that the drawer did not have the obligation to perform. If the bank succeeds with an enrichment claim against either the drawer or payee, the latter may seek contractual recourse against each other. Until then their respective situations will be uncertain.

It might finally be argued that the essence of such a case lies in the contractual dispute between the drawer and payee. Even any potential enrichment claim that the drawee bank may have now hinges on that. If the bank has an enrichment claim against the payee in these circumstances, regardless of the validity of the payee's claim against the drawer, the matter will once again be reduced to a contractual dispute between the drawer and payee. Since the bank has inadvertently and through its own doing become indirectly involved in the dispute between the drawer and payee, it is suggested that it would not only expedite the matter but make it far simpler to resolve if the bank were removed from the equation by granting it an enrichment claim against the payee and leaving the parties to sort out their contractual dispute.

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A SUCCESSFUL CONSTITUTIONAL INVASION OF PRIVATE LAW

Gardener v Whitaker 1995 2 SA 672 (E)

1 Purpose of this review

This evaluation of the *Gardener* case focuses mainly on certain aspects of the court's approach to the construction and use of the Constitution and the doctrine of fundamental human rights in private law. From this case it appears that private law should brace itself for a type of "total onslaught" on many of its rules and principles. This invasion will be mainly undertaken by judges who are well armed with (a) a vague Constitution and (b) endless methods of interpreting it in order to achieve the desired results.

2 Facts and decision

This case concerns an action for defamation by the town clerk of East London against a city councillor on the ground of an alleged insinuation that the plaintiff had deliberately misled the city councillors. The court, per Froneman J, proceeded from the very general and radical assumption that

> "*all* aspects of the common law, including the present state of the law of defamation, should, in cases that come before the courts, be scrutinised to decide whether they accord with the demands of the Constitution" (686B; my italics).

After a brief survey of certain aspects of the law of defamation (especially concerning the *onus* of proof) Froneman J concluded that the present common law of defamation "may be at odds with the Constitution" (Act 200 of 1993) as far as both the substantive interests protected by and the manner of their protection by a court of law are concerned" (687B).

The court also held (691H) that the right to good name (*fama*) can be interpreted as forming part of the constitutionally protected fundamental right to human dignity (s 10 of the Constitution). However, this right is on an equal footing with the right to free speech and expression in terms of section 15 of the Constitution (the incorrect assumption of the court being that the Constitution creates no hierarchy of fundamental rights). To balance these two fundamental rights, according to Froneman J, a court will have to employ the standard of the *boni mores* of the community. But here the plaintiff's case broke down as the court held that a *plaintiff* who relies on the precedence of one fundamental right over another should bear the *onus* of establishing such fact. *In casu* it meant that the plaintiff had to prove, which he failed to do, that the defendant's statement was not worthy of protection as an expression of free speech.

3 Basic mistake by the court

Regardless of any other consideration, the court's decision is incorrect because one of its foundational arguments, namely that the Constitution creates no hierarchy of fundamental rights (690A; see also H Botha "Privatism, authoritarianism and the Constitution: The case of Neethling and Potgieter" 1995 *THRHR*

496; Cachalia *et al Fundamental rights in the new Constitution* (1994) 115 who all make the same mistake as Froneman J) is at odds with the decision of the constitutional court that the right to life and the right to human dignity are the most important in our bill of fundamental rights (see *S v Makwanyane* 1995 6 BCLR 665 (CC); 1995 3 SA 391 (CC) 451: "The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chap 3 . . . [W]e are required to value these two rights above all others.") As *fama* forms part of the fundamental right to human dignity (eg 690; *Mandela v Falati* 1995 1 SA 251 (W); Neethling and Potgieter "Laster: die bewyslas, media-privilegie en die invloed van die nuwe Grondwet" 1994 *THRHR* 517) it is obvious that the right to *fama* is on a higher level than the right to freedom of speech and that (on the court's approach) it should generally be the *defendant* who has to prove that his defamatory remarks deserve protection as envisaged by section 15 of the Constitution.

4 Constitutional "attack" on private law

Although no reasonable lawyer will suggest that the current body of private law has reached perfection and that it should enjoy immunity from necessary changes, it spells trouble for our legal system as a whole if a judge is actually empowered to change private law almost at will. The approach by Froneman J is a good example of how a single judge sitting in a provincial division can "rely" on the Constitution in order to ignore or "overrule" previous judgments of the Appellate Division (eg regarding defamation – *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 1 SA 708 (A)) by choosing a particular method of interpreting the new bill of fundamental rights.

If the decision by Froneman J is to be followed in future (and why should it not, at this rather revolutionary stage in the history of our country and its legal system where almost anything can be changed provided that one can somehow vaguely justify it by a reference to the injustices of the past – regardless, of course, of the actual facts or the real merits of the intended change), our private law had better prepare itself for drastic reconstructive surgery.

In *De Klerk v Du Plessis* 1995 2 SA 40 (T) 49 Van Dijkhorst J made the sensible remark that he

> "cannot imagine that the drafters of the Constitution intended the whole body of our private law to become unsettled . . . There was no need for constitutional invasion of the private law. Parliament is empowered to alter the existing law wherever the shoe pinches".

However, who cares what the drafters of the Constitution actually or presumably intended? The invasion of private law has now begun, as some judges apparently do not trust Parliament to attend to pinching shoes but are eager to display their own legislative skills in effecting law reform (see also par 6 *infra*).

5 Some ideas on that nebulous pseudo-scientific exercise called "the interpretation of our Constitution"

It is clear that in the case of constitutions and bills of fundamental rights the traditional and common sense methods and rules of interpretation should be

discarded (see eg C Botha "Steeds 'n paar tekstuele ikone teen die regstaatlike muur" 1995 *THRHR* 526–527 who refers to doubts about the *legal* nature of such rules of interpretation) in so far as they fail to "deliver the goods" (see generally on interpretation Rautenbach *Algemene bepalings van die Suid-Afrikaanse handves van regte* (1995) 19–37).

In casu Froneman J seemed to have resorted to a method of interpretation described by himself as "a broader approach based on the inherent values of the Constitution" (679D) and which apparently has something to do with the alleged "benevolent spirit" of this part of our law (678H). It is really difficult to criticise the general method of interpreting the Constitution adopted by the court. The reason for this is not to be found in the inherent excellence or brilliant logic of the judge's arguments, but merely because there are so many possible ways of interpretation, and such a variety of relevant considerations, that it will be unfair to brand as incorrect the one adopted by him. After a survey of what judges and academics have to say on interpretation, my conclusion is that no method of constitutional interpretation can be "incorrect" as long as it achieves politically "correct" results.

There are different forms of *free floating interpretation* which all to a greater or lesser extent place the Constitution at the mercy of the interpreter and allow him to use it like a ventriloquist's dummy. (Cf the remark by Van Dijkhorst J in *De Klerk v Du Plessis supra* 46A. See, however, the word of caution and warning – if it was really seriously meant and not merely intended as window dressing to camouflage actual practice – uttered by Kentridge AJ in *S v Zuma* 1995 2 SA 642 (CC) 62: "But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.") These free floating methods of interpretation may be described as "generous", "liberal", "purposive", "benevolent" etcetera and there are apparently subtle differences between them depending on the measure of distortion of the literal meaning of words that they achieve in a particular case (cf generally *Government of the RSA v 'Sunday Times'* 1995 2 SA 221 (T) 225); *Qozeleni v Minister of Law and Order* 1994 3 SA 625 (E); *Shabalala v Attorney-General, Transvaal; Gumede v Attorney-General, Transvaal* 1995 1 SA 608 (T) 623; C Botha 1995 *THRHR* 527 for further references). These approaches to interpretation are sometimes described and discussed in a manner aimed at disguising their arbitrariness and the fact that they are anchored in subjective political ideas and not in legal principles (see eg the use of a high sounding phrase "regstaatlikheid" by C Botha 1995 *THRHR* 524 to describe the present legal situation in South Africa).

There are also examples of a more *conservative approach* (of course, one should automatically denounce this approach as "legalistic" in order to remain popular with the new political rulers and their lawyer friends) to the interpretation of the Constitution (eg *Kalla v The Master* 1995 1 SA 261 (T); *De Klerk v Du Plessis supra*; see also *S v Lombard* 1994 3 SA 776 (T); *S v Coetzee* 1994 4 BCLR 18 (T)). It is obvious that the "conservative" methods of interpretation will probably not be maintained for very long for the simple reason that they are not sufficiently in accordance with the new political ideas sweeping the country.

In addition to the exciting possibilities generally offered by the "liberal" approach to the interpretation of the Constitution, there are many other factors and

considerations which may play a role in the process of construction and may provide "authority" for revolutionary and unpredictable decisions and propositions:

First, the personal, moral or intellectual *preconceptions of the judge* concerned may play a role (as admitted by Kentridge AJ in *S v Zuma supra* 652J; cf also Cameron "Lawyers, language and politics – in memory of JC de Wet and WA Joubert" 1993 *SALJ* 63 who suggests that it is "a harmful myth that judges are dispassionate oracles pronouncing without personal or political predilection on the issues before them"). In fact, it would be a miracle if judges, who are now to a much greater extent called upon to render politically acceptable or quasi-political judgments, can manage not to be influenced by their own political predilections!

Secondly, our Constitution qualifies as a masterpiece of *ambiguity* (see eg the clever use of the phrase "freedom and equality" in s 33 and 35), *political compromise* (eg s 32 on the right to education), and *vagueness* (eg the use of the expression "open and democratic society") and is therefore especially susceptible to being used as high "authority" for almost anything. In particular, section 35(3) which orders our courts to have regard to the "spirit, purport and objects" of the chapter on fundamental rights when applying and developing common law and customary law, is pounced upon by some judges who desire to change the law by relying on vaguely defined values which, when seen through the lens that suits them best, suddenly "reveal" the so-called deepest norms of the Constitution.

Thirdly, the fact that the provision on *national unity and reconciliation* (see generally *Qozeleni v Minister of Law and Order supra* 79–80 for a discussion by Froneman and Kroon JJ; Basson *South Africa's interim Constitution* (1994) 318–319), which contains a kind of political credo, enjoys the same legal status in interpreting the Constitution as any other provision (s 232(4)), is absolutely guaranteed, if "properly" used, to cause the Constitution to be potter's clay in the hands of the new generation of politically conscious lawyers. For example, the reference to the deeply divided society of the past, the conflict and strife and the untold suffering and injustice, may possibly prompt certain judges to change as much of the law as they can in the vain hope that they are in fact building a bridge to Utopia. However, the elevation to the realm of constitutional law of an interpretation of our history acceptable to the new political masters and their supporters, may obscure reality: conflict, strife, untold suffering and injustice definitely continue in the new South Africa and will probably (and sadly) not be cured by the present government, legal system or any judge.

Fourthly, it is accepted that in constitutional interpretation regard must be paid to the legal *history, traditions and usages* of the country concerned (eg *S v Zuma supra* 651H; *R v Big M Drug Mart Ltd* (1985) DLR (4th) 321 395). The use of this handy tool depends, of course, on the nature of one's views on history. And to complicate matters considerably, Du Plessis ("Enkele gedagtes oor die historiese interpretasie van hoofstuk 3 van die oorgangsgrondwet" 1995 *THRHR* 511) regards as relevant the following views on history by Heidegger *An introduction to metaphysics* (1961) 36:

> "History as happening is an acting and being acted upon which pass through the *present*, which are determined from out of the future and which take over the past. It is precisely the present that vanishes in happening."

One can only hope that no court in South Africa will ever attempt to make use of this unintelligible *dictum* in construing the Constitution as it may cause the strangest results imaginable.

In justifying the application of the Constitution between individuals *in casu*, Froneman J was not slack in giving attention to "history". He took his lead from the constitutionally approved and politically "correct" version of past events (see the provisions on national unity and reconciliation *supra* 748): He dutifully referred to structural inequality and injustice gradually filtering through to all spheres of society since the arrival of European colonists some three and a half centuries ago (685D). Although this form of "European colonist" bashing may cause Froneman J to be politically popular in certain circles, it will unfortunately not change the harsh truth that the general backwardness, lack of discipline, genocide, lawlessness, spiritual darkness etcetera in too many parts of the African continent, have nothing to do with the activities of the European colonists or their descendants.

Fifthly, as if the principles mentioned above do not create enough room for arbitrary interpretation and causes enough uncertainty, Du Plessis (1995 *THRHR* 504 *et seq*) also desires historical facts such as the *deliberations at Kempton Park* as well as "die toekomsverwagtings van die outeurs van die teks" to be used (see for an effective criticism of this suggestion the discussion by Van Dijkhorst J in *De Klerk v Du Plessis supra* 46–47). One can merely hope that our courts will never find themselves so desperate for ideas on constitutional interpretation that they have no choice but to revisit the tedious deliberations of our own version of the Founding Fathers.

All the above causes one to wonder whether the whole process of "interpreting" the Constitution has any characteristics of an objective or scientific discipline or is merely an arbitrary exercise in party political and social expediency by judges and academics. Although some lay persons will possibly still accept that the Constitution is in fact the "supreme law" of the land, lawyers have no excuse for supporting this myth any longer. *The supreme law of the land can be more accurately described as the ideas on constitutional interpretation used at a given time by the most powerful judges in the country.*

6 Some final thoughts

It is suggested that the *Gardener* case serves as a warning that our courts should sparingly use the opportunity they enjoy in terms of section 35(3) of the Constitution to change private law. Froneman J, armed with his "politically correct" version of South African history, alleged that the function of the Constitution is to "release" common law from the shackles of institutionalised racial inequality that are apparently visible to him (685). He added that to leave those areas of the common law which are in conflict with the Constitution unaffected would in effect perpetuate aspects of an undemocratic, discriminatory and unjust past (686B).

Through these arguments Froneman J apparently attempted to invest himself with wide legislative powers. And as it is largely a subjective decision whether

some principle of common law is in "conflict" with vague constitutional concepts such as *democracy, non-discrimination* or *justice*, South Africa will in fact have as many "parliaments" as there are judges willing to assume the new role of ensuring that our common law is changed in accordance with their ideas on democracy etcetera. (There is also uncertainty about the role, if any, the Appellate Division of the supreme court will have in this regard to overrule the "mini parliaments" operating in the provincial and local divisions of the supreme court – see also C Botha 1995 *THRHR* 524.)

To the many enthusiastic exponents of free-floating interpretation methods, the following may be ridiculously irrelevant and old-fashioned questions but they must nevertheless be asked: (a) Could the approach by Froneman J in the present case ever have been the intention of the legislature in adopting section 35(3) of the Constitution? (b) How does a legal practitioner advise clients on matters of private law if he is in fact not only bringing their cases to *court* but also to a type of *legislature* which may very well change the law on which he based his initial legal opinion? (c) Has the basic and golden rule of interpretation, namely the presumed "intention of the legislature" been replaced by a new golden rule, the "intention of the judge"?

It is suggested that our "final" constitution and bill of rights should be more restrictive as far as a court's power to change common law in general and private law in particular is concerned. Moreover, the constitution should provide better guidelines as regards the horizontal operation of the bill of rights so that there is less room for judicial initiative causing confusion and even chaos in private law. And if technically possible, the final constitution should contain more directives for its own interpretation in order to rid us of at least some of the more fanciful free-floating methods currently in judicial use or being advocated by academics.

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MODEKONFORMERING, DIEREMISHANDELING EN DIEREREGTE

BayObLG, Beschl v 8/41993 NJW 1993, 2760

1 Inleiding

In hierdie saak het die volgende feitestel na vore gekom: B, die beskuldigde, is 'n teler van Dobermann-honde. 'n Ideaal van telers van dié honde is dat hulle honde staanore, en nie slapore nie, moet hê. Staanore word deur koepering (*Kupierung*) bereik. Koepering is in Duitsland verbode. Daarom het B sy sewe hondjies na 'n diereklinïek in België geneem. Daar is hulle ore onder narkose

gekoepeer, dit wil sê een derde van die oppervlakte van hulle ore is weggesny. Die wonde is daarna toegewerk en op 'n spesifieke wyse met kleefband opgebind. Hulle is nog dieselfde dag na Duitsland teruggeneem. Die ore is daarna daagliks masseer en die opbind daarvan is daagliks hernu. Dié behandeling is uiters pynlik. Die hof moes beslis of die bepalings van die Tierschutzgesetz (TSG), wat dieremishandeling verbied, deur hierdie optrede geskend is. In die onderhawige bespreking word die antwoord op dié vraag, ook met verwysing na die Suid-Afrikaanse reg, is 'n diereregtelike perspektief geplaas.

2 Die Duitse reg

Volgens die TSG is dit strafbaar om (onder andere) opsetlik en sonder redelike gronde 'n werweldier aansienlike pyn (*erhebliche Schmerzen*) toe te voeg (a 3–18; sien ook Lorz *Tierschutzgesetz* (1992) 36 ev). Die *Bundesgerichtshof* het beslis dat die vraag of aansienlike pyn teenwoordig is of nie, 'n feitelike vraag is (*BGH*, Urt v 18-2-1987, *NJW* 1987, 1833 1834–1835; sien ook OLG Dusseldorf, Beschl v 6-7-1992, *NJW* 1993, 275). In die onderhawige beslissing word daarop gewys dat die toevoeging van pyn aan 'n besondere sensitiewe orgaan as aansienlik aangemerk kan word. Die ore van honde is volgens die hof besonder sensitief. Die hof beslis dat die genoemde handelinge van B na die operasie aansienlike pyn vir die hondjies meegebring het. Die hof beslis verder dat die pyn sonder redelike gronde toegevoeg is. Redelike gronde bestaan as die toevoeging van aansienlike pyn duidelik geregverdig is. Die hof beslis uitdruklik dat redelike gronde nie bestaan as die pyn toegevoeg word bloot om die hondjies, in navolging van 'n modegier, mooier te laat lyk nie. B word gevolglik skuldig bevind.

3 Suid-Afrikaanse Reg

In Suid-Afrika is die Dierebeskermingswet 71 van 1962 (soos gewysig) van toepassing. Artikel 2 van dié wet stel verskeie handelinge waardeur onnodige lyding aan diere toegevoeg word, strafbaar. Uit ons gewysdes blyk dat pyntoevoeging aan diere in verskeie omstandighede geregverdig is (vir 'n gedetailleerde bespreking hiervan sien Labuschagne en Bekker "Dieremishandeling" 1986 *Obiter* 42–46). Ons howe het egter, sover my kennis strek, nog nooit beslis of modekonformering as regverdiging vir dieremishandeling kan dien nie.

4 Diereregte

Ek het in ander publikasies daarop gewys dat diere 'n reg op pynvermyding het (Labuschagne "Regsubjektiwiteit van die dier" 1984 *THRHR* 344; "Regsobjekte sonder ekonomiese waarde en die irrasionele by regsdenke" 1990 *THRHR* 557). Die argumente daar geopper, word nie hier herhaal nie. Die vraagstuk van diereregte en veral die uitbreiding daarvan het die afgelope paar dekades wêreldwyd aansienlik toegeneem en die aandag van wetenskaplikes in beslag geneem (sien Chase "Animal rights: An interdisciplinary selective bibliography" 1990 *Law Library J* 359–391). Die geleidelike juridiese erodering van die bevoegdhede van die eienaar van 'n dier is 'n teenpool vir die akkumulering van diereregte (sien Soehnel "What constitutes offence of cruelty to animals – modern cases" 6 *ALR* 5th 733 798; BayObLG, Beschl v 5 5 1993, *NJW* 1993, 2760). Dit blyk ook uit die onderhawige beslissing.

Die feit dat aan eienaars van diere grense gestel word waarbinne hulle hulle diere moet behandel, is myns insiens reeds bewys daarvan dat dit om die diere self gaan en nie om eiendomsreg nie. In dié verband kan gewys word op 'n onlangse Amerikaanse saak. In *Regalado v United States* (572 A 2d 416, 6 ALR 5th 1178 (1990, District of Columbia CA)) was die feite soos volg: R is aan dieremishandeling skuldig bevind omdat hy sy twaalf week-oue Duitse herdershondjie met die een hand aan sy leiband in die lug gehou en met die ander hand geslaan het. 'n Dierearts wat die hondjie kort daarna ondersoek het, het getuig dat sy gesig geswel was, met snymerke aan sy linkeroog wat bloederig en gekneus was. Hoofregter Rogers verklaar soos volg (1186):

> "Unlike cruelty to children, cruelty to animals was not an offense at common law. It has only been since the early part of the twentieth century that most jurisdictions began enacting statutes for the protection of animals without regard to ownership . . . Thus, although children are doubtless deserving of greater protection than animals, the rationale . . . regarding the social policy that is enhanced by requiring a general intent with malice, is applicable here. Statutes enacted for the protection of animals from cruelty were not intended to place unreasonable restrictions on the infliction of such pain as may be necessary for the training or discipline of an animal. On the other hand, there is a distinction between discipline and training and a beating or a needless infliction of pain accompanied by a cruel disposition. Accordingly, we are not persuaded that sec 22–801 should be interpreted to require proof of specific intent to injure or abuse. The specific intent requirement would offer the animal owner the greatest protection, but the general intent with malice requirement reflects the growing concern in the law for the protection of animals, while at the same time acknowledging that humans have a great deal of discretion with respect to the treatment of their animals."

(Sien ook *State v Fowler* 1974 22 NC App 144, 205 SE 2d 749; Soehnel 798.)

5 Gevolgtrekking

Uit bogaande bespreking blyk dat 'n Duitse hof in die onderhawige saak die blote konformering met 'n modegier nie as geldige verweer op 'n klagte van dieremishandeling aanvaar het nie. Die benadering van genoemde hof is in ooreenstemming met die toenemende verbetering van die regsposisie van diere, veral in Eerste Wêreld-lande. Ons howe kan dit met vrug navolg.

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BOEKE

THE SOUTH AFRICAN LAW OF UNFAIR DISMISSAL
by PAK LE ROUX and ANDRÉ VAN NIEKERK
Juta Cape Town Wetton Johannesburg 1994; xl and 355 pp
Price R145,00 (soft cover)

The aim of this book, according to the preface, is an attempt to describe and discuss the jurisprudence dealing with unfair dismissal in South African labour law. What the authors conceived as a guide to the subject for non-lawyers, grew into a work to be consulted by legal practitioners and specialist industrial relations practitioners as well. Fortunately, the result is no mere documentation for the business or student market, but a valuable source of practical and also academic information addressing a dire need in a rapidly developing field of law.

Unemployment is rife in South Africa, resulting in fierce contests where employers attempt to terminate services of employees. The proper documentation and systemisation of the law of termination of employment at the initiative of the employer, as the authors have chosen to call it, was timeous and necessary. Rather than merely recording the law and the debates which led to the decisions of the courts and the principles applied there, the authors also join in the debate, offering useful comments and well-considered opinions.

It is a well-written book, the text clear, brief and to the point. The style and language is accessible and user-friendly, satisfying not only the requirements of laymen and students but also those of the labour law specialist. The subject-matter is treated practically and systematically, the main topics culminating in a discussion of current law as often stated in decisions of the labour appeal court. The material is clearly and accurately printed and the work strongly bound and tastefully presented by the publisher.

For the specialist in the field of labour law, comprehensive footnotes highlight authority and background on many issues of interest. Footnote 6 on 99, for example, contains a wealth of information on the origin and nature of the power of the employer to control the activities of and to discipline, an employee. Where applicable, references to international sources are made throughout the work.

The book lends itself to easy reference, primarily because of its subdivision into seven parts and twenty seven chapters, clearly set out in the table of contents. Headings are brief and to the point. A very extensive table of cases and

arbitration awards bears witness to the research done and made available through this publication.

Readers are alerted to the cut-off date of 31 May 1994 for all materials and cases referred to. Brief reference is made to amendments to legislation regulating employment in the Public Service which came too late to be incorporated before going to press and which have to be taken into account under Part 7 of the book.

Part 1, by way of a brief overview and introduction, records the origin and evolution of substantive and procedural fairness as the basic principles of fair dismissal. A short, comparative survey of the role of the common law, legislation and collective bargaining in the protection against unfair dismissal, follows. A discussion of the principles contained in Convention 158 and Recommendations 119 and 166 of the International Labour Organisation concludes this part.

Part 2 deals with preliminary topics such as the application of labour relations legislation, the definition of employee, and the question of what constitutes a dismissal. The concept of constructive dismissal is discussed extensively.

In Parts 3, 4 and 5 different grounds for termination of employment at the initiative of the employer are discussed. The authors chose to categorise the different grounds under dismissal for misconduct (Part 3, ch 7 to 14), dismissal for incapacity (Part 4, ch 15 to 17) and dismissal for operational requirements (Part 5, ch 18 to 22). This corresponds to the categorisation of the International Labour Organisation.

More than one third of the work (Part 3) is devoted to what is termed by the authors the most common ground upon which employers seek to justify dismissal, namely dismissal for misconduct. The relevance of a wide variety of factors to determine the fairness of a dismissal on this ground has led to conflicting approaches by arbitrators, members of the industrial court, and the labour appeal court. The authors succeed in effectively highlighting the most important elements required for a fair dismissal by analysing the approach adopted by the courts and arbitrators (ch 7). Chapter 8 deals with specific acts of misconduct, ranging from absence from work and the use of abusive language, to drunkenness and insolence, insubordination, and sexual harassment.

Chapter 9 is devoted to procedural fairness, discussing the generally accepted requirements for a fair hearing before dismissal.

Discipline and group misconduct (ch 10), non work-related conduct (ch 11), and criminal proceedings and disciplinary action (ch 12) are also discussed under Part 3.

The dual role of shop stewards and the disciplinary problems arising from that situation are discussed in chapter 13. Part 3 concludes with a chapter on specific invalid reasons for dismissal. Several practical problems are dealt with in this chapter, such as the dismissal of employees who refuse to belong to a union which is party to a closed shop.

Part 4 evaluates incapacity (or incapability) as a ground for fair dismissal. This may manifest itself in the form of dismissal for poor work performance or incapability on account of illness or injury.

Dismissal for operational requirements (Part 5, ch 18 to 22) deals with retrenchment, the closure, transfer and sale of businesses, refusal to accept a change in the terms and conditions of employment, as well as other forms of dismissal which may include incompatibility, breakdown of trust, and so on.

One chapter in Part 6 is devoted to dismissal in the context of industrial action. Controversial aspects, for example the dismissal of strikers, are analysed, revealing the inconsistency of present jurisprudence. The relevance of constitutional provisions is also highlighted. A review under chapter 23.4 raises the issue of the refinement and further development of this important area of strike law by the courts as against possible future statutory intervention.

Part 7 (ch 24 to 27) sets out the procedures and remedies for unfair dismissal available to employees under the Labour Relations Act 28 of 1956 as well as to employees in the public service, education and agriculture under the statutes in question. Finally, the aspect of costs is briefly touched upon.

In his foreword professor Adolph Landman remarks that the authors' mastery of the subject enables the reader to be on top of the law. One cannot but agree and conclude that the book is to be thoroughly recommended to all who are involved in the field of labour law.

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INLEIDING TOT DIE FAMILIEREG
INTRODUCTION TO FAMILY LAW
FAMILY LAW: CASES AND MATERIALS

deur PJ VISSER en JM POTGIETER

Juta Kaapstad Kenwyn Johannesburg 1994; 245 bl (Inleiding, Introduction); 480 bl (Cases and materials)

Prys R95,00 (*Inleiding, Introduction*); R120,00 (*Cases and materials*)

1 Inleiding

Dit is sekerlik geen oordrywing nie om te sê dat dit in die huidige staatkundige oorgangsbedeling ietwat ongemaklik is om 'n regshandboek op die mark te bring. Nie alleen is daar nog nie duidelikheid oor die inhoud van die grondwet wat tans onder bewerking is nie, maar ook is die invloed van (veral hfst 3 van) die Grondwet van die Republiek van Suid-Afrika 200 van 1993 nog grootliks ongetoets. Hierdie dokument het deurslaggewende invloed ook wat die familiereg betref en moet derhalwe verdiskonteer word by die skryf van handboeke in dié dissipline. Die Grondwet het inderdaad 'n belangrike kriterium geword waaraan die geskiktheid en relevansie van handboeke in die regswetenskap beoordeel moet word en dien derhalwe mede as uitgangspunt waaraan die werk

van Visser en Potgieter beoordeel word. Die Engelse en Afrikaanse uitgawes van die werk word inhoudelik en chronologies deur die vonnisbundel aangevul. Die vonnisbundel volg egter nie dieselfde hoofstukindeling as die handboeke nie. Ter wille van gerief word na al drie die bronne saam verwys as "die werk".

Die outeurs is by uitnemendheid toegerus om 'n werk van hierdie aard voort te bring. Hulle word albei erken en gereken as vooraanstaande privaatreggeleerdes en daar word ook melding gemaak van Visser se betrokkenheid by die aanbieding van die familieregkursus vir eerstejaarstudente en van Potgieter se ondervinding rakende die ontwerp van effektiewe en gebruikersvriendelike studiemateriaal. Die inslag van dié werk getuig in ruim mate van die besondere aanslag van die outeurs.

2 Inhoud van die werk

Die inhoud van die familieregkursus soos dit tradisioneel ontwikkel het, word volledig in die werk aangespreek. In die eerste hoofstuk word 'n kort inleiding tot die familiereg gebied. In dié hoofstuk word die familiereg omskryf, die onderafdelings van die vakgebied geïdentifiseer en 'n beskrywing gebied van die aard van die huwelik. Die huweliksregstelsel, die geskiedenis daarvan asook die problematiek rondom huwelike wat in die buiteland gesluit is en die invloed van die Grondwet word onder die loep geneem.

Hoofstuk 2 handel oor die verlowing en hoofstuk 3 oor die geldigheidsvereistes vir 'n huwelik. Hoofstuk 4 het dit oor nietige en vernietigbare huwelike. Noodwendigerwys word putatiewe huwelike ook hier behandel. In hoofstuk 5 word na die onveranderbare gevolge van die huwelik gekyk. Hoofstuk 6 bied 'n inleiding tot die huweliksgoedereereg as veranderbare gevolg van die huwelik. Die struktuur van die huweliksgoedereereg, die verskillende huweliksgoederebedelings en die verandering van die partye se huweliksgoederebedelings word in die hoofstuk behandel. Dit is jammer dat die outeurs (69 en elders) praat van "huweliksvorme" as dit ooglopend is dat hulle eintlik huweliksgoederebedelings bedoel. Dié term kan tot onsekerheid lei. In die Engelse vertaling van die werk word eweneens gepraat van "different possible forms of marriage".

Hoofstukke 7, 8 en 9 handel oor die huwelik binne gemeenskap van goedere. Die algemene beginsels van sodanige huweliksgoederebedelings asook die bestuur van die gemeenskaplike boedel word in behandeling geneem. Besondere aandag word aan die effek van die afskaffing van die maritale mag gegee soos dit in Die Vierde Algemene Regswysigingswet 132 van 1993 bepaal word.

In hoofstuk 10 word met die huwelik buite gemeenskap van goedere omgegaan. Die aanwasbedeling kom uiteraard ook daar aan die orde en die outeurs maak dit duidelik dat dié bedeling geen derde goederebedeling is nie, maar dat dit inderdaad 'n huwelik buite gemeenskap van goedere is waarop al die voorskrifte van sodanige goederebedeling van toepassing is en waarby die aanwasbedeling ingesluit is.

Egskeiding en die persoonlike en vermoënsregtelike gevolge daarvan kom in hoofstukke 11 en 12 aan die orde en ouerlike gesag, die posisie van die hof as oppervoog en die posisie van sekere ander voogde en kuratele word in hoofstukke 13 en 14 in behandeling geneem.

3 Enkele oorwegings

Uit paragraaf 2 is dit duidelik dat die hele spektrum van die familiereg aangesny word. Die perspektief waarmee die outeurs die werk aangepak het, kom in die voorwoord na vore waar verduidelik word dat die werk "spesifiek vir eerstejaarregstudente" bedoel is. Sodanige studente word wat die regswetenskap betref, as leke bestempel wat aan die begin van hulle regstudie staan.

> "Daarom is die materiaal en voetnote so gekies en aangebied dat die volle inhoud van die boek vir die student verteerbaar behoort te wees. Historiese en suiwer teoretiese vraagstukke is tot die minimum beperk."

By die bestudering van die werk, is dit duidelik dat die outeurs nie gepoog het om iets meer te bereik as wat hulle vir hulleself as oogmerk gestel het nie. Teen hierdie agtergrond word enkele opmerkings ter oorweging gegee.

Die outeurs gee weinig aandag aan die bepalings van die Grondwet. Op 5 word gesê dat die "handves van fundamentele menseregte" wel 'n invloed op die huwelik en die familie het, maar dat daar nie 'n fundamentele reg op die beskerming van die huwelik of die gesin is nie. Op 10 en 11 word 'n oorsig oor bepalings van hoofstuk 3 van die Grondwet gegee. Die teks daarvan is ook in die vonnisbundel opgeneem.

Terwyl daarmee akkoord gegaan word dat dit 'n ernstige leemte in die Grondwet is dat die huwelik of gesin nie as sodanig daarin beskerm word nie, is dit onvoldoende dat daar in 'n werk van hierdie aard (al is dit net op die eerstejaarstudent gerig) met so 'n oppervlakkige bespreking volstaan word. Outeurs behoort juis nou rigtinggewend te werk te gaan en leiding te gee. Dié argument kan gestaaf word deur na 'n enkele voorbeeld te verwys. In *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W) word gehandel met die probleem van 'n lesbiese geskeide moeder wat die hof nader om 'n verklarende bevel rakende haar toegangsregte tot haar kinders uit haar ontbinde huwelik. Een van die bevele wat die hof maak, is dat X, die lesbiese party waarmee die moeder saamwoon, nie in die huis mag wees ten tyde van besoeke van die kinders nie en dat die moeder alle redelike stappe moet doen om die kinders daarvan te weerhou om met lesbianisme in aanraking te kom.

Ofskoon dit so is dat die Grondwet geen besondere bepalings rakende familie- en gesinsbeskerming bevat nie, spreek dit duidelik uit die aangehaalde saak dat die algemene bepalings daarvan die familiereg ingrypend kan beïnvloed. Sou *Van Rooyen* nie byvoorbeeld anders beslis gewees het na die inwerkingtreding van die Grondwet nie? Die Grondwet maak dit duidelik dat daar teen niemand gediskrimineer mag word (onder andere) op grond van geslag en geslagtelike oriëntasie nie. Dié beslissing, wat lesbianisme as "abnormal bedroom behaviour" tipeer, kan moontlik gesien word as inbreukmakend op die reg op bewegingsvryheid van X, die saamwoongenoot en ook op die reg op vryheid van geslagtelike oriëntasie van die moeder.

Artikel 30(3) van die Grondwet plaas die beste belang van die kind in 'n bepaalde hiërargiese prioriteit deurdat dit in alle omstandighede voorkeur moet geniet. Sou daar teen dié agtergrond geredeneer kon word dat die blootstelling van kinders aan lesbiese verhoudings nie die beste belang van die kind voorop stel nie, sou dit eweneens die *Van Rooyen*-beslissing kon beïnvloed.

Die outeurs volstaan met die insluiting van die *Van Rooyen*-beslissing in die vonnisbundel (259 ev) en dui bloot onder die bespreking van die saak aan dat die beslissing moontlik onkonstitusioneel sou wees deurdat dit inbreuk maak op die reg van homoseksuele en lesbiërs wat volgens dié beslissing nie dieselfde reg van toegang het nie as persone met heteroseksuele geslagsoriëntasie.

Juis vir eerstejaar-regstudente, wie se regsdenke nou in 'n fase gevorm word waarin die waardes wat in die Grondwet vervat word die moraliteit en sedelikheidsoorwegings van die pre-Grondwet fase in 'n nuwe lig stel, behoort handboeke wat op hulle afgestem is veel indringender met die bepalings van die Grondwet om te gaan.

In aansluiting by die bespreking in die vorige paragraaf, word die sinvolheid daarvan om "historiese en suiwer teoretiese vraagstukke" óf buite rekening te laat, óf sodanig af te water dat dit nie verhelderend tot 'n situasie spreek nie, bevraagteken. Daar word ter oorweging gegee dat dit eerder voordelig vir junior studente is om op 'n suiwer en korrekte teorie-grondslag te bou, as om (by wyse van spreke) met die deur direk in die familiereghuis te val. 'n Voorbeeld dien hom ook in hierdie verband aan.

Artikel 4(1) van die Wet op Egskeiding bepaal dat 'n egskeidingsbevel verleen kan word indien die huwelik onherstelbaar verbrokkel het en daar geen redelike moontlikheid op die herstel van 'n *normale huweliksverhouding* is nie. Die begrip "normale huweliksverhouding" kan as een van die kernbegrippe van die familiereg bestempel word en behoort tipies onder die *consortium*-begrip hanteer te word. Vanuit hulle vertrekpunt behandel die outeurs die begrip uiters oorsigtelik en dit lei daartoe dat die student nie geredelik sal kan reageer op 'n uitspraak soos dié in *Coetzee v Coetzee* 1991 4 SA 702 (K) nie.

In die vonnisbundel word die gewysde op 216 en verder bespreek. Op 217 gee die outeurs te kenne dat die beslissing nie korrek is nie en voer hulle soos volg aan:

> "The moment one of the spouses firmly decides that the marriage is over, there is conclusive proof of irretrievable breakdown of that marriage. The fact that a marriage has always been dreary [soos inderdaad geblyk het die omstandighede van die saak te wees] cannot be used as proof that it has not broken down irretrievably – it rather confirms the sorry state of the marriage and is proof that a normal marriage relationship is not possible."

Dié benadering van die outeurs lei daartoe dat die student deurgaans onseker is oor wat 'n normale huweliksverhouding behels. Daarom word aan die hand gedoen dat dit sinvol sou wees om die *consortium* as kernbegrip in die familiereg indringend te bespreek ten einde daarmee aan te toon dat 'n huwelik waarin die feitesituasie soos in *Coetzee* voorgekom het, nie *'n normale* huweliksverhouding was nie. Na aanleiding van die geykte uiteensetting in *Swart v Swart* 1980 4 SA 364 (O) sou daar dus wel geargumenteer kon word dat die feite subjektief op verbrokkeling en 'n "abnormale huweliksverhouding" dui en dat daar objektief geen redelike moontlikheid op die herstel van 'n normale huweliksverhouding bestaan het nie. Die verhouding tussen die partye was inderdaad vir 15 jaar lank 'n "droewe" en "onaantreklike" een, en daarom binne die *consortium*-begrip geen normale huweliksverhouding nie.

Terloops, juis die *Coetzee*-beslissing waarin die hof 'n egskeidingsbevel geweier het nieteenstaande die feit dat die eiseres (onder andere) getuig het dat sy die verweerder nie meer lief gehad het nie en bang was vir hom, dui daarop dat die Suid-Afrikaanse howe steeds nie egskeiding op aanvraag verleen nie. Die stelling van die outeurs op 142 dat die Suid-Afrikaanse reg egskeiding op aanvraag sal verleen, moet derhalwe met versigtigheid bejeën word.

4 Slot

Dit het tyd geword dat regsdosente wat vir eerstejaarstudente doseer, gedagtes behoort uit te ruil oor onder andere vakinhoud, doseertegniek, ensovoorts. Dit is juis die feit dat sodanige studente as leke sonder vooraf wetenskaplik gefundeerde kennis oor die regswetenskap vir die kursus inskryf, wat die keuse van geskikte leerstof en die aanbieding daarvan bemoeilik. Die werk poog nie om iets meer te wees as 'n ontsluitingsbron van die familiereg vir eerstejaarstudente nie. Daar word goed in dié doel geslaag. Die outeurs se skryfstyl is maklik leesbaar en dit dra beslis daartoe by dat die volle inhoud van die boek vir die student verteerbaar is – 'n taak wat die outeurs hulleself ten doel gestel het. Die hele spektrum van die familiereg word in 'n maklik hanteerbare formaat aan die student gebied.

'n Besondere pluspunt van die werk hang saam met die inhoud van die vonnisbundel en die wyse waarop beslissings gerapporteer word. Anders as wat die geval is met vonnisbundels in die algemeen, het die outeurs dit goedgedink om telkens ook relevante wetgewing op te neem. Dit lei meteen daartoe dat die gebruikswaarde van die bundel aansienlik verhoog word. Daarmee saam bied die kantskrifte by die beslissings handige aanknooppunte. Dit vergemaklik die begrip van die beslissing aansienlik.

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HUMAN RIGHTS: FUNDAMENTAL INSTRUMENTS AND DOCUMENTS

by ESSOP M PATEL and CHRIS WATTERS

Butterworths Durban 1994; xvii and 531 pp
Price R182,40

One of the many consequences of the adoption of the Republic of South Africa Constitution Act 200 of 1993 and the unexpectedly important role accorded public international law within the Constitution, has been a general rush to find international documentation. This is particularly true of human rights documents – understandably so, given the ambit of section 35 of the Constitution.

While practitioners, the courts, and even academics could in the past conveniently hide behind the questionable excuse that as many of these conventions and

documents stem from the United Nations General Assembly and other non-legislative bodies, their practical relevance was limited and they could largely be disregarded for practical purposes, this is no longer the case. Unfortunately, this approach to international law has meant that international documentation has not been readily available. A search for even the Universal Declaration of Human Rights could be a daunting prospect for someone without ready access to adequate library facilities.

Two major elements arising from the Constitution render international human rights documents indispensable. First, section 35 provides in peremptory terms that the courts "*shall*, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter [chapter 3] . . ." The interpretation of this section is not without problems: are we dealing with "general" customary international law (see, eg, Maluwa "International human rights norms and the South African Interim Constitution 1993" 1993/1994 *South African Yearbook of International Law* 14), or with a specific and individual branch of public international law, namely international human rights law, with sources of its own (see, eg, Botha "International law and the South African Interim Constitution" 1994 *SA Publiekreg/Public Law* 245)? Nevertheless, a practitioner dealing with fundamental rights before any court of law will be compelled to present the international law status of the right in question. Secondly, the new approach to constitutional interpretation demands that the net be cast far wider and that the provisions of the Constitution be read in broader context – which will include the international perspective. In short, the days of glossing over legal developments in the international community are well and truly past.

With this in mind, no one can doubt the need for Patel and Watters's collection of international documents dealing with human rights. While there are a number of collections of international documents on the market, including some less expensive ones, this edition is particularly attractive to the South African reader. Of course, one cannot really "review" international documents; just as one cannot "review" statutes! The value of such a work lies first of all in the selection of the documentation and secondly in its arrangement. It is in these regards that the present publication is particularly useful; it is not only catholic in its selection but logical in classification. There are few international human rights documents not included in the work.

Part 1 deals with the development of international human rights; part 2 with the Continental human rights ethic; part 3 with theocentric human rights; part 4 with directive principles of human rights (self-determination, servitude, racial discrimination and religious intolerance, and crimes against humanity); part 5 with rights of specific persons (refugees, indigenous and tribal peoples and minorities, women, children, the family, the mentally and physically handicapped and prisoners); part 6 with workers' human rights; and part 7 with universal aspirations (education and culture, the environment, right to peace and freedom from want). Part 8 contains extracts from African countries' constitutional provisions on human rights. The countries covered are the BLS countries, Zimbabwe, Namibia and, of course, South Africa itself.

Although one can, I dare say, survive without a collection of international documents, such a work saves many hours and much frustration. It is well produced and "built to last". Those who realise that they do in fact now need a work of this type (and will in the future need it to an ever increasing extent), need look no further.

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RIGHTS AND CONSTITUTIONALISM – THE NEW SOUTH AFRICAN LEGAL ORDER

deur DH VAN WYK, J DUGARD, B DE VILLIERS en DM DAVIS (reds)

Juta Kaapstad Wetton Johannesburg 1994; liv en 720 bl

Prys R295,00 (hardeband)

Die oorkoepelende oogmerk van die redakteurs met hierdie boek, waartoe 'n aantal prominente Suid-Afrikaanse outeurs bygedra het, is 'n (vooruitskouende) analise van die fundamentele beginsels wat die grondslae van die nuwe Suid-Afrikaanse regsorde gaan lê. Hierdie beginsels, wat aan die "finale" Grondwet beslag moet gee, sluit in die normatiewe verhewendheid van die Grondwet (in teenstelling met parlementêre soewereiniteit), die idee van 'n demokratiese regstaat en die judisiële beskerming van fundamentele regte. 'n Ondersoek van hierdie begrippe, waarvan die behoorlike verstaan die sleutel gaan bied tot die interpretasie en toepassing van die Grondwet, vorm die oorhoofse tema van hierdie werk.

Die boek is in vier dele verdeel. Deel I (deur Davis, Chaskalson en De Waal) handel oor die begrippe "konstitusionalisme" en "demokrasie" en die teoretiese begronding van grondwetlike interpretasie. Deur die aantoon van die akademiese, politieke en judisiële kontroversie waaraan laasgenoemde in ander jurisdiksies (met spesifieke verwysing na Duitsland, die VSA, Kanada en Indië) blootgestel is, word die verreikende implikasies van teoretiese keuses in hierdie verband vir die toekomstige ontwikkeling van ons hele regstelsel aangedui.

Deel II (deur Van Wyk) bied 'n oorsig oor die historiese aanloop tot die 1993-Grondwet asook 'n uiteensetting van die vernaamste kenmerke daarvan. Die basiese doel daarvan is om as 'n brug te dien tussen dele I en III.

Deel III, wat in 'n veertiental ongenommerde hoofstukke ingedeel is, fokus op 'n analise, in vergelykende en internasionale konteks en perspektief, en telkens met 'n samevattende vooruitskouing na die Suid-Afrikaanse situasie, van die sleutel-fundamentele regte soos in hoofstuk 3 van die interim-Grondwet vervat. Dit is nie bedoel as 'n gedetailleerde kommentaar op hoofstuk 3 nie en bied

eerder 'n oorsig oor die neerslag van die belangrikste onderhawige beginsels in die internasionale en geselekteerde staatlike regsordes.

In die lig van die belangrikheid van die beginsels en norme van die internasionale reg met betrekking tot die beskerming van menseregte vir die interpretasie van hoofstuk 3 van die Grondwet, word die eerste hoofstuk van deel III in geheel aan 'n bespreking daarvan gewy. Hierdie hoofstuk (deur Dugard) bied saam met die beginsels in deel I uiteengesit, 'n rigtinggewende basis asook 'n raamwerk vir die toekomstige ontwikkeling van ons regstelsel.

In die oorblywende hoofstukke van deel III word die belangrikste aspekte van die volgende fundamentele regte bespreek: gelykheid en gelyke beskerming (Davis); persoonlikheidsregte – die reg op lewe, waardigheid, vryheid en sekuriteit van die persoon, privaatheid, en vryheid van beweging (Du Plessis en De Ville); vryheid van spraak en uitdrukking (Van der Westhuizen); vryheid van vergadering en vryheid van assosiasie (Woolman en De Waal); administratiewe geregtigheid (Corder); prosessuele regte (Milton, Cowling, Van der Leeuw, Francis, Schwikkard en Lund); regte rondom arbeid (Davis); eiendomsreg, regte met betrekking tot grond en regte met betrekking tot die omgewing (Van der Walt); regte rondom die gesin (Sinclair); regte met betrekking tot kultuur, onderwys en godsdiens (Dlamini); sosiale en ekonomiese regte (De Villiers); en die beperking of opskorting van regte (Erasmus).

Deel IV bestaan uit 'n feitlik volledige bibliografie van werke geraadpleeg en is tematies volgens die hoofstukindelings ingedeel. Hierdie byvoeging sal van onskatbare verwysingswaarde vir alle gebruikers van hierdie publikasie wees. Laastens is hoofstuk 3 van die Grondwet (die handves van fundamentele regte) as 'n aanhangsel bygevoeg.

Dit is onmoontlik om binne die beperkte omvang van 'n resensie behoorlik reg aan al die aspekte van hierdie komplekse en omvangryke werk te laat geskied. Met die oorkoepelende oogmerke daarvan as uitgangspunt kan daar egter by 'n aantal breë opmerkings volstaan word. Soos by werke van 'n saamgestelde aard verwag kan word, is die individuele bydraes van wisselende aard wat opmerklike variasies in styl, inhoud en (ongelukkig) kwaliteit tot gevolg het. 'n Deurlopende staats- en regsfilosofiese begrondingslyn wat 'n mens graag in so 'n werk sou wou sien, ontbreek as gevolg hiervan ook (noodwendigerwys).

Dit is beslis nie 'n maklike boek om te lees nie. Dit bevat 'n groot hoeveelheid inligting en is baie beskrywend van aard. Hoewel laasgenoemde sekerlik deur die doel van die werk genoodsaak was, is die gevolg dat dit gevaar loop om juis daarom plek-plek aan begronding en diepgang in te boet. Vanuit 'n onderrigsoogpunt lewer hierdie boek 'n essensiële bydrae tot die oorbrugging van 'n teorie/praktyk dualisme en bevorder daardeur 'n geïntegreerde benadering tot ons regstelsel as 'n geheel – beide sake wat veral in die toekoms besondere aandag behoort te ontvang. Dit sal egter nie sommerso as inleidende werk vir studente gebruik kan word nie – vir die behoorlike verstaan daarvan word 'n redelike mate van voorafkennis by beide dosent en student veronderstel.

Vanuit 'n historiese perspektief is dit jammer dat die radikale implikasies wat die dogma van 'n *Grundnorm*-grondwet, gebaseer op die ideologie van konstitusionalisme, vir die status en voortbestaan van die Suid-Afrikaanse gemenereg

en inheemse reg inhou, nie vroeër in deel I eksplisiete aandag ontvang nie. Dit kom die eerste keer werklik ter sprake (en dan ook indirek in die vergelykende konteks van 'n vreemde regstelsel) by die bespreking van die *Drittwirkung*-leerstuk van die Duitse konstitusionele reg (89–92). Hoewel die wisselwerking privaat/publiek en konstitusionele reg/gemenereg deurgaans in die besprekings van die vreemde jurisdiksies na vore gebring word, is die eerste indringende bespreking van die konstitusionele implikasies vir die Suid-Afrikaanse gemenereg en inheemse reg (wat terselfdertyd die gebreke van en komplikasies met betrekking tot laasgenoemde blootlê) te vind in die uitstekende bydrae van Sinclair (519–522 531–535 540–544).

Vanuit 'n regsvergelykende oogpunt is dit kommerwekkend dat daar soms redelik kritiekloos na vreemde regstelsels as "modelle" verwys word en met die vreemde regsmateriaal op 'n deskriptief-kwantitatiewe wyse omgegaan word. Gelukkig word daar verblydende vermanings tot die omsigtigheid waarmee vreemde regsmateriaal benader moet word, gemaak deur Du Plessis en De Ville (263), Van der Westhuizen (280), Woolman en de Waal (308 314 328 342), Corder (387), Davis (453) en Erasmus (629–630 636 638 646 647–648). Alhoewel die outeurs oor die algemeen die reg van Duitsland, Kanada, Indië en die VSA indringend ondersoek, is daar tog by geleentheid na verskeie ander vreemde regstelsels behorende tot uiteenlopende sogenaamde "groot families" van die wêreld gekyk. Laasgenoemde kom ongelukkig egter as bloot kompilatories en oorsigtelik by onder andere Davis (444–446) en Van der Walt (475–478) voor.

By die lees van die individuele hoofstukke in deel III kom die herhalings en dupliserings van die bespreking van veral die breë implikasies van die internasionale reg, sonder om dit altyd konteks-spesifiek te maak, soms hinderlik voor. Dit skep die indruk (sekerlik ten onregte) dat die outeurs 'n bietjie in afsondering van mekaar gewerk het. Behoorlike redaksionele versorging van die werk voor publikasie kon veel bygedra het tot die oorkoepelende stilistiese integrering van die inhoud.

Die boek is voorsien van 'n voorwoord, inhoudsopgawe, lys van bydraers, tabelle van hofverslae en wetgewing, en 'n uitgebreide indeks. By so 'n omvangryke werk sou 'n mens egter graag 'n meer gedetailleerde inhoudsopgawe wou sien. Dit sou die werk meer toeganklik en verbruikersvriendelik gemaak het.

Die boek lewer 'n baanbrekersbydrae tot die Suid-Afrikaanse regsliteratuur en behoort op 'n gereelde basis deur alle juriste (studente inkluis) geraadpleeg te word. Die werk kan egter nie meer wees as dit wat die outeurs self daarmee beoog het nie, naamlik 'n inleiding tot die nuwe Suid-Afrikaanse regsorde. Die tweede ("konstitusionele") "Hahlo en Khan" moet nog geskryf word.

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STUDENTEHANDLEIDING VIR SIVIELE PROSESREG
deur JA FARIS, RA KELBRICK en E HURTER
Butterworths, Durban 1994; 205 bl
Prys R74,99 (sagteband)

Die *voorwoord* tot bogenoemde werk deur die drie outeurs sou as gepaste resensie kon dien. Inderdaad is dit ook gepas dat hulle na hulself verwys as samestellers en redigeerders eerder as outeurs. Die boek word uitgegee as eksperiment en is dit inderdaad ook. Ek is egter daarvan oortuig dat die eksperiment geslaag het en met 'n bietjie skaafwerk sy sukseskoers kan opskuif.

'n Studentehandleiding vir siviele prosesreg vul 'n groot leemte. Eerstens is die werk uiters nuttig omdat die hofreëls en relevante statutêre bepalings in een handige, bondige werk saamgevat word. Die verteerbaarheid daarvan word verder verbeter deur sinvolle verkorting en redigering. Hierdie werk sal verwelkom word deur dosente en studente in burgerlike prosesreg. Alhoewel die werk volgens sy titel op studente gerig is, kan praktisyns net daarby baat om ook 'n kopie op die lessenaar en in die tas te hê. Die formaat, indeling, lettertipe en selfs die prys maak van hierdie werkie 'n "pocket book" wat gekom het om te bly. 'n Mens sou hoop en verwag dat toekomstige uitgawes aangevul sou word met bondige aantekeninge en verwysings na gesag.

Die samestellers en uitgewer verdien lof vir 'n interessante, nuttige en sinvolle innovasie.

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As the people of South Africa, who are governed by the text of the Constitution, are entitled to order their lives on the strength of what they read therein without reference to the writings of contemporaries of the drafters or the drafters themselves, the drafting history of the Constitution should, in my view, be regarded as irrelevant to its interpretation . . . The drafters are presumed to intend what they expressed to be their intention – which they chose to do in the Constitution itself. It is virtually impossible to determine the elusive collective intent of all involved in the making of our Constitution from its conception to its birth. We have to study the painting, not ask the artist (per Van Dijkhorst J in *De Klerk v Du Plessis* 1995 2 SA 40 (T) 47).